

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	06.01.2020
Pronounced On	17.03.2020

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos.40159 & 40160 of 2016

and

W.M.P.Nos.34200 & 34201 of 2016

M/s.Ascend Telecom Infrastructure Pvt. Ltd.,
(Formerly known as M/s.Aster Infrastructure
Private Limited)

Represented by Authorised Signatory,
Mr.Vinayaga Moorthy KS,
No.54/32, Butt Road,
St. Thomas Mount, Chennai - 600 016.

... Petitioner
in both W.Ps.

Vs.

1.The Assistant Commissioner (CT),
Pattaravakkam Assessment Circle,
No.127, 2nd Floor,
Yadhaval Street,
Padi, Chennai - 600 050.

2.Commissioner of Commercial Taxes,
Chepauk,
Chennai - 600 005.

3.The Government of Tamil Nadu,
Represented by its Secretary,
Fort St.George,
Chennai - 600 009.

4.Service Tax Group - I,
Service Tax Division,
Hydrabad - III,

5.Union of India,
Represented by Secretary, Ministry of Finance,
Department of Revenue, New Delhi.

...Respondents in both W.Ps.

Prayer in Both WPs: Writ Petitions filed under Article 226
of the Constitution of India praying to issue a Writ of
Certiorari, to call for the records comprised in Impugned

<https://hcservices.courts.gov.in/hcservices/>
Orders TN No.33161325169/2008-09 & TIN No.33161325169/2009-

10, dated 29.07.2016 passed by the 1st respondent and quash the same.

For Petitioner : Mr.Lakshmi Kumaran in both W.Ps.

For Respondents : Mr.G.Dhana Madhri
Government Advocate (Taxes) in both W.Ps.

C O M M O N O R D E R

By this common order both the writ petitions are being disposed.

2. In these writ petitions, the petitioner has challenged the impugned orders both dated 29.07.2016 passed by the 1st respondent in TIN No.33161325169/2008-09 and TIN No.33161325169/2009-10 for the Assessment Years 2008- 2009 and 2009-2010 respectively.

3. The petitioner was issued with a common notice dated 26.09.2010 to provisionally assess tax for the Assessment Years 2008-09 and 2009-10 as if the petitioner had effected sale within the meaning of Section 2(g) of TNVAT, 2006 r/w Article 366(29A) of the Constitution of India.

4. The petitioner replied to the above notice. The 1st respondent proceeded to pass two orders separate orders on 30.06.2014 for the Assessment Years 2008-2009 and 2009-2010 respectively.

5. Aggrieved by the said orders, the petitioner preferred appeals before the Appellate Deputy Commissioner. The petitioner pre-deposited 25% of the disputed tax.

6. The Appellate Deputy Commissioner thereafter asked the petitioner to pre-deposit another 25% of the disputed tax by an order dated 25.11.2014 in S.P.Nos. 6 and 7 of 2014.

7. The petitioner therefore filed W.P.Nos.34466 & 34467 of 2014. By an order dated 23.12.2014, these writ petitions were allowed with the following directions:

" The learned counsel appearing for the petitioner invited the attention of this Court to an earlier order dated 24.07.2014 in W.P. (MD)No.12123 of 2014 in the case of T.V.S.Sri Chakra Limited vs. Assistant Commissioner, Madurai, wherein, this Court after considering a similar case, directed instead of bank guarantee, the petitioner therein can furnish a personal bond. The petitioner has raised several grounds before the first respondent and he has pointed out that the petitioner has paid Rs.2,50,313/- and Rs.7,89,045/-

respectively being 25% as ordered by the first respondent, the petitioner has paid Rs.5,00,626/- and Rs.15,78,090/- respectively which contains to 50% of the disputed tax and if the petitioner is directed to furnish bank guarantee for the remaining amount, he will be put to irreparable hardship as the petitioner is engaged in the business of providing infrastructural support services to telecom operators and under financial constraint due to heavy business competition.

7. Hence, this Court is of the view that the petitioner on deposit of 25% of disputed tax, should be directed to furnish a personal bond instead of bank guarantee as ordered by the first respondent.

8. These writ petitions are disposed of with a direction to the first respondent to accept the personal bond in the proper format instead of bank guarantee as ordered by the first respondent.

8. Thereafter, these two appeals were numbered as A.P.Nos.166 & 167 of 2014 and final order came to be passed on 19.08.2015 by the Appellate Deputy Commissioner. The Appellate Deputy Commissioner remanded the cases back to the 1st respondent with the following observations:-

Point No.(i) - Levy of Tax at 12.5% on the turnover of Rs.80,10,001/- for the year 2008-09 and on the turnover of Rs.2,52,49,436/- for the year 2009-10

(V) In view of the above facts of the case and judicial decisions, to meet the ends of justice, one more opportunity is to be granted to the appellant to explain their submissions with all the documentary proof/evidence before the assessing officer. The Assessing Officer is directed to verify all the documents and evidences that would be produced before him and also directed to consider the lacunae mentioned supra in the para 7(i)(Q) and pass fresh orders. With the above observation, the levy of tax at 125% on the turnover of Rs.80,10,001 for the year aside and remanded back to the Assessing Officer to redo the process of assessments de novo after affording reasonable opportunity to the appellant and to pass fresh orders in accordance with law.

Point No.(ii) - Levy of penalties for Rs.15,01,875/- and Rs.47,34,270/- respectively for the years 2008-09 and 2009-10

"In view of above and inasmuch as the main appeals are remanded back to the Assessing Officer, the levy of penalties for Rs.15,01,875/- and Rs.47,34,270/- respectively for the years 2008-09 and 2009-20 are also set aside and remanded back to the Assessing Officer with the direction to consider various judicial decisions before arriving for the above years. This portion of appeal is remanded."

9. Pursuant to the aforesaid order dated 19.08.2016, 2nd notices dated 14.03.2016 were issued to the petitioner by the 1st respondent for the respective Assessment Years. The petitioner replied to the respective notices. Thereafter, another notice was issued to the petitioner on 20.06.2016 for both the Assessment Years. The petitioner separately replied to the aforesaid notice dated 20.06.2016 on 27.06.2016 for the respective Assessment Years.

10. Thereafter, the impugned orders dated 29.07.2016 came to be passed by the 1st respondent for the respective assessment years. By the impugned orders, the 1st respondent has noted inter-state purchase of several goods from other states amounting to Rs.1,54,46,232/- during the Assessment Year 2008-09 and Rs.4,04,90,379/- for the Assessment Year 2009-10.

11. On the aforesaid interstate purchase, the 1st respondent has added 15% to arrive at the value of the deemed sale of Rs.1,77,63,137/- and Rs.4,65,63,936/-.

12. For the respective Assessment Years, the 1st respondent has re-determined the turnover Rs.1,77,63,167.00 and Rs.41,65,63,396.00 to demand tax that had allegedly escaped assessment on the deemed sale effected by the petitioner.

13. For the Assessment Year 2009-10, an additional amount of Rs.4,89,672/- also has been demanded on the civil contract work carried out by the sub-contractor of the petitioner. Vide impugned orders, the 1st respondent has demanded tax and the penalty. Details of tax and penalty read as under:-

S1 .N o	Subject	2008-2009 (Rs.)	2009-2010 (Rs.)
1	Deemed Sales Turnover	1,77,63,167	4,65,63,396

2	Tax at 12.5% on Deemed Sales Turnover	22,20,396	58,20,492
3	Value of Civil Works Contract	Nil	2,44,83,600
4	Tax at 2% on value of Civil Work Contract	Nil	4,89,672
5	Total Tax (2+4)	22,20,396	63,10,164
6	Penalty at 150%	(+) 33,30,594	(+) 87,30,738
7	Total (5+6)	55,50,990	1,50,40,902

14. Before filing the present these two writ petitions, the petitioner had also filed applications under Section 84 of the TNVAT Act, 2006 for rectification of the impugned orders dated 29.07.2016 which came to be rejected by the two separate orders dated 08.10.2016. In the operative portion of the respective orders are identical, which reads as under.

The attention of the dealers is invited to the reference first cited wherein revision orders were passed consequent on the orders of the Appellate Deputy Commissioner (CT) Chennai South, Chennai-6 on 29.07.2016.

The dealers vide their detailed reply dated 23.08.2016 received on 26.08.2016 and another letter dated 26.09.2016 received on 07.10.2016 have requested to consider the facts and nature of the business of the dealers, set aside the revision orders passed on 29.07.2016 and pass revised orders as may be deemed fit and proper in the facts and circumstances of the case in the interest of justice and good conscience.

The request was examined. The dealers are informed that the undersigned is empowered only to rectify any error apparent on the face of the record under Section 84 of the TNVAT Act 2006 by way of passing revision orders. Only the appellate authority is empowered to consider the fact and nature of the business now put forth by the dealers. Since there is no error apparent on the face of records, the dealers are informed that their request to issue revision orders is not feasible of compliance.

15. Pursuant to the aforesaid refusal of the rectification application, demand notice dated 20.10.2016 has also been issued. Challenging the impugned orders dated 29.07.2016, the petitioner Ascend Telecom Infrastructure Pvt.

16. Petitioner has challenged the tax demanded primarily on the ground that the petitioner is a provider of Passive Infrastructure service for the Mobile Telecommunication Operators (MTO) which is outside the proviso of VAT. It is stated that the petitioner acquired such facilities from existing mobile telephone company and was started with view to reduce the cost of telecom service provided by them.

17. Assailing the impugned orders passed by the 1st respondent, it is the contention of the petitioner that the impugned orders have been passed pursuant to notices dated 14.03.2016 for the respective Assessment Years which do not contain any reasons and therefore, the impugned orders are violation of principal of natural justice and are contrary to law. It is further stated that the tax and the penalty have been increased without any notice and therefore, the impugned orders were liable to set aside.

18. It is a case of the petitioner that the passive infrastructure petitioner include a temporary shelter and tower which can be used by two or more Mobile Telecommunication Operators (MTO) for the purpose of their mobile service.

19. It is submitted that under the business model, the petitioner has signed Master Service Agreement with these Mobile Telecommunication Operators (MTO). Thereafter, under the umbrella of the master agreements, site specific agreements were signed.

20. The passive infrastructure service provided by the petitioner allows two or more to Mobile Telecommunication Operators (MTO) to house their Base Transceiver Station (BTS) and antenna and other accessories for receiving and transmitting cellular mobile signals through the Passive Infrastructure. According to the petitioner, it is a re-mere renting of space coupled with service and therefore, there is no deemed sale.

21. It is submitted that the petitioner is merely required to ensure constant power supply and ambient temperature for the mobile telecommunication equipments to function efficiently day and night without any break (24 x 7 x 365) throughout the year. It is submitted that there is no transfer of right to use.

22. Mr. Lakshmi Kumaran, learned counsel for the petitioner submitted that the issue is no longer res-integra in the following cases:-

(Kar).

- ii. State of A.P Vs. Bharat Sanchar Nigam Ltd., 2012 (25) STR 321 (A.P).
- iii. Indus Towers Ltd., Vs. UOI, 2014 (35) STR 459 (Del.).
- iv. Bharati Infratel Ltd., Vs. State of M.P, 2018 (17) GSTL 225 (M.P).
- v. Indus Towers Ltd., Vs. UOI, in W.P.(C). No.19506 of 2011 decided by the Hon'ble Kerala High Court.

23. That a part, it is submitted that the appeal filed by the Sales Tax Department, against the decision rendered in the case of Delhi High Court, was dismissed by the Hon'ble Supreme Court.

24. The learned counsel for the petitioner further submits that the Show Cause Notice issued to the petitioner was based on the decision of the Kerala High Court rendered in *Essaar Telecom Infrastructure Pvt.Ltd., Vs. Union of India*, 2012 (275) E.L.T.167 (Kar.), wherein, the Court held as follows:-

21. Various decisions rendered and referred to by the petitioner's counsel are in the context – what is movable and immovable. As a matter of fact finding, the re-assessing authority having regard to the nature of the equipment used and its fixation to the earth i.e., civil foundation or on the roof of the building for proper functioning and the nature of the activity that is being transferred to the customers viz., telecom companies to use the equipment i.e., the tower raised and in consideration petitioner receives some amount which are in the form of rents, has proposed tax under the provision of VAT Act, treating it as lease of movable. Further, having regard to the nature of the agreement entered into and the nature of transaction, the effective control is with the petitioner and, the component of delivery is also involved and the maintenance and over all control is also with the petitioner, it could be specifically said that the right to use the goods has been transferred by the petitioner to the telecom companies and that very much falls within Art. 366 (29 A) (d) of the Constitution.

25. He submitted that the view taken in the above case may not be correct and has been overruled in *Indus Towers Ltd. Vs. DCCT*, 2012 (285) ELT 3 (Kar). It is further submitted that the petitioner has paid service tax on the gross amount

received from its clients namely, Mobile Telecommunication Operators (MTO). He also relied on the decision of the Hon'ble Supreme Court in *Imagic Creative Pvt.Ltd. Vs. Commissioner of Commercial Taxes*, 2008 (9) S.T.R.337 (S.C.) to state that VAT levy and service tax are mutually exclusive. He relied on the following passages from the said judgment:

"25. If the submission of Mr. Hegde is accepted in its entirety, whereas on the one hand, the Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994, it is possible to arrive at a conclusion that no tax at all would be payable as the tax has been held to be an indivisible one. A distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause 29A had to be inserted in Article 366, must be kept in mind.

26. We have noticed hereinbefore that a legal fiction is created by reason of the said provision. Such a legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.

27. The Court, while interpreting a statute, must bear in mind that the legislature was supposed to know law and the legislation enacted is a reasonable one. The Court must also bear in mind that where the application of a Parliamentary and a Legislative Act comes up for consideration; endeavours shall be made to see that provisions of both the acts are made applicable.

28. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contra distinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract;

irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct.

34. We may notice that the concept of aspects theory which had found echoes in State of U.P. Another v. Union of India & Anr. [(2003) 3 SCC 239] has expressly been overruled by a Three Judge Bench in Bharat Sanchar Nigam Ltd. (supra) stating :

78. But if there are no deliverable goods in existence as in this case, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.

79. Therefore whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable. To the extent that the decision in State of U.P. v. Union of India held otherwise, it was, in our humble opinion erroneous.

35. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The Appeal is allowed. No costs."

26. Learned counsel for the petitioner placed reliance on the decision of the Honourable Supreme Court in State of AP Vs. Rashtriya Ispat Nigam, 2002 126 STC 114, in support of the contention that there is no transfer of right to use goods. He further submits that to attract the extended definition of sale of "transfer of right to use" within the meaning of Section 2(33)(iv) of the TNVAT Act, 2006, there should be a transfer of possession to the exclusion of the others. The petitioner has no access to the passive infrastructure.

27. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in BSNL Vs. Union of India, (2006) 3 SCC 1.

28. It is submitted that the test enunciated in the above case of the Hon'ble Supreme Court is not satisfied in the present case. In this case admittedly the passive infrastructure was not given exclusively to a Mobile Telecommunication Operators but was given on shared basis to two or more such Mobile Telecommunication Operators.

29. It is submitted that even if there is an element of sale or deemed sale of transfer of right to use goods along with service, the dominant test would have to be applied to determine whether there is any "deemed sale" i.e. "Transfer of right to use" within the meaning of the extended definition of sale in Section 2(33)(iv) of the TNVAT Act, 2006.

30. He further submits there is no basis on which demand can be sustained. The learned counsel also submits that the decision of the Andhra Pradesh State of Andhra Pradesh Vs. Bharat Sanchar Nigam Ltd., 2012(25) S.T.R.321 (A.P.) has not been considered.

31. The learned counsel for the respondents on the other hand submits that the impugned orders are well reasoned and require no interference. It is further submitted that petitioner has an alternate remedy and therefore these writ petitions are liable to be dismissed.

32. It is further submitted that the decision of the Karnataka High Court in Antrix Corporation Ltd Vs. The AC, (2010) 29 VST 308 was not considered in the cases cited by the learned counsel for the petitioner and therefore those decisions cannot be relied upon.

33. The learned counsel for the respondents relied on the following cases in support of the submission:-

- i. Essar Telecom Infrastructure (Pvt.) Ltd., Vs. Union of India and Others, (2012) 52 VST 306 (Kar).
- ii. Antrix Corporation Ltd. Vs. Assistant Commissioner of Commercial Taxes, Bangalore and Others, (2010) 29 VST 308 (Kar.).
- iii. M/s. Rashtriya Ispat Nigam Ltd., Vs. The Commercial Tax Officer, Company Circle, Visakhapatnam and Another, 1989 SCC OnLine AP 413.
- iv. State of A.P Vs. Rashtriya Ispat Nigam Ltd., (2002) 3 SCC 314.
- v. Idea Mobile Communication Limited Vs. Commissioner of Central Excise and Customs, Cochin, (2011) 12 SCC 608.
- vi. Vodafone Mobile Services Limited Vs. Commissioner of Service Tax, Delhi, 2018 SCC Online Del 12302.

- vii. Commissioner of Central Excise, Ahmedabad Vs. Solid and Correct Engineering Works and Others, (2010) 5 SCC 122.
- viii. Sirpur Paper Mills Limited Vs. Collector of Central Excise, Hyderabad, (1998) 1 SCC 400.
- ix. Federation of Hotel and Restaurant Association of India, Etc Vs. Union of India and Others, (1989) 3 SCC 634.
- x. Commissioner of Income Tax Vs. Arvind Investments Ltd., 1990 SCC OnLine Cal 376.
- xi. Bhagirath Ram Chand Vs. State of Punjab and Others, AIR 1954 PH 167.
- xii. Union of India and Others Vs. Bombay Tyre International Ltd. and Others, (1984) 1 SCC 467.

34. I have considered the arguments advanced on behalf of the petitioner and the respondents. The petitioner no doubt provides passive infrastructure service to be Mobile Telecommunication Operators (MTO). Under the business model the petitioner has the real estate namely lease of land on which it has erected a temporary shelter which is equipped with Air Conditioners and is connected with power supply generators and antenna. In the temporary shelter, the Base Transceivers of Mobile Telecommunication Operators are placed. Next to be temporary shelter the transmission tower/mast is erected. The power generator, which is part of the power management system of the petitioner, is also in the same vicinity to ensure continuous supply of power to BTS etc. Inside the temporary shelter optimal temperature is maintained with the air-conditioners.

35. The shelter can accommodate Base Transceivers (BTS) and exercise of 2 or more Mobile Telecommunication Operators (MTO's). The Base Transceivers are connected to the antenna with the feeder cables which run on the mast/transmission towers of the petitioner.

36. The nature of activity undertaken by the petitioner clearly indicates that no doubt there is a provision of service as there is renting of space within the temporary shelter and on the transmission tower/ mast.

37. Therefore, the question to be answered is whether such renting of space as a part of the service would also attract VAT under Section 4 of the TNVAT Act, 2006 in view of the extended definition of sale in Section 2(33)(iv) under the said Act. This aspect ought to have been answered by the 1st respondent in the impugned order before confirming the demand.

38. As per the said definition, transfer of right to use "any goods" for any purpose for cash, deferred payment or other valuable consideration is a sale. As per the decision of the Hon'ble Supreme Court in BSNL Vs. Union of India, (2006) 3 SCC 1, such transfer should be to the exclusion of the owner

and others and exclusively in favour of the person in whose favour such transfer of right to use is made.

39. From the facts that has been disclosed in the documents filed before this court, it is evident that there is no exclusive transfer of the temporary shelter or the transmission tower/mast in favour of any one of the Mobile Telecommunication Operators. The space in the shelter and the transmission tower/mast is given on shared basis and charged separately therefore it would not come within the fold of the extended definition of sale Section 2(33) of the TNVAT Act, 2006.

40. The decision of Karnataka High Court in Antrix Corporation Ltd. Vs. Assistant Commissioner of Commercial Taxes, Bangalore and other, (2010) 29 VST 308 (Kar) was on a different issue altogether. There, the appellant had provided marketing and contract services for hiring transponders of INSAT satellites and was required to carry out certain activities on behalf of the Department of Space including billing of customer's collection of service and remittance, realization of payments against invoice raised on customers and providing service support for marketing INDAT/G-SAT space segment capacity both in local and global markets. There, it was concluded that there was a transfer of right to use the "leased capacity" under the contract of agreement executed by the Department of Space with the customers and the leased space segment capacity in a transponder of a satellite was "goods" within the meaning of Article 366(12) of the Constitution of India.

41. It was therefore held that the transaction came within the scope of Article 366(29A) (d) of the Constitution of India, inasmuch as, there was delivery of possession of the goods by transfer (Department of Space) to the transferee (customer) and in law, the transferee had effective control over the goods, i.e., "space segment capacity" in the transponder of satellite, though its technical operation was handled by the Department of Space.

42. In BSNL Vs. Union of India, (2006) 3 SCC 1, the Hon'ble Supreme Court observed that "Gannon Dunkerley [State of Madras Vs. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] 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."

43. It further observed that "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." It further observed that "This does not mean that the content of the concepts remain static. The courts must move with the times. [See Attorney General v. Edison Telephone Co. of London Ltd., (1880) 6 QBD 244 : 43 LT 697]."

44. The Hon'ble Court in para 43 also cautioned and stated that the Forty-sixth Amendment did not give a licence to state, for example, to assume that a transaction is a "sale" and then to look around for what could be the goods. It further stated that the ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366 (29-A).

45. It has further observed in para 43 and 44 that barring the 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.

46. It further observed that of all the different kinds of composite transactions, the drafters of the Forty-sixth Amendment chose only three specific situations namely:- (a) a works contract; (b) a hire-purchase contract; and (c) a catering contract, to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. However, while making the above operation, the Court did not talk about "Transfer of Right to Use" in these two paragraphs.

47. It further observed that "For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases."

48. While answering the above illustration, in para 45, the Court observed as under:-

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 principles enunciated in Gannon Dunkerley case [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379], 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 ask what is "the substance of the contract" [See Atiyah: The Sale of Goods, (1995 reprint) p. 27.]. We will, for the want of a better phrase, call this the dominant nature test.

49. In para 49, the Hon'ble Supreme Court further held as follows:

"49. We agree. After the Fort-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying."

50. In State of A.P. Vs. Rashtriya Ispat Nigam Ltd., (2002) 3 SCC 314, the Hon'ble Supreme Court has held that the transaction there did not involve transfer of right to use the machinery in favour of contractors as the effective control was not transferred in favour of the contractor. The contractor was not free to make use of the machinery for the works other than the project work of Rashtriya Ispat Nigam Ltd. In fact, the Division Bench of the A.P. High Court has very beautifully explained the concept of transfer of right to use in the following passage in Rashtriya Ispat Nigam Ltd. Vs.

CTO, (1990) 77 STC 182, which reads as under:

"9. The essence to transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word 'transfer' due regard must be had to the thing to be transferred. A transfer of right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a Taxi cab is hired under "Rent-a-car" scheme and a cab is provided, usually driver accompanies the cab there the driver will be in custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another there the driver will have both the custody as well as the possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this difference."

51. In *Aggarwal Bros. Vs. State of Haryana*, (1999) 9 SCC 182, the Hon'ble Supreme Court has held that when the assessee had hired shuttering in favour of contractors to use it in the course of construction of buildings it was found that possession of the shuttering materials was transferred by the assessee to the customers for their use and therefore, there was a "deemed sale" within the meaning of sub-clause (d) of clause (29-A) of Article 366.

52. The Hon'ble Supreme Court in *BSNL* case supra ultimately while dealing with the issue as to whether electromagnetic waves are not "goods" or not within the meaning of Article 366(12) of the Constitution of India and whether the telephone instrument given by BSNL to its subscribers amounts to transfer of right to use or not concluded that the constitutional amendment under Article 366 (29-A) of the Constitution was not loosely drawn and must proceed on the basis of the parameters of "sale" were carefully defined. The Court concluded that there is no sale element apart from the obvious one relating to the handset, if any, that and any other accessory supplied by the service provider remain to be taxed under the State sales tax laws. Thus, it is evident the Hon'ble Supreme Court has concluded

that sale element of those contracts which are covered by six sub-clauses (29-A) of Article 366 which are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature of test being applied. The test enunciated in the said decision for composite contracts other than those mentioned in Article 366 (29-A) continues to be dominant nature test which is "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."

53. Ultimately, the Court has held as follows:
"92. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:

(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366(29-A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.

(B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

(C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D) The issue is left unanswered.

(E) The 'aspect theory' would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."

54. The above view was concurred by Hon'ble Dr. Justice A.R. Lakshmanan in para 97, which is extracted below.

97. 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.

55. Thus, it is evident that wherever extended definition of “sale in Article 366(29-A) are attracted the transaction can be taxed both under the provisions of TNVAT Act, 2006 and under the provisions of Finance Act, 1994. However, it is for Assessing Officers under the respective enactments to determine the value of the two transactions and collect tax.

56. In the present case, no transfer of right to use goods as contemplated under Article 366(29-A) (d) and Section 2(33)(iv) of the TNVAT Act, 2006 is discernable. Even though the temporary shelter and the mast are goods within the means of Article 366(12) and Section 2(21) of TNVAT Act, 2006 yet there is no exclusive transfer to exclusion of others to attract the levy of transfer of “right to use”.

57. The business model is not based on exclusivity. It is on a shared usage basis of the facility viz., passive infrastructure consisting of temporary shelter, Mast, AC, Genset etc. Therefore, there is no “deemed sale” within the meaning of Article 366(29-A)(d) of the Constitution of India and Section 2(33)(iv) of the Act so as to attract a charge under Section 4 of the TNVAT Act, 2006.

58. That apart, the issue is also now covered in favour of the petitioner in Indus Towers Ltd. Vs. Deputy Commissioner of Commercial Taxes, Bangalore, 2012 (285) E.L.T. 3 (Kar). That view has been followed in Indus Towers Ltd. Vs. UOI, 2014 (35) STR (Del) and maintained in Hon’ble Supreme Court in 2017 (52) STR J81 (SC), Bharti Infratel Ltd. V. State of M.P., 2018 (17) GSTL 225 (M.P.) and maintained in Hon’ble Supreme Court in 2018(17) GSTL J 51 (SC) and The Indus Towers Ltd. V. UOI, in WP No.19506 of 2011 decided by the Hon’ble High Court of Kerala.

59. In my view, though the passive infrastructure of

the petitioner are "goods" within the meaning of Article 366 (12) of the Constitution of India and Section 2(21) of the TNVAT Act, 2006 yet there is no "transfer of right to use" within the meaning of extended definition of "sale" under Section 2(33)(iv) TNVAT Act, 2006 and Article 366(29A)(d) of the Constitution of India so as to attract levy under Section 4 of the said Act. Therefore, no tax is payable by the petitioner.

60. In the light of the above discussion, I am inclined to allow these Writ Petitions. Accordingly, the impugned orders dated 29.07.2016 are quashed and the present Writ Petitions are allowed. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Assistant Commissioner (CT),
Pattaravakkam Assessment Circle,
No.127, 2nd Floor, Yadhaval Street,
Padi, Chennai - 600 050.
- 2.Commissioner of Commercial Taxes,
Chepauk, Chennai - 600 005.
- 3.The Secretary,
The Government of Tamil Nadu,
Fort St.George, Chennai - 600 009.
- 4.Service Tax Group - I,
Service Tax Division, Hyderabad - III,
- 5.The Secretary,
Union of India,
Ministry of Finance,
Department of Revenue, New Delhi.

+2cc to Mr.Lakshmi Kumaran, Advocate, S.R.No. 23810
+1cc to the Special GovernmentPleader, S.R.No.24002

W.P.Nos.40159 & 40160 of 2016
and W.M.P.Nos.34200 & 34201 of 2016

SJ(CO)

GN(26/06/2020)