

(2011) 04 KAR CK 0098
In the Karnataka High Court
Case No : Writ Petitions 2459-2482 of 2011

Essar Telecom Infrastructure Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI), State of Karnataka and Deputy Commr.
of Comml. Taxes (Audit 52)

RESPONDENT

Date of Decision : 07-04-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 246 (1), 366 (12)
Finance Act, 1994 — Section 65 (11), 65 (19)
Karnataka Value Added Tax Act, 2003 — Section 3, 39, 4 (1) (b)

Citation : (2011) 04 KAR CK 0098

Hon'ble Judges : Hulumadi G. Ramesh, J

Bench : Single Bench

Advocate : B.G. Chidananda Urs, for the Appellant; N.R. Bhaskar, for R1 and Shivayogiswamy, GP for R2-3, for the Respondent

Final Decision : Allowed

Judgement

Hulumadi G. Ramesh, J.—Petitioner is a company registered under the Companies Act, 1956 engaged in providing infrastructure service in relation to cellular telephones. He having entered into contract with various telecom/cellular operators is required to render service in relation to passive telecom network including operating and maintenance.

2. Petitioner is also registered under Finance Act, 1994 and the transactions are subject to service tax in terms of Section 65(19) of the Finance Act. Acting u/s 39 of the Karnataka Value Added Tax Act, 2003, the Respondent authority proceeded to levy tax on the premise that there is a transfer of right to use the telecom network towers which according to the Petitioner, is overlooking the fact that the transactions which are in the nature of service contract and also according to him, as per Section 65(11) of the Finance Act, 1994 it is only a service contract.

3. The Petitioner erects and constructs tower sites and lease out the space on

such sites to various telecom/cellular operators such as BSNL, Airtel, Vodafone, etc. It is stated, they are service providers falling with the category zzzq defined u/s 65(105) r/w Section 65(105)(104c) of the Finance Act, 1994. Petitioner also holds a registration certificate issued by the Centralized Service Tax authority at Bombay and is having centralized billing and accounting system and is filing periodical returns and paying proper tax due to the Union.

4. Acting u/s 39 of the VAT Act, 2003, the 3rd Respondent has issued notice for the assessment years 2007-08 and 2008-09 proposing to impose VAT on providing of cellular telephony towers on rent to various service providers stating that the transaction falls under the definition of "deemed sale" u/s 2(29)(d) of the Act r/w Section 3 and 4(1)(b) of the VAT Act, 2003 and also proposition notices were issued for those periods as at annexures A and A1 on 20.10.2010. Petitioner relied to the said notices stating that the activity is considered as "service" as per the definition provided under the Finance Act, 1994 and that activity cannot be considered as sale within the meaning of Section 2(29)(d) of the Act. It is also stated, cellular telephony towers are part of immovable property. This reply at annexure B is dated 29.10.2010. Later, the impugned orders came to be passed as at annexures C and C1 for the assessment years 2007-08 and 2008-09 stating that the equipment is fixed on earth on the top of roof of a building just to enable it for functioning. Just fixing the equipment on the building or on earth does not lose its form of equipment.

5. According to the Petitioner, as per Article 246(1) of the Constitution, it is the exclusive domain of the Centre to make laws in respect of matters enumerated in List I in the VII Schedule and having enumerated imposition of "service tax" on service element of a contract, the levy of service tax on the facility of providing mobile telephone towers for various service provider would oust the jurisdiction of the State to impose VAT on such immovable structure. Referring to various judgments of the Apex Court and other courts, Petitioner's counsel contended that Petitioner has already remitted the entire service tax due to the Centre. Directing the Petitioner to pay tax as per Section 2(29)(d) of the VAT Act is impermissible and also it would be in the form of double jeopardy. As against the order of the assessing authority at annexures C and C1, Petitioner has come up before this Court to exercise efficacious remedy under Article 226 of the Constitution and praying not to insist upon for redressal before the appellate forum as the matter involves a Constitution stipulation and since it also involves substantial question of law of public importance, this has to be adjudicated by this Court exercising power under Article 226 of the Constitution.

6. In support of his argument, learned Sr. Counsel representing the Petitioner has relied upon the following judgments:

1 CCE, Mumbai v. Hutchison Max Telecom Pvt. Ltd. 2008 (224) ELT 191

2 Swan Mills Ltd. Vs. Union of India (UOI) and Others,

3 Karthik Engg. Works v. State of Karnataka 2000 (119) STC 88

4 Dy. Commr. Of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Bobby Rubber Industries 1998 (108) STC 410

5 CST, UP, Lucknow v. Prahlad Industries (112) STC 0548W

6 Tata Consultancy Services Vs. State of Andhra Pradesh,

7 Rashtriya Ispat Nigam Ltd v. CTO, Visakhapatnam 1990 (77) STC 0182

8 State of AP and Anr. v. Rashtriya Ispat Nigam Ltd 2002 (126) STC 11

9 Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others,

10 Lakshmi Audio Visual Inc and Anr. v. Asst. Commr. of Comml. Taxes and Anr. 2001 (124) STC 0426

11 Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others,

7. In the statement of objections filed by the State, it is stated, the relief sought for by the Petitioner to restrain the State from proceeding to recover as per Section 45 of the VAT Act and challenging the authority to impose tax u/s 3 of the VAT act is not maintainable. On the basis of the order of the Commissioner for Commercial Taxes as per Section 61 of the Act, the Respondent authority visited the business premises of the Petitioner's company, passed an order of reassessment after proceedings had been initiated by issuing notice u/s 39(1) of the Act and sought to levy tax on the leasing of cellular telephone networking equipment along with the tower. When such a notice was served, reply was filed by the Petitioner objecting to levy of tax on the transaction in question stating that it is a kind of service providing infrastructure to the telecom companies and is only liable for service tax and also they are paying service tax accordingly. The said objection has been considered by the Respondent / reassessing authority and he has given a factual finding that it amounts to transfer of right to use goods and as such, Petitioner is liable to pay tax on the goods lent, though not there is actual delivery and the equipment is constructed and same is provided to different telecom companies on lease/rental for specific periods as per the agreement between the Petitioner and the telecom companies. Certain goods are used for erection of towers and thereafter, after assembling the equipment, lease is extended to different telecom companies as per the agreement entered into between the parties. It is stated that as per Section 29 Clause 2(d) of the VAT Act, it is permissible to levy tax on transfer of right to use any goods for cash or deferred payment or valuable consideration. The agreement entered into provides for certain identification of terms in infrastructure equipment and on that basis, stating that it is in the form of a lease agreement and infrastructure provider gives the right to use the equipment to the parties to the agreement, possession and effective control of those equipment also lies with the telecom companies and, it is clear that it is not immovable property like land or building as such, the Petitioner company is liable to pay tax on the transfer of right to use goods as per law. As per the conditions of the agreement entered into by the

Petitioner with the telecom companies, the Petitioner company maintains the equipment on behalf of telecom companies and the effective control lies with the telecom/cellular operators only and the cellular operators are having effective control and paying lease rentals and Petitioner is liable to pay tax. The lease rentals received is exigible to tax as per Section 4(1)(b) of the Act. Rather, the Respondent has not at all levied any tax on the service transaction but, tax was levied only on transfer of right to use the goods. Contending further that Petitioner is not leasing any immovable property, it is stated, Petitioner is liable to pay tax as per Section 4(1)(b) of the Act treating this as lease of equipment and transfer of right to use goods. The tower is not embedded permanently and it is a movable property, it can be shifted at any point of time to any new site and rather, land is hired from private parties to make temporary fixation. Any instrument/equipment let out incidentally, exclusively it is taxable as per the agreement. The decision of the Apex Court in *Karthik Engineering Works v. State of Karnataka* is not applicable to the case on hand and so also the decision in *Laxmi Audio Visual Inc and Anr. v. Asst. Commr. of Comml. Taxes and Anr.* cannot be squarely made applicable to the case. Accordingly, resisting the petitions, it is submitted the telecom towers are movable property and leasing of these towers by collecting rentals are deemed to be sale of movable property exigible to tax.

8. The 1st Respondent has not filed any counter rather, it is his contention that the nature of service extended by the Petitioner is only in the form of service to various telecom companies. Accordingly, Petitioner having registered under the Service Tax law, is paying the taxes regularly and the transaction does not come within the purview of the VAT Act as, the infrastructure provided by the Petitioner is in the nature of service and also it is permanently fixed to extend that service. Only the service is extended and not the right to use the goods, it cannot be termed as "movable" in the context except that service is being extended through the fixture which is permanently embedded to the earth and it becomes immovable property and cannot be treated as one coming within the provisions of the VAT Act.

9. Learned Sr. counsel representing the Petitioner, in support of his contention apart from the pleadings, referring to the various judgments of the Apex Court and other High Courts, argued that the Bombay High Court in similar- context in the case of *Commissioner of C. Ex., Mumbai IV v. Hutchison Max Telecom P Ltd.* has held that the equipment installed cannot be considered as movable goods as they are embedded in the earth or on a building and cannot be shifted without damage and, adopting the test of damage, shifting cannot be done without damage, the act of dismantling from a permanent site would render such goods not marketable and accordingly contended that the activity involved is in the nature of service and more a permanent structure by way of movable property over which the VAT act cannot be made applicable and there is no question of transfer of right to use goods. Learned Counsel has also referred to the case of *Triveni Engineering and Industries Ltd and Anr. v. Commissioner of Central Exise*

and Anr. as to the test of mobility wherein the Apex Court with reference to combining and fixing of steam turbine and complete alternator permanently on a platform at the premises of the customer to form a turbo alternator, in the context of imposing excise duty, has held that the goods are movable property and cannot pass the test of mobility and therefore, does not attract the provisions of Central Excise Act.

10. Hutchison's case, of course is based on the principle that once the goods are installed it cannot be relocated and certain amount of damage would be there. Even in Triveni Engineering's case, referring to the installation of machinery i.e., Turbo Alternator, the Apex Court has, with reference to levy of excise duty, distinguished the goods from movable to immovable. In para 14 of the said judgment, it is made clear, whether an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth and, this has to be ascertained from the facts and circumstances of each case.

11. Although an opinion is formed by the Bombay High Court based on Triveni Engineering's case that the erection of towers cannot be treated as mobile and it is fixed to the earth, in my opinion, it cannot be accepted in the context to treat it as immovable property to contend that it is only in the form of service rendered and not transfer of right to use the goods. The definition provided under the provisions of Section 3 of the Transfer of Property Act or under the Sale of Goods Act if interpreted in so far as this type of equipment fixed to the earth or on the building, definitely it can be dismantled and replanted else where. Except the civil work of putting up a platform to fix the equipment/tower, the structure does not acquire the character of immovable goods to detract the application of the VAT Act. Though it appears, for outward appearance, a semblance of service is being rendered but, factually it is a super structure in the form of movable, it being, as per the agreement/contract, is lent to various telecom companies who entered into agreement with the Petitioner wherein maintenance and other control over the equipment would be still retained by the Petitioner but in fact, till the expiry of the term either for cash or liquidated payment or some other consideration, it will be only a transfer of right to use the goods which attracts the provisions of the VAT Act. On the amount/consideration received by way of lending movable, though incidentally it has to be treated that there is service involved, in pith and substance, what is being lent is the right to use the goods and the very super structure raised cannot be treated as movable properly as long as service is rendered so as to attract service tax.

12. The Respondent State has also relied upon the following decisions:

1. Tamil Nadu Kalyana Mandapam Assn. v. Union of India and Ors. 2005 VAT STC 5 : 1 P&H. 180

2 20th Century Finance Corpn. Ltd and Anr. v. State of Maharashtra 2000 STC 5

3 Bharat Sanchar Nigam Ltd and Anr. v. Union of India and Ors. 2006 STC 5

- 4 Sirpur Paper Mills Ltd. Vs. Collector of Central Excise, Hyderabad,
- 5 Jaipakash Industries Ltd v. Commr. Of Commercial Taxes, Uttarakhand, Dehradun (2010) 36 VST 152
- 6 Modern Decorators v. Commercial Tax Officer, Maniktola and Ors. 1990 STC 5
- 7 Jasper Aqua Exports Pvt Ltd v. State of Andhra Pradesh (2011) 37 VST 481
- 8 Tata Sky Ltd v. State of Punjab and Anr. (2011) 37 VST 1
- 9 Antrix Corporation Ltd, Bangalore v. Asst. Commr. Of Comml. Taxes, South Zone, Bangalore 2010 (69) KLJ 174

13. The Division Bench of this Court in Antrix Corporation Ltd v. Asst. Commr. of Commercial Taxes, referring to various terms and conditions entered into between the parties in the agreement in similar context, has observed in paragraphs 51 and 52 of the order that in case of "space segment capacity" which is termed as "leased capacity", also involves surrender of lease capacity, however as regards control, it has observed that it would be under the control of the customer as per the agreement therein and accordingly opined that there is transfer of right to use the leased capacity as per the agreement executed between the Department with the customer and considered as "goods" within the meaning of Article 366(12) of the Constitution.

14. While advancing his argument, learned Sr. counsel for the Petitioner referred to the provisions of the agreement entered into between the Petitioner and the customer at clauses 1.2.5; 1.2.6; 1.2.9; 1.6.2 and 4.2.3 to contend that the erection of tower cannot be treated as movable property and mere delivery without control is not a sale and that there is no delivery involved at all in the context and it is only a matter of service and not lending of goods or lending the right to use the goods.

15. The specific contention raised by the Petitioner is, Respondent has not proved the test of mobility and has also laid thrust on Hutchison's case rendered by the Bombay High Court to contend the lending of space in the tower is immovable property.

16. Learned Advocate General contended that the transaction involved is a component of sale to which VAT Act applies. There is transfer of right to use the goods as is mentioned under Article 366, Clause 29A (d) of the Constitution. Learned Counsel has also referred to clauses 4.3.5; 4.4.3 and 5.1 of the Agreement which reads:

4.3.5: Identification of Equipments: The cellular operator shall maintain on all the active infrastructure equipments identification marks to show that the equipment is the property of the Cellular Operator

4.4.3: The access to the site should be available to Cellular Operator engineers round the clock, throughout the year. Any change of security or any such event

which affect Cellular Operator's access to site may be intimated to Cellular Operator in advance. Infrastructure Provider to ensure that Cellular Operator's authorized personal can access the site within 15 minute of notice to infrastructure provider's maintenance control centre or authorised personnel.

5.1: Infrastructure provider shall provide supervision, operation and control of the services relating to all infrastructure equipments provided by infrastructure provider at the sites.

17. It is contended, the Petitioner has leased out the towers to cellular operators in the form of transfer of rights to use the goods and the super structure which cannot be easily dismantled without damage but, can be reinstalled elsewhere. As and when there is termination of the agreement with the land/building owner, necessarily the equipment installed though it was attached to the civil structure i.e., platform, can be easily removed and replaced elsewhere and that stands the test of mobility. It is also the argument of the learned Advocate General that the facts and decisions rendered by the Apex Court referred to by the Petitioner are in a different context and accordingly, submitted that the re-assessment orders passed by the authority is in accordance with law and it attracts the provisions of the VAT Act and not Service Tax.

18. In reply, Petitioner's counsel submitted that it is not as if they are not paying tax at all and being registered under the Service Tax Act, they are paying tax and for the assessment years 2007-08 and 2008-09, service tax has been paid. Once again asking the Petitioner to pay tax to the State amounts to double jeopardy and double taxation is not upheld or recognised elsewhere. Accordingly, he has sought for quashing the orders passed by the Respondent authority for those periods stating that Petitioner is not at all liable to pay the tax.

19. In the case of BSNL and Anr. v. Union of India and Ors., the Apex Court although in para 64 of the judgment opined that the concept of sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection, but, in para 65 it has observed "We cannot anticipate what may be achieved by scientific and technological advances in future. No one has argued that at present electromagnetic waves are abstract able or are capable of delivery. It would, therefore, appear that an electromagnetic wave (or radio frequency as contended by one of the counsel for the Respondents), does not fulfill the parameters applied by the Supreme Court in Tata Consultancy for determining whether they are goods, right to use of which would be a sale for the purpose of Article 366(29-A)(d)."

20. In the reassessment order passed by the Respondent authority as a matter of fact finding, he has referred to the various equipment used in the installation of the tower either on the land or on the roof of the building and also the

agreement entered into between the parties and opined that the Petitioner company has transferred the right to use the goods i.e., cellular telephony tower for periodical rentals as per the agreement and that there is consideration for transferring the right to use the goods and that the Petitioner company is liable to pay tax treating this as monthly lease rentals as per the agreement. The opinion formed by the reassessing officer is that the equipment which are in the form of fabricated steel structure, shelter, D G Set, Air conditioners, rectifiers, stabilizers, DC converter, fire extinguisher, etc., are goods used and the equipment are fixed on the earth or on the roof of the building just to enable it to function and just fixing the equipment on the building or on the earth it does not lose its form of equipment. Accordingly, taking each and every equipment used i.e., fixed for the purpose of functioning either on the roof of the building or on the earth, the authority has treated it as movable and that it can be shifted and installed elsewhere. Having held that it attracts the provisions of the VAT Act based on the accounts maintained, the authority proposed to impose VAT.

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

22. So far as imposition of penalty is concerned, of course penalty or interest thereof cannot be imposed as, in the usual course Petitioner having exercised his bonafides, having registered under the Service Tax, went on paying service tax. For the assessment years in question, the amount is paid by the Petitioner to the 1st Respondent and it is for the State to seek for recovery of the amount so paid by the Petitioner to the 1st Respondent in a separate proceedings based on the judgment rendered herein. Further, in future, it is for the Petitioner to file returns/assessment under the provisions of Section 3 and 4(1b) of the VAT Act, 2003.

23. Petitions are allowed in part while upholding the assessment orders passed, so far as recovery of the amount which is legally due to the State, the State can very well have recourse to recover from the 1st Respondent Union. However, the differential amount if any to be paid, be adjusted from the amount already deposited by the Petitioner and, if there is any excess amount remaining, the same be refunded to the Petitioner.