

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

WP(C).No. 19506 of 2011 (K)

PETITIONER(S):

**M/S. INDUS TOWERS LIMITED,VANKAARATH
TOWERS, NH BYEPASS, PALARIVATTOM,
COCHIN - 682 024, REP. BY BONIFACE JAMES
AUTHORISED SIGNATORY.**

BY ADV. SRI.A.KUMAR

RESPONDENT(S):

- 1. UNION OF INDIA, REP. BY THE SECRETARY,
MINISTRY OF FINANCE, NORTH BLOCK, NEW DELHI - 110 002.**
- 2. STATE OF KERALA, REP. BY SECRETARY,
TAXES DEPT.MINISTRY OF FINANCE, GOVERNMENT,
SECRETARIAT, THIRUVANANTHAPURAM-01.**
- 3. COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM-01.**
- 4. AUTHORITY FOR CLARIFICATION, DEPARTMENT
OF COMMERCIAL TAXES, THIRUVANANTHAPURAM-01.**
- 5. ASSISTANT COMMISSIONER (WORKS CONTRACT),
DEPARTMENT OF COMMERCIAL TAXES, ERNAKULAM-16.**
- 6. COMMISSIONER OF SERVICE TAX,
17-B, IAEA HOUSE, MAHATMA GANDHI MARG,
I.P. ESTATE, NEW DELHI - 110 002.**

**R1 BY ADVS. SHRI.MATHEW SEBASTIAN, CGC
SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
R1 & R6 BY ADV. SRI.JOHN VARGHESE, SC
R2 TO R5 BY GOVERNMENT PLEADER SRI.LIJU V. STEPHEN**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
29-10-2015 ALONG WITH WPC.NO.16248/2011 AND CONNECTED CASES,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S)' EXHIBITS:

EXT.P1: TRUE COPY OF THE AGREEMENT WITH M/S. UNITECH WIRELESS (SOUTH) PRIVATE LIMITED.

EXT.P2: TRUE COPY OF THE APPLICATION FOR CLARIFICATION DTD.3.11.2010.

EXT.P3: TRUE COPY OF THE ORDER DTD.20.4.2011.

EXT.P4: TRUE COPY OF THE NOTICE ISSUED UNDER SECTION 25(1) FOR THE ASSESSMENT YEAR 2008-09 DTD.21.2.2001.

EXT.P5: TRUE COPY OF THE LETTER DTD. 3.3.2011 SUBMITTED BY THE PETITIONER.

EXT.P5(a): TRUE COPY OF THE LETTER DTD.18.6.2011.

EXT.P6: TRUE COPY OF THE ASSESSMENT ORDER DTD.11.5.2011.

EXT.P7: TRUE COPY OF THE BILL RAISED BY THE PETITIONER ON THE CELLULAR OPERATOR.

EXT.P8: TRUE COPY OF EVIDENCE CONSISTING OF SITE LOG BOOK, COPIES OF SERVICE ORDER, SERVICE REQUEST AND SERVICE PROPOSAL, TO EVIDENCE THE TRANSACTION OF SERVICE.

EXT.P9: TRUE COPY OF THE DEBIT NOTES.

EXT.P10: TRUE COPY OF THE REGISTRATION CERTIFICATE NO.177/2008 DTD.10.1.2008.

EXT.P11: A COPY OF THE ACKNOWLEDGMENT DTD.21.6.2011 SHOWING RECEIPT OF THE LETTER DTD.18.6.2011.

EXT.P12: TRUE COPY OF THE JUDGMENT OF THE DIVISION BENCH OF THE HON'BLE KARNATAKA HIGH COURT IN WA.NO.3403 AND CONNECTED CASES DTD.7.9.2011.

EXT.P13: TRUE COPY OF TABULAR COMPARISON OF THE VARIOUS TERMS OF THE SERVICE AGREEMENT DEALT BY THE HON'BLE KARNATAKA HIGH COURT.

RESPONDENT(S)' EXHIBITS:

EXT.R6(a): TRUE COPY OF THE LETTER DTD.3.7.2012 ISSUED BY THE PETITIONER TO THE DEPARTMENT.

//TRUE COPY//

P.S.TO JUDGE

Msv/

(CR)

A.K.JAYASANKARAN NAMBIAR, J.

=====
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=====
Dated this the 29th day of October, 2015

JUDGMENT

Since the issue involved in all these writ petitions is the same, they are taken up for consideration together and disposed by this common judgment. For the sake of convenience, the reference to facts and exhibits is from WP(C) No.19506 of 2011.

2. The petitioner, is a public limited company incorporated under the Companies Act, and a registered dealer under the Kerala Value Added Tax Act and Central Sales Tax Act (hereinafter referred to as the “KVAT Act” and “CST Act”). The petitioner is registered with the Department of Telecom for providing passive infrastructure services to various telecommunication operators in India on a shared basis. As a part of its activity, the petitioner installs the necessary infrastructure to facilitate telecommunication operation. For providing the passive infrastructure services, the petitioner enters into a Master Services Agreement with the sharing operators, wherein the inter se roles and responsibilities of each party are clearly defined. In order to provide infrastructure services, the petitioner puts up, either on sites belonging to it or on

acquired sites, the passive infrastructure which is comprised of towers and a shelter. The latter is basically a construction, in which the telecom operators are permitted to keep and maintain their base terminal stations, associated antenna, back-haul connectivity to the network of the shared telecom operators and associated civil and electrical works required to provide the telecom service. In addition to the towers and shelters, the petitioner also provides diesel generator sets, air conditioners, electrical and civil works, DC power system, battery bank etc. All these components are together referred to as the passive infrastructure under the Master Services Agreement entered into between the parties. The active infrastructure contemplated under the agreement consists of the base terminal stations, associated antenna, back-haul connectivity and other requisite equipment and associated civil and electrical works required to provide the telecommunication service by the telecom operators at a telecommunication sites other than the passive infrastructure. While the active infrastructure is owned and operated by the sharing telecom operator, the passive infrastructure is owned and maintained by the petitioner herein. The entire arrangement is such that there can be several operators who may use the tower and the shelter, which are parts of the passive infrastructure, by

keeping their active infrastructural equipment, on an agreed basis. The working of the telecom network involves the process of receiving and transmitting telecom signals, and for the said working, the active infrastructure which is owned and put up by the sharing telecom operator needs certain conditions for the proper functioning and uninterrupted telecom network/signal. These conditions are the maintenance of a particular temperature, humidity level, safety etc., which are ensured by the passive infrastructure made available by the petitioner, to the sharing telecom operators. In the instant writ petitions, the orders impugned by the petitioners are assessment orders passed under the KVAT Act, whereby the consideration received by the petitioner for providing passive infrastructural services, has been deemed as consideration received for the transfer of the right to use the passive infrastructure, by treating it as a deemed sale under Section 6(1)(c) of the KVAT Act. The assessment orders are passed by treating the petitioners as assesseees, who are liable to pay tax under the KVAT Act, on the said consideration received by them. The challenge in the writ petition therefore, is on the very treatment, by the respondents, of the petitioners as dealers for the purposes of the KVAT Act, and with regard to the finding in the assessment order, that the arrangement contemplated under the

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Master Services Agreement, entered into between the petitioners and the mobile services operators, is one, that attracts the definition of transfer of right to use goods for the purposes of the KVAT Act. It is also the specific case of the petitioners that, on the consideration received by them for providing the services contemplated under the Master Services Agreement, they are paying Service Tax in terms of the Finance Act, 1994 as amended, and hence there cannot, at any rate, be a levy of KVAT also on the same consideration amount.

3. I have heard Sri.A. Kumar, the learned counsel appearing for the petitioners as also the learned Government Pleader appearing for the respondents in all the writ petitions.

4. Before proceeding to discuss the findings in the assessment orders, that are impugned in the writ petitions, it would be apposite to refer to some of the relevant clauses in the Master Services Agreement, entered into between the petitioners and the mobile service operators. Some of the relevant clauses in the said agreement are extracted hereunder:

“**Active Infrastructure**” includes base terminal station equipment, associated antennae, backhaul connectivity to the Sharing Operators' network and other requisite equipment and associated civil and electrical works required to provide

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telecommunications services by the Sharing Operator at a telecommunications site other than Passive Infrastructure (as defined below):

“BTS” means Base Transceiver Station, part of the Active Infrastructure, deployed by the Sharing Operator to establish the wireless communication between its customer's Mobile Handset/ other device and the Sharing Operator network.

“Indus Infrastructure” means all infrastructure and equipment (other than Sharing Operator Equipment), including Passive Infrastructure, controlled or managed or owned by Indus and located at a Site.

“Operation and Maintenance Services” means those services set out in Schedule 2 (Operations and Maintenance Services);

“Passive Infrastructure” means at any Site, any infrastructure located at such site which is permitted by Law to be used/shared by the Sharing Operator, including but not limited to the tower, shelter, diesel generator sets, air conditioners and electrical and civil works; DC power system, battery bank etc.

“Service Order” means the document by which the Sharing Operator places a firm order on Indus in respect of each Site or any additional requirement beyond Standard configuration as defined in clause 1 of Schedule 1 in the form set out in Schedule 4 or for the change of status of site.

“Service Contract” means each service contract to be executed between the Sharing Operator and Indus in relation to any particular Site, in respect of which the Sharing operator is being provided Site Access Availability and Operation and Maintenance Services and such other services as may be agreed between the parties, which shall in each cases be in accordance with the Standard Site Access Terms set out in Schedule 5 (Standard Site Access Terms)

“Site Access Availability” in relation to a Site; means the availability of access to/for the Sharing Operator to the Passive Infrastructure at the Site;

“Site Access Service Credits” means the service credits relating to the Site Access Availability as set out in Schedule 1 (Site Access Availability);

“Site Access Service Levels” means the service levels relating to Site Access Availability as set out in Schedule 1 (Site Access Availability);

2.1 Provision of Passive Infrastructure

2.1.1 Upon the Sharing Operator fulfilling its obligations in accordance with this Agreement, Indus shall provide Site Access Availability to the Sharing operator in accordance with the terms and conditions of this Agreement. Provided that, if the Sharing Operator desires any additional service on any Site where it is already availing the services from Indus under this Agreement, the same may be provided by Indus subject to feasibility and availability.

2.1.2 Throughout the Term of this Agreement, the Sharing Operator shall be entitled to provide notice to Indus those Sites in relation to which it wishes to be granted Site Access Availability a “Service Order”). The process for issuing a Service Order shall be as specified in Schedule 1 (Site Access Availability).

2.1.4 With respect to each Site in relation to which Indus is able to grant Site Access Availability, the Parties shall execute a Service Contract in accordance with the procedure set out in Schedule 1 (Site Access Availability), and the provisions of each Service Contract shall include the standard terms set out in Schedule 5 (Standard Site Access Terms). Each Service Contract shall be duly stamped and the applicable stamp duty shall be borne equally by both the Parties.

2.1.5 Upon the execution of a Service Contract in respect of a Site, the Sharing Operator shall have the right to install the Sharing Operator Equipment or any portion thereof at such Site at the mutually agreed place. The Sharing Operator shall have access to each such Site and the Passive Infrastructure for all installation activities and Indus shall provide to the Sharing Operator the necessary means of access for the purpose of ingress and egress from each such Site in accordance with the terms of the Service Contract. Provided, however, that only the representatives of the Sharing Operator with proper identification or its properly

authorised sub-contractors shall be allowed such access to the Sites.

2.1.6 The right, title and interest in and to the Site and the Passive Infrastructure, including any enhancements carried out by Indus, shall vest with Indus and all such enhancements thereto shall be at the sole cost and expense of Indus. Enhancements in this context means the augmentation in capacity carried out by Indus to achieve increased sharing.

2.1.7 The Sharing Operator shall have Site Access Availability on “use-only basis” for installation, operation and maintenance etc of Sharing Operator Equipment for which the Sharing Operator shall be liable to make payments to Indus in accordance with this Agreement and the Sharing Operator undertakes that neither does it have nor shall it ever have any right, title or interest over the Site or Passive Infrastructure. The Sharing Operator is not nor shall be deemed to be the tenant of Indus and no tenancy shall be deemed to ever exist over the Site/Passive Infrastructure.

2.1.8 It is expressly agreed by the Sharing Operator that nothing contained in this Agreement or otherwise shall create any title, right, tenancy or any similar right in favour of the Sharing Operator.

2.5 Non-Exclusive

Indus retains the right to provide Site Access Availability to other telecommunications operators and the Sharing Operator retains the right to seek passive infrastructure services from other passive infrastructure providers.

2.6 Approvals

2.6.1 Indus shall be responsible for obtaining of all necessary and requisite Permits for the installation of any Passive infrastructure, including, without limitation, municipal and local bodies approvals, electricity board approvals and pollution control board approvals.

2.6.2 The Sharing Operator shall be responsible for obtaining all required approvals including but not limited to Standing Advisory Committee for Frequency Allocation (“SACFA”), Wireless Planning Commission (“WPC”) clearance and such other Permits, licenses, sanctions, etc. from DoT or Telecommunications Regulatory Authority of

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India or other applicable regulatory body or Government Authority, banks, financial institutions, etc. as may be required for the installation of Active Infrastructure at the Site from time to time. Indus shall provide information, within its control, required by the Sharing Operator. Further, Indus shall make best endeavours to provide copies of the SAFCA approval of the other sharing operator(s).

3 Operation and Maintenance

3.1 Provision of Operation and Maintenance Services

3.1.1 Indus shall provide Operation and Maintenance Services in relation to each Site and the Passive Infrastructure at each Site in accordance with the terms set out in Schedule 2 (Operation and Maintenance Services).

3.1.2 The Sharing Operator shall be responsible for the operation and maintenance of all Sharing Operator Equipment. In order to conduct such operation and maintenance activities, the Sharing Operator shall have the right to replace, repair, add or otherwise modify the Sharing Operator Equipment or any portion thereof and the frequencies over which such Sharing Operator Equipment operators. The Sharing Operator shall be provided access to the Sites in accordance with clause 1.8 of Schedule 2 (Operation and maintenance Services), unless otherwise specified in the relevant Service Contract, for the purpose of carrying out such operation and maintenance activities and Indus shall provide to the Sharing Operator the necessary means of access for the purpose of ingress and egress from each Site, provided, however, that only authorised employees of the Sharing Operator or its properly authorised sub-contractors shall be allowed such access to the Sites in terms of this Agreement.

3.3 Operation and Maintenance Service Levels

3.3.1 If Indus fails to provide the Operation and Maintenance Services in accordance with the Operation and maintenance Service Levels then Operation and Maintenance Service Credits shall become payable in accordance with Schedule 2 (Operation and Maintenance Services). Indus shall not be liable under this Agreement to pay any amount including third party claims for its failure to provide Operation and Maintenance Services except Operation and Maintenance Service Credits as provided above. The Sharing Operator may, on a quarterly basis,

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claim any such Operation and maintenance Service Credits from Indus.

3.3.2 The Parties agree that the operation and Maintenance Service Credits are an estimate of the adjustment to the Charges to reflect the value of services and are not a penalty, and are, at the amounts stated in this Agreement, reasonable.

Schedule 2

Operation and Maintenance Services

1. Uptime

1.1 For the purposes of this Schedule: (A) “Uptime” means the time during which the Sharing Operator's network is operational, as measured at the Sharing Operator's Network Operations Centre (“NOC”), and at Indus' Tower Operations Centre (“TOC”), once Indus' TOC becomes operational; and (b) “Downtime” means the time during which Sharing Operator's network is not operational. It is further clarified that (i) any Downtime that is attributable to the Passive Infrastructure or the activities of any other operator at a Site shall be to the account of Indus (“Indus Downtime”), and (ii) any Downtime that is attributable to the Sharing operator's Equipment and transmission ring failures connected to the Site shall be to the account of the Sharing Operator (“Sharing Operator Downtime”).

1.9.2 The expected Uptime Service Level in each Circle for each month is 99.95% across all Sites in that Circle that are utilised by the Sharing Operator.

1.9.3 The Operation and Maintenance Service Credits payable by Indus to the Sharing Operator for failure to achieve the above Uptime Service Levels are as set out below.

Operation and Maintenance Service Level	% of Total Rate payable by Indus
99.95% or greater	0.0%
99.90% or greater but less than 99.95%	5.0%
99.70% or greater but less than 99.90%	7.5%
99.50% or greater but less than 99.70%	10.0%
99.00% or greater but less than 99.50%	25.0%

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Operation and Maintenance Service Level	% of Total Rate payable by Indus
Less than 99.00%	30.0%
Less than 94.00%	100.0%

The Operation and Maintenance Service Credits payable by Indus in accordance with the table above shall be applicable in respect of those Sites in the relevant Circle which are below the Operation and Maintenance Service Level specified in paragraph 1.9.2 above. An example / illustration of this has been provided as Appendix 3.

However the above shall not apply to sites where Electricity Board connection is not available or sites which are difficult to access.

4. Indus Rights

4.1 Sites

Indus shall have the right:

4.1.1 where the Sharing Operator, any Approved Contractor or any other third party requires access to any Site for any reason, to require that such access is supervised by Indus or its nominee; and

4.1.2 to use and grant access to any Site, including any Passive Infrastructure, for the provision of such other services to any party or for such other purposes as Indus may in its discretion decide to support from time to time.

4.2 Relocation of Sharing Operator Equipment

4.2.1 Indus, acting reasonably, shall have the right, at any time during the term of the Service Contract in respect of a Site, with 45 days prior written notice to require the Sharing Operator to relocate all Sharing Operator Equipment at such Site to an alternative Site (“**Relocation**”), subject to the reasonable technical satisfaction of the Sharing Operator if such Relocation is required on account of the acquisition of a Site or due to action by a Government Authority in India or due to any judgment or order (interim or final) of any court of law in India by whatever name it may be referred or consolidation of Sites or premature termination of Lease Deed/Leave and License Agreements, etc. or any other Force Majeure Event. In the event of Relocation the applicable Service Contract shall, following the removal of the last of the Sharing Operator Equipment from the original

Site, immediately terminate and the Parties shall simultaneously execute a new Service Contract in relation to the new Site. The terms of the new Service Contract shall be determined in accordance with the provisions of this Agreement, provided that:

- (i) the term of the new Service Contract shall be the remaining term of the original Service Contract;
- (ii) the Sharing operator shall not be subject to Charges greater than the Charges applicable under the original Service Contract; and
- (iii) the other provisions of the new Service Contract shall be equivalent to those of the original Service Contract.

5.2 Indus Warranties and Covenants

Indus covenants, warrants and represents that it:

5.2.1 shall use its best endeavours to renegotiate all lease or licence agreements in relation to the Sites where such lease, or licence agreements are due to expire during the Term.

5.2.2 shall use its best endeavours to ensure that no other sharing operator on the Site, causes any damage to or installs any equipment that is of a type or frequency which will cause harmful interference with or physical obstruction of, any Sharing Operator Equipment existing at the Site at the time of such installation and in case any harmful interference or obstructions is caused to Sharing Operator Equipment at the said Site, to take all steps necessary to make any other sharing operator to correct or eliminate such interference or obstruction, including but not limited to powering down the newly installed equipment;

5.2.3 shall endeavour to share the Passive Infrastructure in a manner that will enable the simultaneous use by other sharing operators, without affecting the Sharing Operator Equipment or the Sharing Operators utilisation of the same.

5.2.4 shall maintain the Passive Infrastructure in a good and safe state of repair and condition to enable Indus to meet the Operation and Maintenance Service Levels;

5.3 Sharing Operator Warranties and Covenants

The Sharing Operator covenants, warrants and represents that it shall:

5.3.1 comply, and procure that its employees, agents and/or

subcontractors comply, with the terms of all applicable Service Contracts:

5.3.2 not commence use of the Sharing Operator Equipment at any Site until:

- (i) it has secured any and all Sharing operator Licences and any Permit that the Sharing Operator requires from any Government Authority or any consent, approval, licence, authorisation or permission that Sharing Operator requires from any third party for the Permitted Use; and
- (ii) it has clearly labelled or marked such Sharing Operator Equipment with its name or such other acceptable markings, which labels or marking shall be subject to Indus' approval, such approval not to be unreasonably withheld or delayed, as to enable the equipment to be identified as the Sharing Operator's Equipment; on pre-agreed basis.

5.3.5 make best endeavours to install equipment of a type or frequency that shall not cause harmful interference or physical obstruction to any equipment of indus or other existing operators on the Site. In case of any such harmful interference caused by any equipment installed by the Sharing Operator, the Sharing Operator shall take all steps necessary to correct or eliminate such interference, including but not limited to powering down such equipment.

6 Charges

6.1 Payment of Charges

Indus shall charge and invoice the Sharing Operator for the Charges in accordance with Schedule 3 (Charges). However, the Charges set out in Schedule 3 (Charges) can be mutually reviewed annually or otherwise for future new Sites and new upgrade requests on the existing Sites.

Any such review and revision shall not effect any other provision of a Service Contract existing at the time of such revision and shall be applicable on all Service Orders received on or after the effective date of such revision.

14. INSURANCE

14.1 The Sharing Operator will, at its own expense, maintain in effect such insurance policies in relation to its Active Infrastructure on a Site, including third party claims, with a reputable insurance company as i is required to hold under Law and such other policies, at such coverage limits, as a

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prudent business conducting similar operations would maintain.

- 14.2** Indus will, at its own expense, maintain in effect such insurance policies in relation to the Passive Infrastructure on a Site, including third party claims, with a reputable insurance company as it is required to hold under Law and such other policies, at such coverage limits, as a prudent business conducting similar operations would maintain, including public liability insurance and business interruption insurance policies.”

5. It will be apparent from a consideration of the various clauses in the Master Services Agreement that, what is contemplated therein is the provision of certain infrastructural facilities by the petitioner, which could be tapped into by various mobile services operators, who have entered into an agreement with the petitioners, on payment of a fee as consideration. What is evident from a perusal of the various clauses is that the ownership of the infrastructural facility continues to be with the petitioners. The obligation to maintain and control the passive infrastructure is also retained with the petitioners. The risk attached to the maintenance of the infrastructural facility continues to lie with the petitioners and for this reason, the obligation to take out an insurance in respect of the passive infrastructure is also with the petitioners. The mobile service operators are given only a limited permission to use the infrastructural facility in accordance with the terms and conditions in the agreement. It is in the backdrop of the said arrangement between the parties that one has to examine

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the legal provision under the KVAT Act, to see whether the agreement between the parties contemplates the transfer of a right to use the passive infrastructure to the various mobile service operators. In this connection, it would be apposite to refer to the decision of the Supreme Court in the case of Bharat Sanchar Nigam Ltd. v. Union of India **[2006 (145) STC 91]**. At paragraph 98 of the said judgment, the tests, which have to be applied to examine whether a transaction could be said to result in the transfer of right to use goods has been laid down in the following terms:

- “98 To constitute a transaction for the transfer of the right to use the goods the transaction must have the 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 - consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;
 - (d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute- viz., a “transfer of the right to use” and not merely a licence to use the goods;
 - (e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.”

6. Applying the said test, a Division Bench of Karnataka High Court in the case of Indus Towers Ltd. v. Deputy

Commissioner of Commercial Taxes, Enforcement 1, Bangalore and Others [2012 (56) VST 369], considered the scope and ambit of a Master Services Agreement, identical to the agreements entered into in the instant writ petitions, and found that the terms of the said agreement could not be construed as having transferred a right to use passive infrastructure to the mobile service operators. The findings of the Division Bench of the Karnataka High Court are to be found at paragraph 71 and 72 of the judgment, which read as follows:

“71 It is well-settled that, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of the transfer. From a close reading of all the clauses in the agreement it appears to us that under the terms of the contract there is no transfer of right to use the passive infrastructure conferred on the sharing operator/mobile operator. What is permitted under the contract is, a permission in the nature of a license to have access to the passive infrastructure and permission to keep the equipments of the mobile operator in the pre-fabricated shelter with permission to have ingress and egress only to the authorised representatives of the mobile operator. It is because an owner of a property has a bundle of rights, namely, right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc. Therefore, to constitute a deemed sale under article 366 (29A)(d) having regard to the object with the 46th Constitutional Amendment was inserted, it is clear the right that is transferred under a contract should be a bundle of rights minus right to title. It is because of the earlier Constitution Bench judgment of the apex court where the right to use the property was transferred by the person who retained the title as only a nominal owner with the benefit

of the goods has been passed on to the transferee, without paying taxes to the exchequer, that the Constitution was amended to bring within its fold such transactions which are styled as deemed sale. Therefore, in deciding whether a transaction falls within article 366(29A)(d) so as to constitute a deemed sale, the purpose of the 46th Amendment, the mischief sought to be remedied and the object sought to be achieved by the said provision cannot be lost sight of. In that background, in the facts of this case, if we look into the various terms of the agreement it is clear under the contract, the assessee has not transferred any right in the passive infrastructure to the mobile operators. The right that is conferred on the mobile operator is a permission to have access to the passive infrastructure, a permission to keep the active infrastructure in the site belonging to the assessee, a permission to mount the antennae on the tower erected by the assessee and to have the benefit of a particular temperature so as to operate the equipments belonging to the mobile operator. No sale of goods or transfer is involved in the transaction in question. Therefore, it does not fall within the mischief of article 366 (29A)(d) of the Constitution as held by the learned judge as well as the assessing authority. Therefore, the impugned order passed by the learned single judge as well as the assessing authority cannot be sustained.

- 72 In the result, we pass the following order:
- (a) The appeals preferred by the assessees as well as by the Union of India are allowed.
 - (b) The impugned orders passed by the learned single judge as well as the assessing authority are hereby set aside.
 - (c) It is declared that under the contract entered into between the parties there is no sale of goods and at any rate there is no deemed sale so as to attract levy of tax under the Karnataka Value Added Tax Act, 2003.
 - (d) In so far as the State appeals are concerned, the appeals preferred against the order of the learned single judge in so far as denying the penalty and interest are rejected as we have held there is no liability to pay tax at all.
 - (e) In so far as the direction issued by the learned single judge that the State has to recover the tax from the Union of India, in view of our finding that there is no liability to tax, that portion of the order of the learned single judge is hereby set

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- aside.
- (f) The payments made by the assesseees either in terms of the order of the assessment order or in terms of any interim order passed in the writ petitions or in pursuance of the final order shall be refunded to the assesseees within three months from the date of receipt of a copy of this order, failing which the said amount to be refunded would carry simple interest at nine per cent after the expiry of 90 days till the date of payment.
 - (g) No costs”

7. The aforesaid decision of the Karnataka High Court has since been followed by the Delhi High Court in the judgment reported in Indus Towers Limited v. Union of India and Others **[2013 (62) VST 422]** wherein also, the Hon'ble High Court considered the various clauses in the Master Service Agreement and found that the right to use goods could be said to have been transferred by the provider of passive infrastructural facilities to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. It was found that, they would have the right to use the passive infrastructure, if they were in lawful possession of it. There had to be therefore, an act demonstrating the intention to part with the possession of the passive infrastructure. It was found that there was none in the case before the High Court. The passive infrastructure was found to be an indispensable requirement for the proper functioning of the active infrastructure, which was owned and operated by the

sharing telecom operators. The Master Services Agreement was found to have merely permitted access to the sharing telecom operators to the passive infrastructure to the extent it was necessary for the proper functioning of the active infrastructure. There were references made to the other provisions in the Master Services Agreements, which controlled the right of the sharing operator to gain access to the site and the passive infrastructure and ultimately, it was found that when the provider of the passive infrastructural services had not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, the limited access provided to them could only be regarded as a permissive use or a limited licence to use the same. The possession of the passive infrastructure was found to have always remained with the provider of the passive infrastructural services and therefore, the sharing telecom operators did not have any right to use the passive infrastructure.

8. In a similar context, a Division Bench of this Court in Malabar Gold Private Ltd. v. Commercial Tax Officer, Kozhikode and Others [2013 (63) VST 497 (Ker)], while analysing the issue as to whether there was a transfer of a right to use a trademark consequent to a franchise agreement entered into between a

company and its franchise for use of the trademark, found that, what the franchise obtained through the franchise agreement was only a licence to use the trademark and the transfer of its use was not to the exclusion of the transferor. This aspect of non-exclusive use was seen as militating against the concept of a transfer of right to use goods and it was therefore held that, on the facts of that case, there was no transfer of right to use goods for the purposes of the KVAT Act. Going by the ratio of the decisions referred to above, I am of the view that in the instant cases as well, there is no transfer of the right to use the passive infrastructure, that is made available by the petitioner to the various mobile service operators. As already noted above, the petitioners retained control over the passive infrastructure that was maintained by them and this degree of control, that was exercised by the petitioners over the passive infrastructure, ensured that the mobile service operators, who were given permission to use the infrastructural facility, obtained only a licence to access the infrastructural facilities offered by the petitioner, and did not get a right to use the goods transferred to them in the process. I therefore, find that, in these cases, there is no transfer of the right to use the infrastructural facilities, from the petitioners to the mobile services operators, that could be

brought to tax under the KVAT Act. The impugned assessment orders in all these writ petitions are therefore liable to be quashed and I do so.

9. Before parting with these cases, I must note that, in the assessment orders that are impugned in the writ petitions, the assessing officer has not dealt with the factual aspects of the case to the extent dealt with in this judgment. As a matter of fact, the finding of the assessing officer, in the assessment order, is solely on the issue of whether or not the passive infrastructure, that was set up by the petitioners, constituted an immovable property or a movable property, for the purposes of treating it as goods for the purposes of the KVAT Act. There is no consideration, whatsoever, of the main issue as to whether, the arrangement between the petitioners and the mobile service operators resulted in a transfer of a right to use the passive infrastructure. In my view, it was incumbent on the part of the assessing officer to enter a finding on this crucial aspect, since on the facts of these cases, that was a jurisdictional fact, that would have clothed the assessing authority with the jurisdiction to levy a tax on the consideration received by the petitioners pursuant to the arrangement that was entered into with the mobile service operators. The orders impugned in the

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writ petitions have therefore, to be quashed on the ground of non-application of mind by the assessing officer also. Thus, I allow all these writ petitions by quashing the orders impugned therein, namely, Ext.P6 order in WP(C) 19506 of 2011, Exts.P6, P7, P10 and P10 orders and recovery notices in WP(C) 19499 of 2011, Ext.P6 order in WP(C) 19504 of 2011, Ext.P7 order in WP(C) 23023 of 2011 and Exts.P7 and P7(a) assessment orders in WP(C) 31972 of 2011.

WP(C) No.16248 of 2011

In the light of my judgment in WP(C) Nos. 19506, 19499, 19504, 23023 and 31972 of 2011 above, this writ petition is closed as infructuous.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE