

(2009) 01 KAR CK 0067
In the Karnataka High Court
Case No : Writ Appeal No. 629 of 2007

Bharti Airtel Ltd. (Formerly Bharti Tele Ventures Ltd.)	APPELLANT
Vs	
State of Karnataka and Others	RESPONDENT

Date of Decision : 16-01-2009

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 2 (15), 2 (29), 2 (29) (d), 3

Citation : (2009) ILR (Kar) 807 : (2010) 3 KCCR 1652 : (2009) 22 VST 465

Hon'ble Judges : V. Gopalagowda, J;Arali Nagaraj, J

Bench : Division Bench

Advocate : V. Sridharan, G. Shivadas and Suresh Astelar, for the Appellant; K.G. Raghava K.J. Kamath, for R. 1 to 3 and Aravind Kumar, A.S.G. for R. 4 and 5, for the Respondent

Final Decision : Allowed

Judgement

Arali Nagaraj, J.—The appellant herein namely Bharti Airtel Ltd. (Formerly M/s. Bharti Televentures Ltd.,) has challenged the order dated: 16.03.2007 passed by the learned Single Judge of this Court in W.P. No. 1537/07 (T-RES) declining to interfere with and quash the order of Re-assessment dated 12.01.2007 passed by the 3rd respondent - Deputy Commissioner, Commercial Tax, Audit-42, DVO-4, Bangalore (hereinafter referred to as the "Assessing Authority" for short) and consequent 12 notices of demand issued by him for the months of April 2005 to March 2006 demanding the tax from the appellant - company quantified thereunder. The learned Single Judge declined to interfere with and quash the said order and notices on the ground that the Appellant did not avail the statutory remedy provided under the Karnataka Value Added Tax Act, 2003 (hereinafter referred to as the ("KVAT Act" for short). Therefore, the appellant has also challenged the legality and correctness of the said order of re-assessment.

2. Stated in brief the case of the appellant-assessee company as averred in its W.P. No. 1537/07 are as under:

(a) The Appellant company is incorporated under the Indian Companies Act, 1956. It has been granted license by the Government of India, Ministry of Telecommunications, u/s 4 of the Indian Telegraph Act, 1885 for providing "broad band services" to its subscribers. It has also been registered with the 5th respondent, namely, the Commissioner of Service Tax, Bangalore under the Finance Act, 1994 and it has been regularly paying "Service tax" in respect of the said service.

(b) The Appellant Company has established telecom infrastructure for providing "broadband connectivity" by laying down about 35000 kms optic fibre cables across the country live feet deep in the ground. These optic fibre cables have enormous data carrying capacity at very high speed at which the light travels without any interference. The Appellant provides service of telecom connectivity to its subscribers from one "point of presence" (POP) to one or more "points of presence" through a complex network of copper cables as well as optic fibre cables. This service in commercial parlance is called as "leased lines" whereby the appellant allots to a particular subscriber a particular "bandwidth". A "bandwidth" means, the rate at which data is transferred across a transmission medium and is measured in units of "Kilobits per second" (Kbps)/"Megabits per second" (Mbps). Each subscriber would be provided with a different bandwidth depending upon the individual needs and appellant would enter into a "Service Level Agreement" (SLA) with all its subscribers.

(c) Once a particular bandwidth is allotted to a particular subscriber, the latter will have the freedom to transmit any amount of data throughout the period of subscription from one end to another and for this, the appellant charges the subscriber a fixed sum for the subscription period. Since the Appellant Company does not effect any sale of goods, it would not be required to pay any tax under KVAT Act. Therefore, it has been submitting monthly returns showing thereunder taxable turnover as "Nil".

(d) On 4.4.2006, the officials of the Commercial Taxes Department of Karnataka, Bangalore visited the premises of the Appellant Company and recorded the statement of one Sri Er. Ashok Kumar, DGM (Sales), of the Appellant Company who stated that the company is not effecting any sale of goods inasmuch as its sole business is to provide broad band lease line services to its customers and therefore it is not liable to pay any tax under KVAT Act.

(e) Thereafter, the 3rd respondent issued to the appellant 12 Notices dated 20.05.2006 u/s 39 of the KVAT Act proposing to reject the Forms VAT-100 submitted by the Appellant and to conclude re-assessment, by adding to the turnover, the amounts received by the appellant towards leasing of broadbands by treating the same as "transfer of right to use goods", on the ground that the appellant had leased the physical lines of optic fiber to its various subscribers.

(f) The appellant submitted its detailed reply to the said notices on dated: 07.06.2006. However, by passing the re-assessment order dated 31.07.2006 the

3rd respondent confirmed the demand made in the said notices totally on a new ground that the appellant was engaged in "setting light energy". Aggrieved by the said order of reassessment, the appellant filed W.P. No. 11728/06 before this Court and the said W.P came to be allowed by Order dated 19.10.2006 and the said order of reassessment was quashed and the matter was remanded to the Assessing Authority for fresh disposal.

(g) After the remand, the 3rd respondent - Assessing Authority again issued 12 notices dated 28.10.2006 (Annexure-B) for the twelve months from April 2005 to March 2006 proposing to treat the transaction of providing broadband services as "sale of light energy". The appellant submitted detailed reply to the said notices on 30.12.2006 (Annexure-C). After hearing the appellant, the 3rd respondent - Assessing Authority passed the impugned order of re-assessment (Annexure-A) and thereby confirmed the entire demand proposed in the said notices and imposed penalties and also levied interest on the tax said to be payable and due by the appellant.

(h) Though the appellant had alternative remedy by way of appeal under the provisions of KVAT Act, the same could not be efficacious one inasmuch as for availing the said remedy of appeal, the appellant was to make deposit of huge amount of money (more than Rs. 12 crores). Besides this, the impugned order of re-assessment has been passed by the 3rd respondent - Assessing Authority in gross violation of the fundamental rights of the appellant under Articles 14 and 19(g) of Constitution of India. The issue whether the action of the third respondent in levying the sales tax despite the appellant company being assessed to the Service Tax under the provisions of the Finance Act, 1994 is tenable in law has to be decided by this Court but not by the Appellate Authority under KVAT Act and therefore, the alternative remedy available to the appellant under KVAT Act could not be efficacious one.

(i) The third respondent Assessing Authority has initiated the present proceedings only against the appellant company leaving out the other persons companies earning on the same activity as this appellant. Thus, the action of the 3rd respondent as against this appellant company alone is highly discriminatory and in violation of the fundamental rights of the appellant. Therefore availability of "alternative remedy" to the Appellant - Company could not be a "bar" for maintaining the said Writ Petition.

3. We have heard the arguments of Sri Sridliaran, learned Counsel for the Appellant - Assessee and also Sri K.G. Raghavan, learned Senior Counsel for Respondent Nos. 1 to 3, and Sri Aravind Kumar, learned Additional Solicitor General for Respondent Nos. 4 and 5. We have also perused die impugned order of the learned Single Judge and the Re-assessment order of 3rd respondent - Assessing Authority and other material produced on record by the Appellant.

4. Having heard the learned Counsel for both the parties, the points that arise for our determination in this appeal are:

1) Whether the learned Single Judge is justified in dismissing the WP No. 1537/07, filed by the Appellant - Assessee, declining to quash the order of re-assessment passed by the 3rd respondent - Assessing Authority and consequent 12 notices issued by him demanding from the appellant-assessee the tax quantified thereunder, on the ground that the Appellant - Assessee did not avail the statutory remedy of appeal provided under Karnataka Value Added Tax Act, 2003?

2) Whether the 3rd respondent - Assessing Authority was justified in passing the impugned order dated 12.01.2007 making re-assessment of the tax payable by the Appellant - Assessee - Company on the ground that the broadband connectivity provided by the Appellant to its subscribers amounts to "sale of light energy" taxable u/s 3 of the Karnataka Value Added Tax Act, 2003?

3) Whether the Government of Karnataka has authority under the Constitution of India to levy tax on the Appellant - Company under the provisions of KVAT Act in respect of its transaction of providing broadband connectivity to its subscribers, for the reason that "Service Tax" has been levied on it by the Union Government under the provisions of "Finance Act 1994" treating the said transaction as "Service"?

5. We now proceed to record our findings and reasons on the above points by considering the arguments advanced by the learned Sr. Counsel and other counsels for the respective parties.

6. Point No. 1: - Sri V. Bridfcaran, the learned Counsel for the Appellant-Assessee strongly contended that the learned Single Judge committed serious error in dismissing the Writ Petition on the ground that the appellant did not avail the statutory remedy of appeal provided under the provisions of KVAT Act, though the said writ petition was filed by the Appellant. - Company making allegation of infringement of its fundamental right under Articles 14 and 19(1)(g) of the Constitution of India, despite the fact being that in order to avail the said statutory remedy of appeal the appellant-company was to deposit 50% of the tax demanded from it which amounts to more than Rs. 12 crores and as such the said remedy could not be efficacious one. He further contended that the question whether the activity of the appellant-assessee in providing to its customers the broad band connectivity for the purpose of carrying data from one place to another could only be a service for which the appellant has been assessed to service tax under the provisions of the Finance Act, 1994, or it involved any sale of "light energy" making the appellant-assessee liable to be taxed under KVAT Act or it amounts to both, could not be decided by the Appellate Authority under the provisions of KVAT Act and therefore, the said writ was maintainable.

7. Sri V. Sridharan, the learned Counsel for the Appellant-Assessee has placed strong reliance on the decisions of Hon"ble Supreme Court reported in Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, and J.M. Baxi and Co. Vs. Commissioner of Customs and Another, in support of his contention that

availability of alternative remedy under KVAT Act was not a bar to maintain the said writ petition.

8. Per contra, Sri K.G. Raghavan, the learned Sr. Counsel for respondent Nos. 1 to 3, Sri Aravind Kumar, the learned Addl. Solicitor General for respondent Nos. 4 and 5, while supporting the impugned order passed by the learned Single Judge contended that the learned Single Judge has rightly observed in the impugned order that it is open to the petitioner assessee to avail the statutory remedy of appeal and urge all his contentions before the Appellate Authority challenging the impugned order of re-assessment and therefore, the impugned order of the learned Single Judge does not call for any interference in this appeal.

9. In the case of Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, , the first of the said decisions of Hon''ble Supreme Court relied upon by the learned Counsel for the appellant-assessee, there was threat of using coercive machinery against the appellant assessee for recovery of heavy amount of tax and therefore, Hon''ble Supreme Court held that the alternative statutory remedy available to the appellant therein was not adequate one and hence the writ petition of the appellant-assessee was maintainable. At paragraph No. 9 of its judgment Hon''ble Supreme Court has observed as under:

Para 9: "There it was held that the principle that a Court will not issue a prerogative writ without an adequate alternative remedy was available could not apply where a party came to the Court with an allegation that his fundamental right had been infringed and such relief under Article 226. Moreover, the remedy provided under the Act is of an onerous and burdensome character. Before the appellant can avail of it, he has to deposit the whole amount of tax. Such a provision can hardly be described as an adequate alternative remedy.

10. Further, in second of the above said decisions relied upon by the learned Counsel for appellant-assessee i.e., the decision in J.M. Baxi and Co. Vs. Commissioner of Customs and Another, , where recourse to alternative remedy was onerous involving deposit of huge amount of Rs. 46 lakhs, the Hon''ble Supreme Court held that the writ petition was maintainable despite their being alternative statutory remedy available to the petitioner. Hon''ble Supreme Court has observed at paragraph No. 3 of its judgment in the said case as under:

Para 3: "Normally, the High Court ought not to interfere in exercise of its jurisdiction under Article 226 when adequate alternative remedy is available, but in the special facts of this case when the demand was raised and the same had been challenged on the ground that it was barred by time and where the demand is nearly of 46 lakhs of rupees which will have to be deposited before any appeal can be filed, we are of the opinion that the High Court ought to have exercised its jurisdiction and determined the questions which were raised in the writ petition on merits. In dealing with the contentions raised by the appellant, the High Court would necessarily have to consider the contentions of the respondents as well.

11. It is not in dispute that in order to avail the statutory remedy of appeal under the provisions of KVAT Act, the appellant assessee was bound to deposit 50% of the tax levied in the impugned order of reassessment which would be more than Rs. 12 Crores. Therefore, by applying the ratio in the above said decisions it could be seen that the said alternative remedy was not efficacious but it was onerous. Besides this, as rightly submitted by the learned Counsel for the appellant-assessee the question whether the transactions of the appellant company with its subscribers could only be service for which it is liable to be taxed only under the provisions of Finance Act, 1994 or it involved the element of sale of goods making it liable to be taxed under the provisions of KVAT Act and whether the appellant company could be taxed under both the said provisions, could not be decided by the Appellate Authority under the KVAT Act. Therefore, we are of the considered view, that the Appellant - Assessee - company could maintain its said writ petition and as such the learned Single Judge is not justified in dismissing the same only on the ground that the appellant-assessee did not avail alternative statutory remedy available to it under the said Act. Hence point No. 1 is answered in the "Negative" and in favour of the Appellant-Assessee.

12. Point Nos. 2 and 3 : Having held that the writ petition filed by the appellant-assessee challenging the legality and correctness of the impugned order of reassessment and the consequent notices demanding payment of tax issued by the 3rd respondent - Assessing Authority against the appellant company is maintainable, we now proceed to examine the merits of the case of the appellant-assessee. Since both these point Nos. 1 and 2 as formulated above, involve the discussion as to the same set of facts, we propose to deal with both of them at a stretch.

13. Sri V. Sridharan, the learned Counsel for the appellant-assessee, while referring to the grounds urged in the memorandum of writ appeal and also the writ petition strongly contended as under:

(i) the very fact that the appellant company has been issued licence u/s 4 of the Indian Telegraph Act to install, operate and maintain the National Long Distance (NLD for short) service network for providing services to its subscribers goes to show that the activities of the appellant company are only service rendered to its subscribers, but not sale of any goods. He further submitted that various clauses in die said licence provide for "Delivery of service" by the appellant; communication by the appellant to its subscribers, the surrendering of licence by it; termination of licence in the event of failure on the part of die appellant to deliver service within the specified time; assurance by the appellant company, of continuity of service to its subscribers etc., and therefore, the service activities of the appellant company cannot be held to be sale of any goods much less the "light energy" as held by the Assessing Authority, and hence, the 3rd respondent Assessing Authority has committed serious error in observing in the impugned order of reassessment that there is no element of service in the transaction of

the appellant company.

ii) the 3rd respondent Assessing Authority has erroneously held in the impugned order of re-assessment that "light energy is goods" and therefore, the State Government gets authority" to tax the sale of light energy under Entry 54 of List II of 7th Schedule to the Constitution of India.

iii) the "light energy" which carries the data of the subscribers of the appellant company through OFC laid by it about live feet, deep in the ground across the country cannot be termed as "goods" within the meaning of Sub-section (15) of Section 2 of the KVAT Act and the service rendered by the appellant - company to its subscribers in transmitting their data through the "light energy" cannot be treated as "sale of light energy" as is done by 3rd respondent Appellate Authority; and, besides this, the impugned order of re-assessment is contrary to the decision of the Hon'ble Apex Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, .

iv) While demonstrating die working of OFC network as stated by the appellant-company at paragraph Nos. 32.13 to 32.26 of its writ petition, the learned Counsel for the appellant vehemently contended that in the entire activity of transmission of data from one place to another through OFC network, what is delivered by the broadband users is data in electrical wave form and what is given back to the users at the destination end is the same data in electrical wave form and the light that is emitted by the Laser-Device (LD) in the transmitter is only for the purpose of transmission of either data or the voice information and therefore, there could be no element of sale of any goods much less sale of light energy by the appellant to its subscribers so as to attract the provisions of KVAT Act.

(v) Entry in List I of 7th Schedule provides for "tax on services", the appellant company has been rendering service to its subscribers in transmitting the data through. Optic Fibre Cable (OFC for short) laid by it across the country about live feet deep in the ground and therefore, it had been assessed under Finance Act 1994 by the Government of India through the 5th respondent viz., the Commissioner of Service Tax, Bangalore, and accordingly, it has been paying service tax in respect of the said service and hence the Government of Karnataka has no authority whatsoever to levy tax on the appellant company under KVAT Act in respect of the same activity treating the said service as "Sale of light energy".

vi) The Assessing Authority has erroneously observed in the impugned order of reassessment that there is no express provision under the service tax law stipulating that VAT shall not be levied on any transaction on which service tax is levied nor does the KVAT Act stipulate that KVAT shall not be levied on the transaction on which service tax is levied by the Central Government and therefore, there is no legal bar for levying VAT on the activities of the appellant company. Therefore, levy of tax on the appellant company in respect of the

revenue receipts from its subscribers towards its activity of providing broadband activity to them for transmission of the data from one place to another is patently illegal and without any authority.

14. Sri V. Sridaran the learned Counsel for the Appellant-Company has placed strong reliance on the following decisions in support of Ms above contentions

1. Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others,
2. State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another,
3. East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta,
4. 1970 (26) STC 268 (State of Rajasthan v. Menu Ram)
5. 1971 (28) STC 629 (Associated Cement Co. Ltd. v. Asst. Commissioner of Sales Tax, Jabalpur and Anr.)
6. Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others,
7. Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,
8. Union of India (UOI) and Another Vs. State of Haryana and Another,
9. Smt. L.V. Sankeshwar, Proprietrix, Vijayanand Travels and Others Vs. Superintendent of Central Excise, Range-A and Others etc. etc.,
10. 2007-TIOL-106-HC-KAR-ST (Suresh Kumar Sharma v. Union of India)

15. As against the above contentions of Sri V. Sridharan, the learned Counsel for the Appellant-Company, Sri K.G. Raghavau, the learned Sr. Counsel for respondents 1 to 3 respectively - the State of Karnataka Rep. By its Principal Secretary; the Commissioner of Commercial Tax and the Deputy Commissioner of Commercial Taxes (Assessing Authority), while supporting the impugned order of Reassessment, strongly contended that the process of transmission of data of the subscribers of the Appellant-Company from one point to another through the OFCs laid by it involves the creation of light energy by the Appellant-Company for the purpose of carrying the said data through the said OFCs and the said energy cannot be used for any purpose other than carrying the data and therefore, the Appellant-Company charges its subscribers for the said light energy and as such there has been sale of the said light energy by the Appellant-Company to its subscribers. He further contended that the OFC by itself is of no use unless the artificially created "light energy" is made to pass through it and it is only that light energy which carries the data of the subscribers from one point to another, it satisfies all the properties of "goods" and the generation, sale and consumption of the "light energy" takes place simultaneously and therefore, virtually it is the sale of "light energy" by the appellant-company to its subscribers. He further contended that billing is done by the appellant-assessee on the basis of quantity of data that is transmitted which is directly proportional to the quantity of artificially created light energy used and consumed for the

purpose of transmitting the data. He also contended that in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, Hon"ble Supreme Court did not consider the nature of artificially created light energy and therefore, the principle enunciated in the said case cannot be applied to the facts of the present case. He further submitted that, "electro magnetic waves" in the said case could neither be abstracted nor could they be consumed but artificially created light energy in the instant case can be abstracted and consumed and therefore, the ratio in the said case has no application to the facts of the present case.

16. Sri Raghavan, the learned Sr. Counsel for the respondent Nos. 1 to 3 further contended that though the Appellant-Assessee-Company has been assessed to service tax by the Central Government under the provisions of the Finance Act, 1994, since its activity of transmitting data through OFC laid by it involves the element of sale of artificially created light energy which possesses all the properties of goods, it is liable to be taxed under the provisions of KVAT Act and therefore, the impugned order of re-assessment passed by the 3rd respondent Assessing Authority, does not call for any interference in this writ appeal and as such the present writ appeal deserves to be dismissed by answering all the substantial questions of law in favour of these respondents.

17. Sri Aravind Kumar, the learned Counsel for respondents 4 and 5 respectively die Union of India through its Secretary, Ministry of Finance, New Delhi, and Commissioner of Service Tax, Bangalore, contended that in view of the fact die Appellant-Company has been a licensee u/s 4 of Indian Telegraph Act, 1885, it has been assessed to service tax under the provisions of the Finance Act, 1994 and this is an undisputed fact. He further submitted placing reliance on the decision of Hon"ble Supreme Court in the case of Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, , that, by applying the "Aspect Theory" to the facts of the present case, even if it is held that the activity of providing services by the appellant-company to its subscribers in transmitting the data through the OFCs laid by it involves "sale of light energy" by the Appellant-Company to its subscribers, it may be held that the Appellant-Company would be liable to be taxed both by the Central Government under the provisions of Finance Act, 1994 and the State Government under the provisions of KVAT Act.

18. Sri K.G. Raghavan, the learned Sr. Counsel for respondents 1 to 3 has relied upon the following decisions

1. Tata Consultancy Services Vs. State of Andhra Pradesh,
2. Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others,
3. State of A.P. Vs. National Thermal Power Corporation Ltd. and Others,
4. Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.,

5. M/s. Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh,

6. Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others,

19. For recording our "findings and reasons" on these two points we have to consider and answer the following questions namely:

1. Whether the "tight energy" required for transmitting the data of the subscribers of the Appellant-Assessee-Company from one point to another through the Optic Fibre Cable network laid by the Appellant-Company is artificially created by it?

2. Whether such "artificially created light energy" is capable of being held as "goods"?

3. Whether there is "sale of such artificially created light energy" by the Appellant-Assessee-Company to its subscribers in its activity of transmitting their data from one point to another through its Optical Fibre Cable Network so as to attract the provisions of KVAT Act. 2003?

4. If the element of "service" and also the element of, "sale of artificially created light energy" are to be found in the activity of the appellant-assessee company in providing "broadband connectivity" to its customers, whether the Karnataka State Government would have authority to levy tax on the said Sale despite the appellant-assessee being assessed to "service tax" by the Central Government under Finance Act, 1994?

20. We shall now proceed to analyse the facts of the case as stated by the appellant-assessee company in its reply dated 30.12.2006 (Annexure-C) to the notices issued to it by the 3rd respondent Assessing Authority proposing to levy tax on it under KVAT Act 2003 and also the facts and grounds stated in the memorandum of Writ Petition, in order to find our answers to the above four questions. The appellant assessee has described the working of OPC net work in its said reply (at para Nos. A. 13 to A. 15) under the head "factual position as regards working of OFC net work" and has also reiterated the same at para Nos. 32.13 to 32.15 of its Writ Petition. The 3rd respondent Assessing Authority has also reiterated the said facts and grounds in the impugned order (Annexure-A) and has considered the same in detail. The sum and substance of the contents of the said paragraphs in the said reply and the Memorandum, of Writ Petition is as under:

(i) When a leased line subscriber transmits data from his computer, the data will be in the form of electrical signals. The electrical signal is terminated in a Multiplexer Device in an Electrical interface with the ITU-T (International Telecommunications Union). The multiplexer will have an Electrical/optical input and an optical output. The optical output is a fibre cable which passes through many places in a given geography.

(ii) The electrical signals are multiplexed through the optical net work using the Time Division Multiplexing technology. The data sent from the source is mapped to the destination in a logical way in the network and the data is effectively delivered from source to destination. At the destination end die multiplexer does the de-multiplexing function and delivers the actual data from the optical source into an Electrical signal and the computer will be able to process the data.

(iii) The Multiplexer has the light source which would be a Light Emitting Device (LED)/Laser Device (LD). The data which is in electrical signals modulates the light. The multiplexer converts these signals into a corresponding optical signal (a form of an electromagnetic wave). This stage onwards the data travels in the form of light through the optic fibre cable.

(iv) When the data reaches the other end, it falls on a "photodetector" that senses the modulations in the light and reproduces the original data and sends the electrical signals to the computer. The photodetector surface absorbs the light and hence the light does not travel any further.

(v) In the entire activity of transmission of data from place to place, what is delivered by the broadband users is data in electrical wave form and what is given back to the said users is data in electrical wave form only. The light that is emitted by the LD in the transmitter is only for the purpose of transmission of either data or voice information.

21. From the above, it could be seen that, it is not in dispute that OFC broadband Lines necessarily and invariably work on "light energy" and it is only this "light energy" which carries data/information belonging to the subscribers of the appellant company through the OFCs from one place to another desired place; this "light energy" is not created from any natural source of light, but it is "artificially created" by the appellant - Company itself within its network. It is also not in dispute that this "light energy" is "irretrievable" in the sense that once it is used for transmission of a particular data, it cannot be re-used for transmission of another data; this light energy is intangible one and highly movable; it travels through the OFCs laid by the appellant - Company at the same speed at which the light travels in the free open space.

22. Further, it is stated by the appellant - Company at para No. A. 23 of its said reply to the notices issued by the Assessing Authority thus: "in the present case, the notices clearly admit that the notice (assessee) is tile absolute owner and in possession of the entire net work; that the light energy is created by the notice within the net work". Besides this, as could be seen from the impugned order of re-assessment, it is observed by the Assessing Authority on page Nos. 82 & 83 of the said order that the Assessing Authority obtained the technical opinion from the technical faculty at "Centre for Development of Advanced Computing", ("CDAC" for short) Bangalore, which furnished its opinion that the owner of OFC broadband network creates this light energy for the sole purpose of transmitting the data/information and it is created by LED (Light Emitting Device) or Laser

Device (LD), which is mixed/modulated with the data/information, it is an undisputed fact that the appellant-Company is the owner of OFC broad band network.

23. Thus, it is clear from the above, that the transmission of data of its subscribers is carried out by the appellant-assessee company by artificially creating the light energy and making it to carry the data by travelling through the core of optic fibre cables laid by it across the country about 5 feet deep into the ground. Therefore, the 3rd respondent Assessing Authority has rightly observed at page No. 63, of his impugned order, that "light energy" is "artificially created" by the assessee company within its net work, in this view of the matter, we answer the question No. (1) formulated by us above namely, "whether the light energy required for transmitting the data of the subscribers of the appellant-assessee company from one point to another through Optic Cable network laid by the appellant Company is artificially created by it"? In the "Affirmative" holding that the said energy is created by the appellant-assessee company,

24. The second question is: "Whether such artificially created light energy is capable of being held as goods"? On this question, Sri Sridharan, learned Counsel for the appellant - company strongly contended that "artificially created light energy" (ACL-E) cannot be termed as "goods" as defined under Article 366(12) of the Constitution of India, u/s 2(15) of the KVAT Act 2003 or u/s 2(7) of Sale of Goods Act, 1930 as it does not possess any of the properties of "goods". He further contended that the "artificially created light energy which is the electro magnetic wave of high frequency" is not capable of being possessed, stored, delivered and marked, and therefore, it cannot be held to be "goods". In support of this contention, he has relied upon the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, wherein it is held that "goods" do not include "electro magnetic waves" or "radio frequencies" for the purpose of Article 366(29-A)(d) of the Constitution of India.

25. Per contra, Sri K.G. Raghavan, learned Counsel for the respondent Nos. 1 to 3, strongly contended that the principles enunciated in the case of BSNL v. Union of India cannot be applied to the facts of the present case, inasmuch as, Hon'ble Supreme Court did not consider in the said case, the nature of "artificially created light energy". He further submitted, placing strong reliance on the decisions of the Hon'ble Supreme Court in (i) M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, ; (ii) Tata Consultancy Services Vs. State of Andhra Pradesh, : and (iii) State of A.P. Vs. National Thermal Power Corporation Ltd. and Others, , that the artificially created light energy is capable of being abstracted, possessed and consumed and as such, it is to be held as "goods" as defined under the provisions of Article 366(12) of the Constitution of India; Section 2(7) of Sale of Goods Act, 1930 and Section 2(15) of KVAT Act 2003.

26. Article 366(12) of the Constitution of India defines "goods" as including "all

materials, commodities and articles". Further, Section 2(7) of the Sale of Goods Act, 1930 defines "goods" as meaning "every kind of moveable property other than actionable claims and money; and includes stock and shares growing crops, grass and things attached or forming part of the land which are agreed to be severed before sale or under-Contract of Sale". Further, Section 2(15) of the KVAT Act 2003, the term "goods" is defined as meaning "all kinds of moveable property (other than newspaper, actionable claims, stocks and shares and securities) and includes livestock, all materials, commodities and articles (including goods, as goods or in some other form) involved in the execution of a works contract or those goods to be used in the fitting out, improvement or repair of movable property and all growing crops, grass or things attached to, or forming part of the land which are agreed to be served before sale or under the contract of sale".

27. From the above definitions, it is clear that the term "goods" includes "all kinds of moveable property;" all materials, commodities and articles". Such goods may be either tangible or intangible. In the case of Associated Cement Companies Ltd. v. Commissioner of Customs reported in (2001) 4 SCC 593, Supreme Court has held (at para No. 27 therein) that any media whether in the form of books or computer disks or cassettes which contain information, technology or ideas would necessarily be regarded as "goods" as defined u/s 2(22)(e) of the Customs Act, 1962. It is so held by the Supreme Court, while interpreting the definition of goods as given u/s 2(22)(e) with reference to Section 12 of the said Act which provides for payment of Customs duty on the goods imported into India.

28. Further, in the case of State of A.P. v. National Thermal Power Corporation Ltd. 2002 (5) SCC 503, Supreme Court, following its earlier decision in Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, , wherein Electricity was held to be goods, interpreted the definition of goods as found under Article 366(12) of the Constitution of India to include "all kinds of moveable property". Further, in the case of Tata Consultancy Services Vs. State of Andhra Pradesh, Supreme Court, agreeing with its observations in the case of M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, interpreted the meaning of the term "goods" as used in Article 366(12) of the Constitution of India that the said definition is very wide and includes all types of properties whether tangible or intangible. While interpreting so, it held in the said case [Tata Consultancy's case] that transaction of "sale of computer software is clearly a sale of goods" inasmuch as the term "all materials, articles and commodities" used in Article 366(12) of the Constitution of India includes both tangible and intangible/ any incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed etc., Paragraph 27 of the judgment in Tata Consultancy's case reads thus:

Para.27. In our view, the term "goods" as used in Article 366(12) of the

Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e., the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes.

[Emphasis is supplied by us]

29. In the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, Supreme Court, while interpreting the definition of "goods" as given under Article 366(12) of the Constitution of India and under the provisions of U.P. Trade Tax Act and also after considering its earlier view in the case of Tata Consultancy Services (2005) 1 SCC 308 and also in the case of State of A.P. Vs. National Thermal Power Corporation Ltd. and Others, , held that "goods do not include electro magnetic waves or radio frequency" for the purpose of Article 366(29-A)(d), it has observed at para Nos. 61 and 63 as under:

Para. 61. We will proceed on the basis that incorporeal rights may be goods for the purposes of levying sales tax. Assuming it to be so, the question is whether these electromagnetic waves can fulfil the criteria laid down in Tata Consultancy 131 for goods. In our opinion the question must be answered in the negative. Electromagnetic waves have been described in David Gilles & Roger Marshall: Telecommunications Law: Butterworths:

1.14. Electromagnetic waves travel through free space from one point to another but can be channelled through waveguides which may be metallic cables, optical fibres or even simple tubes. All electromagnetic waves are susceptible to interference from one another and unrelated electrical energy can distort or destroy the information they carry. To reduce these problems they have been

organised within the spectrum into bands of frequencies or wavelengths for the transmission of particular types of services and information.

Para No. 63. It is dear, electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.

[Emphasis supplied by us]

30. Placing strong reliance on the above decision of the Supreme Court in the case of BSNL v. Union of India, Sri Sridharan, contended that the "artificially created light energy" is nothing but "electro magnetic wave of high frequency" which is used by the appellant company for carrying data to its subscribers and that the said light energy cannot be possessed, stored and delivered and therefore, it cannot be termed as "goods" within the definition of Article 366(12) of the Constitution and also u/s 2(15) of KVAT Act.

31. From the above observations of Supreme Court in the case of BSNL v. Union of India it is clear that the term "goods" does not include "electro magnetic waves" or "radio frequencies" for the reasons that they are neither abstracted nor are they consumed, in the sense that they are not extinguished by their user, and that they are not delivered, stored or possessed nor are they marketable. Therefore, the converse of it would be, if the electro magnetic waves of any kind can be "abstracted" consumed and used, and they are capable of being delivered, possessed and stored, they can be termed as "goods".

32. In the said case (BSNL case) before the Supreme Court the "electro magnetic waves" were made to travel in "free space" from one point to another and as such they could not be abstracted, consumed and they were not being extinguished by their user. But In the present case even if the "artificially created light energy" (ACLE) is held to be "electro magnetic waves of high frequency", the same are made to travel in the confined area through OFC Network and the direction of their movement is regulated. Further, it is an undisputed fact that this light energy is "totally absorbed" by the photo detector at the end point of its destination and the data carried by it is demodulated into electrical signals. Thus the electro magnetic waves in the instance case which are in the form of "light energy" are made to travel in a specific direction and they get extinguished and the same cannot be re-used either by the same subscriber for carrying his another data or of any other subscriber. Besides this each specific data is carried by a separate ACLE. In other words, different datas, either of the same subscriber, or of different subscribers, cannot be carried by the same ACLE. Thus, unlike the electro magnetic waves used in the working of mobile phones, the

ACLE which carries data of the subscribers of the appellant company from one place to another through OFCs maintained by it, is totally absorbed or extinguished. Since the movement of light energy is confined and the direction of its movement is regulated it can safely be held that it is being abstracted, possessed, transmitted and delivered in the course of the activity of transmission of data of the subscribers of the appellant company. As in the case of "electricity", the creation, supply, possession, use, transmission (movement) and delivery of "ACLE" takes place almost simultaneously.

33. The appellant has produced a copy of the letter dated 03-10-2006 addressed by Sri Gangaprasad G.L. Centre Head, Centre for Development of Advanced Computing, Bangalore in reply to the letter dated 29-09-2006 that was written to him by Sri G. Shivadas, the learned Advocate on behalf of the appellant company. This letter was annexed by the appellant-assessee as Annexure-7 to his reply to the notices issued to him by the Assessing Authority. This letter reveals that the said Sri Gangaprasad has clarified the doubts expressed by the said learned advocate in his letter dated 29-09-2006 and the said clarification is as under:

a) mobile phones work on the principle of "electro magnetic energy" transmitted in space (wireless mode) whereas OFC broad band uses "artificially created light energy" transmitted through an Optic Fibre line only; these energies are quite different in both physics and chemistry and operate on different platforms; and,

b) the owner of OFC broadband network creates this light energy for the sole purpose of transmitting the data/the information; this light energy is created by LED (Light Emitting Diode) or LD (Laser Device), which is mixed/modulated with the data or information; when this light energy is transmitted through OFC broadband, the data/information is delivered at the desired other end.

c) In mobile telephone network the voice of user is carried by electro magnetic waves (called carrier) which travel in space and at the receiver end the "carried" is separated and the voice is delivered to the receiving user. Similarly, in the case of OFC broadband network the light generated (through LED or LD) is used as "carrier", it carries data/information and travels through OFCs cables to the receiver's end. At the receiver's end the light carrier is separated and the data/information is delivered to the receiving user.

d) The subscriber's data from his computer is mixed (modulated) with the light carrier for the purpose of transmission in OFC media. At the receiver's end this mixed light is separated (demodulated) and a separated data is delivered to the receiving subscriber. During this process the carrier (in this case light) gets dropped and only the data is let passed to the receiving subscriber. No part of light received from the OFC is given to the receiving subscriber as it is in no way useful to the subscriber and is used as carrier only.

34. Another opinion dated 26.09.2006 has also been obtained by the learned advocate for the appellant-assessee from one Dr. Reji Philip, Associate Professor,

Light and Matter Physics Group, Raman Research Institute, Bangalore and a copy of the said opinion (Annexure-8) had been furnished by the appellant to the Assessing Authority along with his reply to the notices. The following emerges from the said opinion:

(i) Light is just "carrier" of data in a fibre, in the same way as electro magnetic radiation in kilo hertz (10³ Hz) to GHz (10⁹ Hz) region which propagates through space is the carrier for audio and video signals in radio and T.V. transmission. Moreover light itself is nothing but high frequency electro magnetic radiation in the 10¹⁴ Hz frequency region.

(ii) The broad band lines are based on the principle of photonics. When light, which is modulated by data, is transmitted through the optical fibre lines, data/information is transmitted. If the light is not modulated, data cannot be transmitted. These optical fibre lines will be within the control of the company and they can reuse, remove or redirect the lines as per the whims of the company. The light energy can also be generated in the absence of data to be transmitted for example LEDs (Light Emitting Diodes) are used in display system, traffic lights, modern torches etc., while laser diodes are used as bar code readers, pointers etc.

(iii) When the data reaches its destination the light will fall on a "photo detector" that senses the modulation in the line and reproduces the original data (if there is no modulation there is no data also), the photo detector surface will absorb the light, so it does not travel any further and it is only the data that is given back to the user of the leased line. In other words, what is received by the leased line owner and what is given back by him is only the data.

(iv) One can make light at will, but it cannot be possessed or stored, it can be transferred and delivered.

35. As to the question "whether the light energy is capable of being abstracted,?" the said Dr. Raji Philip has stated in his said letter that he does not know what "abstraction" means. He has answered the question "whether the light energy is capable of being abstracted, possessed, transferred and delivered" as under:

a) Once a photon is created in a typical network it is transmitted to optical fibre towards the service provider but transmits its information (in certain cases after converting the signal from optical to electronic form) towards its destination through system of routers. This system of routers may be electronic (a conversion of data in the OFC to electronic form, followed by a routing of this data from a collection of explicitly chosen electronic network routers) or optical routers (in an all optical network).

b) The created photon is almost never stored. The storage of photons is difficult though not impossible. An illusion of storage may be created by making the photons re-circulate in a long loop of optical fibre while compensating for the

inevitable losses that may occur during re-circulation.

c) An electron in an electronic network may be stored almost indefinitely in a memory by setting the state of an electric memory bit (a bi-stable or two-state element such as flip-flop) to either one or zero. Thus a photon in an optical network is somewhat like a marathon runner who is never allowed to stop—storing photon for one second usually means sending it off to circulate in an optical fibre loop which is long enough to take the photon one whole second to circulate in it. Thus, photons can be delayed but not stored indefinitely as a photon. To store information riding on a photon, it needs to be converted to an electron which is thus stored in an electric memory as described earlier.

36. Thus, from the above opinions of the experts in the field which were obtained by the Assessing Authority and also the assessee-company, the genuineness of which is not in dispute, it is clear that the "electro magnetic waves" used in the operation of mobile phones and the "artificially created light energy" though it is "electro magnetic waves of high frequency", both are distinct from each other having different characteristics and being used for different purposes. It is further clear that the artificially created light energy in the instance case is capable of being possessed, transmitted, delivered and used, and, to some extent, stored.

37. In the case of *Escotal Mobile Communications v. Union of India and Ors.* reported in (2002) 126 STC 475, Kerala High Court, while interpreting the definition of "goods" in Section 2(XII) of Kerala General Sales Tax Act 1963, which is analogous to the definition of "goods" in Section 2(15) of KVAT Act 2003, has held that "goods include 'intangible property' also".

38. In the case of *State of U.P. v. Union of India* reported in (2003) 3 SCC 239 (at Para No. 18) while interpreting the definition of word "goods" as defined u/s 2(d) of the U.P. Trade and Tax Act 1948, Supreme Court observed that the said definition takes in its fold "every kind or class of movables including all materials and articles" which may be either tangible or intangible. While observing so, it held that the telephone connection and all other accessories with due access to the telephone exchange with or without telephone are "goods" within the meaning of said provision.

39. In the case of *State of A.P. v. Rational Thermal Power Corporation Limited* reported in (2002) 3 SCC 203 following its earlier decision in *Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur*, Supreme Court held that the definition of "goods" as given in Article 366(12) of the Constitution of India is very wide and it includes all kinds of movable property and therefore, "electricity" which is capable of abstraction, consumption and use is "goods". In the said decision, Supreme Court has referred to its another decision in the case of *Indian Aluminium Co. etc. etc. Vs. State of Kerala and others*, and it quoted with approval its observations in the said case which read as under:

Continuity of supply of and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the substation installed at the units of the consumers through electrical high-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously with sale also takes place.

These properties of electricity as goods are of immense relevance, as we would state hereafter.

40. In the case of Commissioner of Sales Tax, Madhya Pradesh v. Madhya Pradesh Electricity Board, Jabalpur reported in (1969) 3 SCR 939 which is referred to by Supreme Court in NTPC case, it has observed on page No. 945 as under:

The term "Movable Property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, would attract punishment u/s 39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property.

41. Further, the view taken by it in State of U.P. v. Union of India (3003) 3 SCC 239; and Mate of A.P. v. NTPC (2003) 5 SCC 203 has been affirmed by Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, .

42. Therefore, even applying the ratio in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, , on which strong reliance is placed by Sri Sridharan, learned Counsel for the appellant-assessee Company, to the facts of the present case, and also following the relevant observations of Supreme Court in all its earlier decisions discussed by us supra and which have been considered by Supreme Court in BSNL's case, we are of the considered view that the "artificially created electrical light energy" which is used for transmission of data of die subscribers of the appellant ? assessee company through its OFC Network is "goods" within the meaning of Article 366(12) of the Constitution of India; Section 2(15) of the KVAT Act 2003 and also Section 2(7) of Sale of Goods Act 1930. Hence we answer the second question formulated by us above namely "whether artificially created light energy is capable of being held as goods" in the

"affirmative" holding it as "goods".

43. Having answered question Nos. 1 and 2 in the "affirmative" holding that the appellant-company "artificially created the light energy" which is used in transmitting the data of its subscribers through its OFC Network and the said energy is "goods", we now proceed to consider 3rd and 4th questions formulated by us supra namely: "whether there is sale of "artificially created light energy" (ACLE) by the appellant assessee-company to its subscribers in its activity of transmitting their data through its OTC Network so as to attract the provisions of KVAT Act 2003?" and "whether Karnataka State Government has authority to levy VAT on the activity of the appellant company of transmitting the data of its subscribers through its OFC Network despite the appellant being assessed to "service tax" by the Central Government under Finance Act, 1994?"

44. On the above questions Sri Sridharan, the learned Counsel for the appellant company strongly-contended that the very fact that the appellant company has been granted licence u/s 4 of the Indian Telegraph Act to install, operate and maintain the National Long Distance (NLD) service network for providing services to its subscribers goes to show that the activities of the appellant company are only service rendered to its subscribers, but they do not constitute sale of any goods, much less, the "artificially created light energy". He further contended that the appellant company has entered into "Service Level Agreement" (SLA) with all its subscribers in respect of its activity of providing service of broadband connectivity to its subscribers in transmitting their data through its OFC network and that the "lease rentals" received by the appellant - company from its subscribers towards the said service could not be termed as "sale proceeds" liable to be taxed under the KVAT Act as is done by the 3rd respondent - Assessing Authority. He also contended that there is no element of "sale" of "artificially created light energy" by the appellant - company to its subscribers in the activities of transmitting the data/information of its subscribers through its OFC Network inasmuch as the said activities do not constitute sale of any goods within the definition of "sale" as given u/s 2(29) of KVAT Act 2003 but they only amount to "service" in respect of which the appellant has been granted licence u/s 4 of Indian Telegraph Act, 1885 and it is subjected to "service tax" under the provisions of Finance Act 1994. He further submitted that even assuming that there is an element of "sale" of light energy in the said activity of the appellant - company, the said sale would only be incidental to the contract of service entered into by the appellant - company with its subscribers and therefore, no tax could be levied on the appellant - company under the provisions of KVAT Act.

45. Sri V. Sridharan, the learned Counsel for the appellant, by giving an illustration of transportation of goods by the transporter, strongly contended that "artificially created light energy" is used by the appellant company in transmitting the data/information of its subscribers in the same way in which the transporter uses petrol/diesel as fuel in the goods vehicle and therefore it cannot be held that the appellant sells ACLE to its subscribers. He submitted farther that

in the transportation of goods entrusted to the transporter by his customers the transporter carries the goods from one place to another in a "carrier" such as lorry and petrol/diesel is used in the said lorry as fuel for creating energy to make the lorry to move but the fuel consumed in the said activity can not be said to have been sold by the transporter to his customers, and in the same way, the data will be given to the appellant company by its subscribers for its transmission from one place to another and the appellant company transmits it through OFC Network maintained by it and for the purpose of transmission of the said data, it makes use of "artificially created light energy" and therefore it cannot be said that the appellant company would be selling to its customers ACLE which is nothing but a fuel used by it in the transmission of data.

46. As to the authority of the Government of Karnataka to levy tax under the provisions of KVAT Act, Sri V. Sridharan, the learned Counsel for the appellant contended that entry 92-C in List I of 7th Schedule to the Constitution of India provides for "tax on services" and therefore the Central Government, holding the activity of the appellant company as "service" to its subscribers in transmitting their data through its Optic Fibre Cable Network, has assessed it to "Service Tax" under finance Act 1994, and accordingly, it has been paying service tax in respect of the said service and hence the Government of Karnataka has no authority whatsoever to levy tax on the appellant company under KVAT Act in respect of the same activity treating the said service as "sale of artificially created light energy". He further-submitted that the Assessing Authority has erroneously observed in its impugned order of reassessment that there is no express provision under the service tax law stipulating that VAT shall not be levied on any transaction on which service tax is levied nor does the KVAT Act stipulates that VAT shall not be levied on the transaction on which service tax is levied by the Central Government and therefore, there is no legal bar for levying VAT on the activities of the appellant company.

47. Per contra, Sri K.G. Raghavan, the learned Sr. counsel for respondent Nos. 1 to 3 strongly contended that the "ACLE" cannot be said to have been used by the appellant-company "as fuel" for transmitting the data of its subscribers from one place to another through OPC network but this light energy itself is the "carrier" which carries the data from one place to another and which is fully absorbed by the "photo detector" at the end point of its destination and therefore the activity of transmission of the data cannot be compared with the transportation of goods by the transporter through a carrier like lorry by using the petrol/diesel as fuel He further submitted that there is no entrustment of any data to the appellant-company by its subscribers for the purpose of its transmission through its OPC network, the carrier in this case namely "ACLE" gets extinguished on its reaching the end point inasmuch as it is fully absorbed by the photo detector there and thereby data is separated from it, but the lorry which carries the goods from one place to another does not get extinguished. He further submitted that unlike the transport vehicle, used by the transporter for transporting the goods, which can be reused by the transporter for carrying other goods, the "ACLE" which carries a

specific data can not be re-used for transmitting other data belonging to the same subscriber nor can it be used for transmitting the data belonging to any other subscriber and therefore, what is being charged by the appellant company is towards the price of the ACLE but not towards the service rendered by it by providing its infrastructure of OFC network to its subscribers for transmitting their data as claimed by it.

48. Sri Raghavan, the learned Sr. Counsel also contended that whatever amounts that are collected by the appellant-company from its subscribers as "lease rentals" are virtually the price of the ACLE and the infrastructure of OFC net work established by the appellant-company for the purpose of transmission of data of its subscribers is only incidental one for facilitating sale of ACLE to its subscribers. He further submitted that though the activity of the appellant-company may also amount to "taxable service" under the provisions of the Finance Act, 1994, the transactions of the appellant company with its subscribers constitute "sale" of "artificially created light energy" within the meaning of Section 2(29) of KVAT Act and the providing of the infracture of OFC Network is, only incidental to the said sale.

49. As to the authority of the Government of Karnataka to levy tax on the appellant-company under the provisions of KVAT Act despite it being assessed to service tax under the Finance Act, 1994, by the Central Government, Sri K.G. Raghavan, the learned Sr. Counsel for respondent Nos. 1 to 3 submitted that the activity of the appellant-company clearly involves sale of "artificially created light energy" as defined u/s 2(29) of the KVAT Act and this sale is dominant object of the contract between the appellant company and its subscribers and as such, the entire proceeds received by it from its subscribers as "lease rentals" are liable to be taxed under KVAT Act. He further submitted that the State Government, by virtue of Entry 54 of list II in Seventh schedule to the Constitution of India, has authority to levy tax on the appellant-company under KVAT Act on the amounts received by it as "tease rentals" from its subscribers despite the appellant-company being assessed to service tax under the Finance Act, 1994, by the Central Government.

50. It is an undisputed fact that the data of the subscriber will be initially in the form of electrical signals and it will be modulated in the multiplexer and then injected into the ACLE emitted by the LED (light emitting devise)/LD (Laser devise) and then the light energy carries the data to the desired end point by travelling through the OFC network. It is also not in dispute that the moment the light energy reaches the desired end point it will be completely absorbed by the photo detector and thereby the data carried by the light energy will be separated and sent to the computer. Thus it is clear that the "carrier" of data viz., ACLE will be completely absorbed (extinguished) immediately after its task of carrying the data to the desired end point is over, but in the course of transportation of goods through a lorry, after the lorry (carrier) readies the destination, the goods will be unloaded from the lorry and delivered to the consignee and the lorry will again

be used for transportation of other goods either belonging to the same customer or belonging to other customers. In other words, in the case of transportation of goods, the carrier i.e. the lorry, does not get extinguished by its user but in the case of transmission of data the "carrier" viz: "artificially created light energy" gets extinguished, by its user namely the subscriber of the appellant company. Thus the ACLE is fully consumed but the "lorry" is not consumed.

51. It is further clear that in the case of "transportation of goods", what is consumed is petrol/diesel which used as source of energy(fuel) for making the lorry (carrier) to run for the purpose of carrying the goods, but not the carrier(lorry) itself. But, in the case of transmission of data, the carrier viz; ACLE itself is fully consumed. This being so, carrying of data by ACLE through OFC Network can not be equated with the carrying of goods by transporter by using a vehicle like lorry and the appellant-company cannot be taken as the "carrier" of data of its subscribers.

52. It is not in dispute that the appellant-company has been granted licence u/s 4 of the Indian Telegraph Act, 1885, to install, operate and maintain National Long Distance (NLD) service network for providing service to its subscribers and that various clauses of the said licence provide for "delivery of service" by the appellant; communication by the appellant-company to its subscribers, the surrendering of licence by it, assurance by the appellant-company of continuity of its service to its subscribers etc. It is also not in dispute that the appellant-company's activity of providing broad band connectivity to its subscribers is held to be "taxable service" as defined under the provisions of the Finance Act, 1994, and accordingly the appellant-company has been assessed to service tax and it has been paying the same to the Central Government. Further, it is not the case of the appellant that it is not liable to pay the service tax on its said activity, nor is it the case of the respondent Nos. 1 to 3 that the appellant-company is not liable to be assessed to service tax.

53. What is in dispute, between the appellant on the one side and respondent Nos. 1 to 3 on the other, is levy of tax on the appellant-company under the provisions of KVAT Act on its activity of providing broad band connectivity to its subscribers despite it (appellant-company), being assessed to service tax by the Central Government under the Finance Act, 1994. It is the case of the appellant company that as could be seen from the "Service Level Agreement" (SLA) the dominant object therein is the "Service" and therefore, even if it is assumed that there is an "element of sale of ALCE by the appellant company to its subscribers, it is only incidental to the said dominant object and therefore the amounts received by it from its subscribers being "lease rentals" cannot be taxed under KVAT Act. On the other hand, the case of the respondent Nos. 1 to 3 is that the dominant object of the transaction being sale of ACLE, providing of infrastructure by the appellant company by laying OFC Network for transmitting the data of its subscribers is only incidental one and therefore the amounts collected by the appellant - company from its subscribers though as "lease rentals" virtually

being the price for the ALCE, are liable to be taxed under KVAT Act.

54. In the case of State of U.P. and Anr. v. Union of India and Anr. reported in (2003) 3 SCC 239 there was composite contract for sale and service. The appellant State in the said case contended that in supplying instruments, accompaniments and the telephone connection to its subscriber the DoT (Department of Telecommunication) which had the exclusive privilege, was transferring the right to use those goods; but the respondent DoT contended that, it was providing service which did not involve transfer of a right to use any goods and that under the Finance Act 1994 Parliament had imposed a service tax and therefore the State could not levy any tax under the U.P. Trade and Tax Act. Allowing the said appeal of the State, Hon'ble Supreme Court held in the said case at para No. 24 of its Judgment as under:

Parm.24. The question "whether a given activity is one of sale or service is a vexed question". The terminology employed to describe an activity as sale or service is not conclusive in itself. By calling sale as service or vice versa, the substance of the transaction will not get altered. The question has to be determined by discerning the substance of the transaction in the context of the contract between the parties or in a case of statutory contract in the light of the relevant provisions of the Act and the Rules. If an activity or activities are comprehensively termed as "service" but they answer the description of "sale" within the meaning of a statute, they can nonetheless be regarded sale for the purpose of that statute. In other words, it is possible, an activity may be service for purposes of one Act and sale for purposes of another Act. It may also be that in a given case, on the facts of that case, a particular activity can be treated as "service" but in a different fact situation the same could be sale under the same statute.

[Emphasis supplied by us]

55. In view of the above observations of Hon'ble Supreme Court we have to see "whether the activity of the appellant company constitutes "only service without there being any element of sale" of "artificially created light energy" or it also answers the description of sale within the meaning of Section 2(29) of the KVAT Act 2003?"

The term "sale" is defined u/s 2(29) of KVAT act 2003 as under:

Section 2(29): Sale: "Sale" with all its grammatical variation and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes:

(a) a transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(b) a transfer of property in goods (whether as goods or in some other form)

involved in the execution of a works contract;

(c) a delivery of goods on hire purchase or any system of payment by installment;

(d) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Four explanations are appended to this definition of sale, according to which, certain transactions under certain circumstances referred to therein shall be "deemed to be sale". Since we are not concerned with "deemed sale", the said explanations are not extracted here.

56. On plain reading of the above definition of "sale" it is clear that in order to describe a "transaction" as "sale", there shall be in it, (i) transfer of property in goods (other than by way of a mortgage, hypothecation, charge or pledge; (ii) by one person to another; (iii) in the course of trade or business; (iv) for cash or deferred payment or other valuable consideration. It is further clear from the said definition that as provided under Clause (d) therein, "a transfer of the right to use any goods for any purpose" (whether or not for a specified period) for cash, deferred payment or other valuable consideration also "sale".

57. On careful analysis of the facts constituting the appellant company's activity of providing "broadband connectivity" to its subscribers under "Service Level Agreement" entered into by it with them, we have found that the appellant company has given its subscribers the right to use its OFC Network and also to use and consume the "light energy" created by it artificially for the purpose of carrying their data/information and it has been collecting from them an ascertained sum of money towards the same. Thus, it is clear that this activity of the appellant company involves - transfer of property in goods viz., the "artificially created light energy" (other than by way of mortgage, hypothecation, charge or pledge) by the appellant company to its subscribers, in the course of business, for ascertained sum of money (consideration) payable to it by its subscribers, and it also involves the giving of right, by the appellant company to its subscribers, to use the OFC Network and also to use and consume ALCE. Thus, this activity of the appellant company though has been held as "service" under the provisions of Finance Act 1994, fully "answers the definition of "sale" as given u/s 2(29)(d) of KVAT Act 2003. Further, as observed by us supra the creation/generation, supply, movement and delivery of the light energy in this case takes place almost instantaneously at the same moment. Further, ALCE supplied by the appellant company to its subscribers gets extinguished in the activity of transmission of the data/information of its subscribers.

58. Therefore, following the observations of Supreme Court at para No. 24 of its Judgment in State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, which are extracted supra, we are of the considered view that even if the activities of the appellant company are comprehensively termed as "service" under the "Service Level Agreement" entered into by the appellant company with

its subscribers, they answer the description of "sale" within the meaning of Section 2(29)(d) of KVAT Act, and therefore they are to be regarded as "sale" for the purpose of the said statute despite the said activities are held as "service" for the purpose of Finance Act 1994. Therefore, we agree with the view taken by the 3rd respondent, the learned assessing Authority, on page No. 96 of its impugned order of re-assessment, that "assessee" is not the carrier of data/information of its subscriber but the manufacturer of the carrier, namely the "light energy" which is supplied by the appellant-company to its subscribers and which is totally lost on being absorbed by the photo detector at the end point, and therefore it cannot be said that there is no element of sale in the appellant's activity of transmission of data of its subscribers through its OFC Network. Hence, we hold that the said activity of the appellant company certainly involves the element of sale of "artificially created light energy".

59. Having come to the conclusion that the appellant - company's activity of providing broad band connectivity to its subscribers for transmitting their data/information involves the element of sale of "artificially created light energy" we have now to examine whether this "sale" (of artificially created light energy) could be brought to tax by the Government of Karnataka under the provisions of KVAT Act as is done by the 3rd respondent Assessing Authority in this case.

60. Article 246 of the Constitution of India provides that the Parliament has exclusive power to make laws with respect, to any of the matters enumerated in List I in the 7th Schedule to the Constitution of India which list is referred to as "Union List" and the Legislature of any State shall have power to make laws with respect to any of the matters enumerated in List II in 7th Schedule to the Constitution, which list is referred to as "State List". The said Article 246 further provides that the Parliament and also the Legislature of any State, both shall have power to make laws with reference to any of the matters enumerated in List III in the 7th Schedule which list is referred to as "Concurrent List". It is further provided under the said Article that the parliament has power to make laws with respect to any matter for any part of the country not included in a State despite such matter being enumerated in the "State List".

61. Entry 54 in List II (State List) in the 7th Schedule of the Constitution provides for levying "tax on the sale or purchase of goods other than news papers", subject to Entry 92-A in List I. Further, Entry 92-A of List I (i.e., Union List) pertains to levy of tax on sale or purchase of goods other than news papers where such sale or purchase takes place in the course of inter state trade or commerce. Thus from a plain reading of the provisions of Article 246 of the Constitution of India and Entry 54 in List II in 7th Schedule and also Entry 92-A in List-I in the said schedule, it is clear that as provided under Entry 54 in List II, the State Government is competent to levy tax on the sale or purchase of goods other than news papers provided such sale or purchase does not take place in the course of inter state trade or commerce. It is not the argument of the learned Counsel for the appellant-company before us that if it is held by us in

this appeal that the activity of the appellant-company in providing broad band connectivity to its subscribers involves an element of sale of "artificially created light energy" the said sale amounts to "sale in the course of inter state trade or commerce" so as to attract Entry 92-A in List I of 7th Schedule. Besides this, the Assessing Authority has observed in the impugned order of re-assessment (on page No. 107) that the transactions assessed in these proceedings are the transactions between the assessee company and its customers i.e., the "lease-line holders" and not the transactions of the customers inter se and, since the appellant company and all its customers herein have their places of business within the State of Karnataka all the transactions reported by the assessee company have to be treated as "locale sales" only and therefore, the question of treating any part of the transactions as "inter state sales" or "export sales" at the hands of the assessee company does not arise. No submissions are made by the learned Counsel for the appellant assessee company during his arguments in this appeal challenging these observations of the learned Assessing Authority. Therefore, we are of the considered opinion that the Government of Karnataka is competent to levy sales tax on the appellant-company on the sale of "artificially created light energy" used in the course of transmission of data/information of the subscribers of the appellant-company through its OFC network.

62. Having come to the conclusion that the Government of Karnataka State has authority to levy tax under the provisions of KVAT Act on the sale of ALCE by the appellant-company in the course of providing broad band connectivity to its subscribers, we have now to examine whether such tax could not be levied on the appellant-company in view of the fact that the Central Government has assessed the appellant-company to the service tax under the provisions of the Finance Act, 1994.

63. It is the case of the appellant assessee that the "dominant object" of the transaction between itself and its subscribers as per the "Service Level Agreement" being "service", even if there is element of sale therein, it is only incidental to the said dominant object and therefore no tax could be levied on it. On the other hand, the case of the respondent Nos. 1 to 3 representing the State of Karnataka is that the dominant object of the transaction of the appellant company with its subscribers is "sale of ACLE" and the "service" element therein is only incidental to the said sale and the amounts received by the appellant company towards sale of ACLE and service cannot be separated and therefore, entire proceeds received, by it as "service rentals" are liable to be taxed.

64. The appellant company has laid the network of OFCs about 5 feet deep in the ground, across the country for the purpose of transmission of data/information of its subscribers. This network, being the infrastructure provided by the appellant company to its subscribers for the said purpose, is the "service element" of its transaction with its subscribers under the "Service Line Agreement". For the same purpose it "creates light energy artificially" and provides the same to its subscribers and this ALCE carries the data/information of its subscribers though

its OFC network and ultimately gets extinguished at the end point of its destination. This is, in our considered opinion, "sale element" of the transaction of the appellant company with its subscribers. But the appellant Company collects from its subscribers ascertained sum of money as "Lease Rentals" treating its entire transaction as "service". It is pertinent to note that without ACLE, the data/information of the subscribers cannot be transmitted by using only the OFC network. Similarly without using the OFC network, the data/information cannot be transmitted by using only ACLE. Therefore we have no hesitation to hold that the nature of the transaction between the appellant assessee company and its subscribers under "Service Line Agreement", though has been described as "service", is one of "composite transaction" involving "service" and also "sale" elements.

65. As to such composite transactions Supreme Court has observed at para No. 44 in the case of of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, as under:

Para.44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract and 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. 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.

66. On a careful reading of the above observations of Supreme Court at para No. 44, in BSNL's case, it is clear that only three specific categories of composite contracts namely "Works Contract", "Hire Purchase Contract" and "Catering Contract" are brought within the fiction of a "deemed sale" and, of these three categories, the Works Contract and Catering Contract involve the elements of service and sale at the same time and, in respect of these two categories of contract, only the splitting of the service and supply has been constitutionally permitted in Sub-clause (b) and (f) of Clause (29-A) of Article 366 of the Constitution of India and there is no other service which has been permitted to be so split Further, while referring to an illustration of Hospital Services, Supreme Court has further observed therein that if, during the treatment of a patient in a Hospital, he or she is given a pill, the transaction cannot be split into the service rendered by the Doctor and the sale of drug i.e. pill.

67. Following the said observations, we are of the opinion that in the present composite transaction between the appellant Company and its subscribers in providing broad band connectivity to the subscribers, the two elements of service and sale cannot be split.

68. Supreme Court has further observed at para 45 of its judgment in the same BSNL's case as under:

Para. 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, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in 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". We will, for the want of a better phrase, call this the "dominant nature test".

69. From the above observations, it is clear that in respect of composite contract other than those mentioned in Article 366(29-A), like the one in the instant case, "dominant nature test" to be applied. The copy of "invoice" dated 31.8.2005 which is found at page No. 457 of the paper book produced by the appellant Company herein reveals that under the said invoice a sum of Rs. 85,162/- is collected by the appellant Company from its customer having customer ID No. 4682 as "recurring charges" (band width and services) and no amount is collected under the said invoice under any other head shown therein namely One Time Charges; Other Charges; Debit Notes; Credit Notes; and a sum of Rs. 8,516/- towards "Taxes" and another sum of Rs. 170/- towards "Cess" are collected. Thus, it is clear that the said recurring charges of Rs. 85,162/- is not exclusively towards service charges, but it is inclusive of charges towards band width and also charges towards services. Further, the term of "Service Level Agreement" does not reveal that the subscribers shall have to pay to the appellant Company only towards service charges and not anything else. Therefore, we are of the considered opinion that having regard to the nature of the transaction between the appellant Company and its subscribers and all other circumstances of the case with respect thereto, the dominant object of the transaction/contract has been the "sale of artificially created light energy" by the appellant Company to its subscribers and the providing of infrastructure of OPC network by the appellant Company to its subscribers to facilitate the carrying of the data/information is only Incidental to the said dominant object though the transaction of the appellant Company is described in the Service Line Agreement

as "service".

70. The amount which the appellant Company has been collecting from its subscribers towards sale of artificially created light energy and the amount which it collects towards service are inseparable. As to the separability of the elements of service and sale in a composite transaction of this nature, Supreme Court has observed at para Nos.34 and 38 of its judgment in the case of State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, as under:

Para 34. In regard to sale of goods where the service is incidental, the principle of nonseparability will apply in the absence of a specific valid statutory provision; for example, in a restaurant/hotel, where food or other articles are sold, the supply of service like providing cutlery-washing liquid, towels, music etc., is merely incidental and it would not be permissible to treat such service as a transfer of right to use the goods for the purpose of taxation under the relevant Sales Tax Act. Where, however, the supply of service as well as supply of goods are prominent objectives and they have been clubbed together under a composite contract, it would be possible to treat them separately; for example, where in a holiday package, transportation, boarding and lodging are separately treated, it would be possible to assess them separately, though covered under the same contract.

Para 38. Having given our anxious consideration to the submissions made in regard to the composite contract of service of goods and the classification, above referred, we are of the view that they will not apply to the present case. Here the service of telephone connection cannot be artificially split into various categories-- supply of instruments and accompaniment on the one hand and supply of telegraphic line/connection on the other, to name the former as "sale" and the latter as "service". The analogy of composite contract will apply where "sale" and "service" are two different independent objects.

Further, at para No. 24 of its judgment in the same case State of U.P. and Anr. v. Union of India, Supreme Court has quoted the observations of its constitutional bench made at para No. 12 of its earlier decision in the case of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi and it reads as under:

Para 12. "Indeed, we have no hesitation in saying that where food is supplied in an eating-house or restaurant and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax".

71. Following the above observations of the Supreme Court, we are of the considered view that since elements of service and sale in the instant transaction cannot be separated from each other, as rightly held by the Assessing Authority in the impugned order of reassessment, the entire proceeds received by the appellant Company from its subscribers as "Service rentals" shall have to be brought under tax under the provisions of KVAT Act treating the entire

transaction of the appellant Company in providing the broad band connectivity to its subscribers as sale of artificially created light energy.

72. Further, it is observed by the Supreme Court at para No. 31 of its judgment in the case of Federation of Hotel and Restaurant Association of India etc. v. Union of India and Ors. reported in (1989) 3 SCC 634 as under:

Para 31. "Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in Governor-General-in-Council v. Province of Madras in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

...The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of, his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale....

73. Following the above observations, we are of the considered opinion that the appellant-assessee Company is liable to be assessed to Sales Tax under the provisions of the KVAT Act, as rightly done by the 3rd respondent Assessing Authority in the impugned order of reassessment, on its activity of providing broad band connectivity to its subscribers despite the assessee being assessed to service tax under the provisions of the Finance Act, 1994.

74. For the reasons aforesaid, we are of the considered opinion that the question Nos. 3 and 4 formulated by us supra shall have to be answered in the "Affirmative" holding that "there is sale of artificially created light energy" by the appellant company to its subscribers in its activity of transmitting their data through the OFCs network so as to attract the provisions of KVAT Act, 2003 and that the Government of Karnataka has authority to levy VAT on the entire proceeds collected by it as "lease rentals" from its subscribers despite the Appellant-Assessee Company being assessed to "service tax" by the Central Government under the Finance Act 1994.

75. Therefore, we answer both the point Nos. 2 and 3 formulated by us in this appeal in the "Affirmative" holding that the 3rd respondent - Assessing Authority is justified in passing the impugned order dated 12.1.2007 making the re-assessment of the tax payable by the appellant - assessee company on the ground that the activity of providing Broad Band Connectivity by the appellant company to its subscribers amounts to "sale of light energy" taxable u/s 3 of the KVAT Act 2003 and further holding that the Government of Karnataka is

competent to levy tax on the said sale under the provisions of the KVAT Act, 2003 on the entire proceeds collected by it from its subscriber's as "lease rentals" despite the appellant company being assessed to service tax on the said activity by the Union Government under the provisions of Finance Act, 1994, treating it as "service". Since the learned Counsel for the appellant assessee did not advance his arguments on the legality of the impugned order of the Assessing Authority insofar as it relates to the imposing of penalty and interest on the appellant - assessee, we have not considered the same.

76. Before parting with, we would like to place on record our appreciation of the efforts made by Sri A.K. Chitaguppi, the learned Deputy Commissioner of Commercial Taxes and the pains taken by him in making thorough investigation in the matter by seeking the opinions of the experts in the field and in properly understanding and analysing the technicalities involved in this matter which is of great general importance. We are considerably assisted by the sincere and honest efforts made by him. In the result, while answering Point No. 1 in the "Negative" and point Nos. 2 and 3 in the "affirmative", we pass the following:

ORDER

This Writ Appeal is hereby allowed in part and the impugned order dated 16.03.2007 passed by the learned Single Judge of this Court dismissing W.P. No. 1537/07(T-RES) of the appellant on the ground that the appellant-assessee company did not avail the alternative remedy of appeal under the Karnataka Value Added Tax Act, 2003 is hereby set aside. Further, the present writ appeal insofar as it relates to the merits of the W.P. No. 1537/07 (T-RES) is hereby dismissed. Consequently the said writ petition is also dismissed and the order of reassessment dated 12.1.2007 passed by the 3rd respondent - Assessing Authority against the appellant company impugned therein is hereby confirmed. No order as to costs.