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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.31167 & 31168 of 2014

and

M.P.Nos.1 & 1 of 2014

M/s.Indus Towers Limited,
Represented by its
Finance Head (Tamil Nadu Circle),
Mr. Sunil Sehgal,
Espee IT Park, 5(NP),
Jawaharlal Road, Chennai - 97. ... Petitioner in both W.Ps.

Vs.

1.Union of India,
Represented by the Secretary to Government,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.

2.State of Tamil Nadu,
Represented by its Secretary,
Commercial Taxes Department,
Fort St. George, Chennai - 600 009.

3.The Commissioner of Commercial Taxes,
Ezhilagam,
Chepauk, Chennai - 600 005.

4.The Assistant Commissioner (CT),
Mandaveli Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028.

5.The Commissioner of Service Tax,
Central Revenue Bhawan, Plot No.36,
Sector - 32, Gurgaon, Haryana. ...Respondents
in both W.Ps.

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 orders TIN
No.33560803089/2008-09 & TIN No. 33560803089/2009-10 dated
24.10.2014 & 30.10.2014 respectively, on the file of the 4th
respondent and quash the same.



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For Petitioner : Mr.B.Arvind Srevata 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 dated 24.10.2014 and 30.10.2014 passed by the 4th respondent in TIN No.33560803089/2008-09 and TIN No.33560803089/2009-10 respectively.

3. The petitioner has entered into a Master Service Agreement with its customers/clients for providing passive infrastructure service to them who are various Mobile Telecommunication Operators (MTO's). Under the umbrella of the aforesaid Master Service Agreement, site-specific agreements have been signed by the petitioner with its clients. Under the Master Service Agreement, the petitioner allows these Mobile Telecommunication Operators (MTO's) to install their active infrastructures such as Base Transceivers Station (BTS) and antenna/disk and other accessories required for providing mobile telecom services to their customers. The Base Transceivers Station (BTS) are sheltered inside the temporary shelter while the antenna/disk is placed on the tower/mast of the petitioner.

4. Petitioner had obtained registration under the TNVAT Act, 2006 and had procured various goods against 'C' Form for setting up passive infrastructure and filed returns under the TNVAT Act, 2006. The dispute in these Writ Petitions is confined to the Assessment Years 2008-09 and 2009-10. For these Assessment Years, the petitioner had declared the following taxable turnover under the provisions of the aforesaid Act:-

Serial No.	Assessment Year	Taxable Turnover Declared Rs.	Tax Paid Rs.
1	2008-09	1, 26, 68, 089	15, 81, 386
2	2009-10	0	0

5. These assessments were also completed accepting the returns filed by the petitioner vide two separate assessment orders dated 24.11.2011 in terms of Section 22(3) of TNVAT Act, 2006, based on the self-assessment of the petitioner.



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6. Thereafter, the petitioner was issued with two notices dated 29.11.2011. It was proposed to determine the taxable turnover and demand tax at 12.5%. Details of the notices issued are as under:-

Serial No	Assessment Year	Notice dated	Taxable Turnover Proposed
1	2008-09	29.11.2011	1,315,76,63,346.00
2	2009-10	29.11.2011	5,623,32,88,000.00

7. In the above notices, it was stated that the petitioner had affected transfer of "right to use" of the space to the mobile service providers as these companies were having access of the equipment, infrastructure and space for their use. According to the 4th respondent, there was transfer of "right to use" by the petitioner to their clients.

8. The petitioner replied to the respective notices. Meanwhile, the petitioner also filed an application under Section 48-A of the TNVAT Act, 2006 before the State Level Authority For Clarification And Advance Rulings disclosing the nature of business carried out by them for providing passive infrastructure service to these mobile telecom operators in India on a shared basis.

9. It was stated by the petitioner that it was providing taxable service under the Finance Act, 1994 under the category of "Support Service of Business or Commerce" and on the entire consideration, the petitioner was paying tax and therefore sought for a clarification as to whether the petitioner would be liable to pay tax under Section 4 of the TNVAT Act, 2006.

10. By an order dated 15.05.2012, the Authority for Clarification and Advance Ruling declined to entertain the application on the ground that the request of the petitioner was not pertaining to any question relating to rate of tax or any specific commodity and therefore same was liable to be dismissed. It was accordingly dismissed.

11. Thereafter, the petitioner was issued with two notices dated 30.08.2012 to show cause as to why the penalty should not be imposed on it. The petitioner replied by its reply dated 13.12.2011 and reply dated 28.09.2012 to the proposals contained in the notices dated 29.11.2011. By the impugned orders, the 4th respondent has concluded as under:-



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- c) Monitoring power connections and battery charging
- d) Charging batteries when necessary
- e) Trigger start and switch off of DG and control AC running as per needs.

From the above it is evident that, the dealer has not only offered facility to mount the mobile operator's RF antenna at a particular height and direction on the top of the tower and offered required level of temperature (i.e) below 35 degree Celsius as to protect the equipments. Apart from that the dealer has also offered uninterrupted power supply by converting electricity AC current from 220 Volts AC current into (-)48 DC which is essentially required to run the mobile operators transmission equipments. This activity is performed by Power Management system.

Therefore, the equipments of the dealer have been directly involved in the functioning of the equipments of the mobile operator and were used by the mobile operator for which the dealers have received lease rental receipts.

The dealer agreed for the following facilities to the mobile operators for lease received, viz.,

- i. General upkeep of tower and site premises".
- ii. Sharing operator has space to access its cables laid in the cable trays.
- iii. Sharing operator has space to access its antennae at all times,
- iv. Mounting are kept tight and rust free
- v. Tower bolts are tight as per torque requirements
- vi. Providing DG set, air conditioner, power management

For affording the above facilities the dealer purchased goods against 'C' Form. The dealer allowed the mobile operators to use the capacity of tower with infrastructure facilities. If any mobile operator terminated the agreement the facilities of using tower with infrastructure facilities are offered/transferred to some other mobile operators. The agreement protects the mobile operator to use the facilities during the tenure of the agreement. In other words, during the period of agreement the facilities



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could not be transferred to any other mobile operator. Further the mobile operator has no right to sub let to others. "Goods" may be a tangible or an intangible and having utility, capable of being bought and sold, transmitted, transferred, delivered, stored and possessed.

Hence, there is right to use the capacity of tower with infrastructure facilities as per the agreement.

The consideration received from the mobile operators for offering access to towers with infrastructure facilities amounts to lease receipts falling under section 4 of the TNVAT Act, 2006.

Moreover the equipments and infrastructures rented by the dealers were based on prior agreements of the contract which stipulates various clauses including liability to tax under VAT. In the agreement executed between them and the sharing operators, Clause 7.1.3 of the agreement specifically states about the sales tax/VAT chargeable which is extracted below.

Clause: 7.1.3

"If any VAT /sales tax and and/or services tax is chargeable in respect of the Charges payable by the Sharing Operator hereunder, Indus shall provide the Sharing Operator with a valid invoice that complies with all requirement imposed by the relevant taxation authorities and which specifically states the amount of tax chargeable and meets all further conditions necessary to allow the Sharing Operator to obtain relief from such tax if a relief procedure is available. The Sharing Operator shall, upon receipt of such valid invoice, pay to Indus the applicable VAT/sales tax and/or services tax at the rate for the time being and from time to time properly chargeable, in respect of the relevant supply of goods or services by Indus".

Clause:7.1.4

"For the avoidance of doubt except as provided in Clause 7.1.2 above, any liability for Taxes in relation to any agreement Between Indus and any third party pursuant to Clause 4.1.2 or otherwise shall not be borne by the Sharing Operator".



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Details	Turnover	Tax due
1.Turnover and Tax originally reported	Rs.1,26,68,089.00	Rs. 15,81,386.00
2. Levy of tax on lease rental receipts at 12.5%	Rs.142,52,77,649.00	Rs.17,81,59,70 6.00
Total and Taxable re-determined	Rs.143,79,45,738.00	Rs.17,97,41,09 2.00

** In view of the above discussion the contention of the dealer that they are providing only service and the receipts represent service charges is not acceptable. Therefore, the turnover of Rs.637,01,41,587.00 is assessed at 12.5% under section 4 of the TNVAT Act, 2006. In fine, the dealers are reassessed under section 27 of the TNVAT Act, 2006 on the following turnover in addition to the turnover already assessed based on the returns for the year 2009-2010 as detailed below:-

Details	Turnover	Tax due
1.Turnover and Tax originally reported	Rs. Nil	Rs. Nil
2. Levy of tax on lease rental receipts at 12.5%	Rs.637,01,41,58 7.00	Rs.79,62,67,69 8.00
Total and Taxable re-determined	Rs.637,01,41,58 7.00	Rs.79,62,67,69 8.00

Note:- Last paragraph is vary in both impugned orders based on the respective Assessment Years.



* For the Assessment Year 2008-09.

** For the Assessment Year 2009-10.

12. Pursuant to the adjudication, in the impugned orders, following tax were demanded by the 4th respondent for the respective Assessment Years:-

Sl. No.	Assessment Years	Taxable Turnover Proposed	Taxable Turnover Re-Determined in the Impugned Order.	Tax due
1	2008-09	1,315, 76, 63, 346.00	143,79,45,738.00	17,97,41,092.00
2	2009-10	5,623,32, 88, 000.00	637,01,41,587.00	79,62,67,698.00

13. The above orders also sought to impose penalty of Rs.26,72,39,539.00 and Rs.119,44,01,547.00 at 150% of the balance tax due under Section 27 (3) of TNVAT Act, 2006.

14. Appearing on behalf of the petitioner, Mr. Arvind Srevata, learned counsel for the petitioner submitted that the issue is no longer res-integra in the following cases:-

- i. Indus Towers Ltd. Vs. DCCT, 2012 (285) ELT 3 (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.

15. 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.

16. 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.

17. The learned 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).



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- 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.

18. I have considered the arguments advanced by the learned counsel for the petitioner and the respondents.

19. Facts are not in dispute. The petitioner is a provider of "Passive Infrastructure Service" for the Mobile Telecommunication Operators (MTO). The petitioner acquired such facilities from existing Mobile Telecommunication Operators (MTO). The petitioner was incorporated with view to reduce the cost of telecom service provided by Mobile Telecommunication Operators (MTO). Thus, same shelter and tower could be used by two or more Mobile Telecommunication Operators (MTO) to receive and transmit signals.

20. Under the business model, the petitioner has signed a Master Service Agreement with its clients followed by site specific agreements. Two or more Mobile Telecommunication Operators (MTO's) can be signed such agreement to "Passive Infrastructure Service" in the petitioner's temporary shelter and transmission mast.

21. The petitioner offered two types of towers with infrastructure facilities, namely, Roof Top Tower and Ground Based tower. Both the towers have the same infrastructure



facilities. The agreements were entered with various Mobile Telecommunication Operators (MTO) for a specific period. The micro controller governs power functions to ensure that telecom network is up and running. Power Management System (PMS) is responsible for coordinating below mentioned functions:-

- i. To convert 220 Volts AC current into - 48 DC current (which is required for running mobile operators transmission equipment).
- ii. To inter connect various equipment (like BTS, batteries, DG sets) with power supply;
- iii. Monitoring power connections and battery charging.
- iv. Charging batteries when necessary.
- v. Trigger start and switch off of DG and control AC running as per needs.

22. From the above, it is evident that the petitioner has not only offered facility to mount the mobile operator's RF antenna at a particular height and direction on the top of the tower and offered required level of temperature (i.e) below 35 degree Celsius as to protect the equipments. Apart from that the petitioner has also offered Uninterrupted Power Supply (UPS) for converting electricity AC current from 220, Volts AC current into (-) 48 DC which is essentially required to run the mobile operators transmission equipments without disruption. This activity is performed by Power Management System of the petitioner.

23. Today, by an order in W.P.Nos.40159 & 40160 of 2016, an identical situation was considered and the said Writ Petitions were allowed. The relevant portion of the order is reproduced below:-

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 the 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.



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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



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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



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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



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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 as 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:



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"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



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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."



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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—



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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.



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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.

24. The reasoning given in the above cases is fairly applicable to the facts of the present Writ Petitions. Therefore, I am inclined to quash the impugned orders. Accordingly, the impugned orders are quashed and these Writ Petitions are allowed. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

To

- 1.The Secretary to Government,
Union of India, Ministry of Finance,
Department of Revenue, North Block, New Delhi.
- 2.The Secretary,
State of Tamil Nadu,
Commercial Taxes Department,
Fort St. George, Chennai - 600 009.
- 3.The Commissioner of Commercial Taxes,
Ezhilagam,
Chepauk, Chennai - 600 005.
- 4.The Assistant Commissioner (CT),
Mandaveli Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028.
- 5.The Commissioner of Service Tax,
Central Revenue Bhawan, Plot No.36,
Sector - 32, Gurgaon, Haryana.

+2 cc's to M/s.R.Ramya, Advocate,sr.24218
+1 cc to Spl.Govt.Pleader,sr.24003.

Spd(co)

krd 8/7

<https://hcservices.ecourts.gov.in/hcservices/>

W.P.Nos.31167 & 31168 of 2014
and M.P.Nos.1 & 1 of 2014