**(2015) 02 BOM CK 0046**

**In the Bombay High Court**

**Case No :** Writ Petition No. 149 of 2015

Tata Net Services Ltd. APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

**Date of Decision :** 03-02-2015

**Acts Referred:**

Constitution of India, 1950 — Article 226, 366 (29A)
Maharashtra Value Added Tax Act, 2002 — Section 2(24), 2(4), 2(8)
Telegraph Act, 1885 — Section 4

**Citation :** (2015) 79 VST 472

**Hon'ble Judges :** K.K. Tated, J.;S.C. Dharmadhikari, J.

**Bench :** Division Bench

**Advocate :** V. Sridharan, Senior Advocate, Prakash Shah and Puneeth Ganapathy, for the Appellant; B.B. Sharma, AGP, Advocates for the Respondent

## Judgement

1. By this Writ Petition under Article 226 of the Constitution of India, although the interim order dated 7th November, 2014 in VAT Appeal No. 203 of 2014 is challenged, in the light of the arguable points, which have been raised, we grant Rule on the Writ Petition.

2. Respondents waive service. With the consent of the Advocate of both sides, we have heard the Writ Petition finally.

3. The Petitioner is aggrieved and dissatisfied with the order passed by the Tribunal on 7th November, 2014, directing the Petitioner to deposit a sum of Rs.77,50,000/- and which is to be either deposited or paid on or before 7th January, 2015. This is an order on the application for stay. That application is allowed partly and if the proof of this payment is produced before the first Appellate Authority, then, further sums under the order of assessment shall not be recovered from the Petitioner.

4. The Petitioner is claiming to be a 100% subsidiary of M/s. Nelco Limited. It is registered under the Maharashtra Value Added Tax Act, 2002 ("MVAT Act" for short).

 

5. The claim of the Petitioner is that it is inter alia engaged in providing network connectivity services to its closed group of customers. The Petitioner does not have any sale or purchase transaction which can be liable to tax during the period in dispute, namely 2006-07.

6. The Petitioner has been granted a Commercial CUG VSAT Service Provider Licence under section 4 of the Indian Telegraph Act, 1885 by the Department of Telecommunications, Government of India vis licence agreement dated 27th February, 2003. That authorises the Petitioner to establish, install, operate and maintain Very Small Aperture Terminal (VSAT) to provide network services via INSAT Satellite System to a closed user group of customers in India. The scope of services which is contemplated under the said licence allows the Petitioner to provide connectivity to its customers between various sites for carriage of data traffic, through the use of VSAT. The Petitioner claims to have agreement with Antrix Corporation Ltd. based in the State of Karnataka for leasing the latter''s space segment capacity in the INSAT Satellite System for the purpose of meeting Petitioner''s VSAT operational requirements and the consequential provision of services to its customers. The Petitioner then relies upon an agreement with the customers and which is to provide normal and high bandwidth data connectivity to the customers. The Petitioner claims that the hardware equipments such as routers, modems, etc. are under the scope of Nelco Ltd. and not in the scope of work of the Petitioner. The agreement with the customers and the invoices have been produced to submit that what is essentially provided is a service and the charge is levied for the same. The Service Tax is paid under the Central Tax regime, namely the Finance Act, 1994 for providing the services. Further, Value Added Tax (VAT) is paid on the hardware equipments supplied to the customers, but that is by M/s. Nelco Limited.

7. The claim is that the Petitioner was directed to subject itself to assessment before the Assessing Officer (Deputy Commissioner) and he passed an assessment order. He would hold that the activities of the Petitioner and of the aforesaid nature fall within the purview of section 2(24) of the MVAT Act. The assessment was thus finalised and the VAT liability was determined by him vide order dated 29th June, 2013.

8. The Appeal was preferred against such an order to the first appellate authority and Respondent No. 3, who is the first appellate authority, during the course of a hearing on application for stay of recovery of the amount demanded by coercive means, pending the Appeal, directed the Petitioner to deposit a sum of Rs.2 crores.

9. Aggrieved by such an order passed on 9th January, 2014, the Petitioner preferred an Appeal to the Tribunal and the Tribunal has reduced that sum to Rs.77,50,000/-.

10. Mr. Sridharan appearing for the Petitioner, in response to our usual query, as to why we should interfere with a interlocutory order, submitted that there are

series of assessment proceedings and which are waiting to be finalised. The Petitioner apprehends that the view already taken would be followed in the later assessments, subjecting the Petitioner to a heavy burden of tax. In the instant case, both before the Joint Commissioner and the Tribunal, fundamental and basic issues have been raised. The argument of Mr. Sridharan is that if the definition of the term "sale" as appearing in section 2(24) is taken into consideration, it would denote a sale of goods within the State for cash or deferred payment or other available consideration, but does not include a mortgage, hypothecation, charge or pledge and the words "sell" "buy" and "purchase" are the words which have to be interpreted in accordance with this meaning. The Explanation to this definition would further denote as to how either the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration would fall within the purview of this section or definition or the transfer of property in goods involved in the execution of a works contract. The concept and in the Explanation as well is worded in tune with the language of Article 366 (29A) of the Constitution of India. Therefore, the supply by way of or as part of any service or any other manner whatsoever of goods during such supply or services made or given for cash, deferred payment or other available consideration is thus contemplated. The goods sale of which is effected during supply of service, at best, can be subjected to the Sales Tax. Mr. Sridharan submits that this definition would have to be read together with the definition of the terms ''dealer'' and ''business'' appearing in sections 2(4) and 2(8). Hence, as long as no element of dealing in goods or transfer of any right in relation thereto is to be found in the activities undertaken by the Petitioner, the taxing provisions would not be attracted and applicable. That is the essential condition and for determining whether the Petitioner can be called upon to pay the tax. Charging provisions of the Act and the incidence of the levy would apply and it will fall only when the Petitioner can be said to be dealing, during the course of its activities as aforesaid, in transfer of goods or transfer of any right to use the goods or during the course of its service supplies goods. That component or element has not been identified. If that is not identified and if the Petitioner is claiming to be a service provider, then, calling upon it to deposit some amount merely because an arguable point has to be decided, is not fair, just and proper. That would mean that the stay application is dealt with on the footing that the Act is applicable prima facie but how the incidence of levy would fall or can be recovered has to be only decided and that is how the security is determined, but in the form of cash deposit. That would mean that in every successive assessment, if the Petitioner is aggrieved by the assessment order, the first appellate authority and at the first instance itself would direct and as a precondition for stay, the deposit or payment of a substantial sum. Mr. Sridharan submits that while it is true that there cannot be unconditional stay of recovery of tax, in the given facts and circumstances, the direction has a negative impact and effect. The Petitioner is already suffering losses in its business and for all these reasons, he would submit that the impugned order be set aside.

 

11. Mr. Sharma, the learned AGP appearing for the State would support the impugned order by contending that this is an interlocutory order and secondly the Tribunal has reduced the sum from Rs.2 crores to Rs.77 lacs. That is not capable of any further deduction, much less complete waiver. That would amount to merely substituting the view of the Tribunal, which is impermissible. Hence, Mr. Sharma submits that the Petition be dismissed.

12. We have noted the rival contentions. We have perused the relevant provisions of the MVAT Act. We have also perused the Petition and the Annexures thereto. In our view, there is substance in the contentions of the Petitioner. The first appellate authority would have to decide as to whether the Petitioner could be subjected to the levy under the MVAT Act. In other words, the applicability of the Act to the business of the Petitioner would have to be determined first. If the Petitioner contends there is absolutely no transfer of any goods or even any right to use the goods during the course of rendering of the services, then, that argument will have to be considered seriously and dealt with. That would have to be dealt with in the backdrop of the scheme of the Act and the object and purpose sought to be achieved by it. Whether the nature of the services resulting in any transfer of the property in goods or right to use the goods or supply of goods during the course of services other than the service part of the transaction will have to be first segregated and then would have to be subjected to tax. Meaning thereby, in a single service provider agreement or transaction, there could be an element of transfer of goods, but that will have to be discerned and identified. That is how the Hon''ble Supreme Court approached the matter in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . In such circumstances, we would expect the authorities under the Act to be reasonable and not impose conditions which would make it impossible for the Appellant to prosecute and pursue its right of Appeal guaranteed by the MVAT Act. In such circumstances, imposition of a condition of predeposit would denote as to how the authorities have prima facie prejudged the issue raised for their consideration. If there is an arguable point and a strong prima facie case, then, other aspects come into play and namely how the rights and equities have to be balanced. They could have been balanced in the given circumstances by not imposing a condition of cash deposit but to provide security and to the satisfaction of the authority. That would ensure, in the event the Petitioner is held liable to pay the tax that, that amount can be recovered by adjusting the security and also by initiating every means of payment. At least some amount then is available for recovery.

13. As a result of the above discussion, we are of the opinion that we should not conclude the issue raised and by expressing ourselves in such a manner as would bind the authorities. We only emphasise and highlight the issues raised and which are of considerable importance. If they could not have been brushed aside and merited consideration, then, in our view, the first appellate authority and the Tribunal''s order can be substituted with our direction. While we substitute these orders, we clarify that we have not expressed any opinion on the rival

 

contentions. Each one of them are open for being raised during the hearing of the Appeal.

14. However, the application for stay in the said Appeal is disposed of with a direction that the Petitioner shall furnish a Bank Guarantee of a Nationalised Bank in the sum of Rs.80 lacs and which shall be furnished to the satisfaction of the first appellate authority within a period of six weeks from the date of receipt of copy of this order. On such Bank Guarantee being furnished and to the satisfaction of the authority, which shall be kept alive during the course of the proceedings and/or as directed, the first appellate authority, on reporting compliance, shall hear and decide the Appeal expeditiously. The Petitioner has agreed to cooperate in the early disposal of the proceedings by not seeking unnecessary adjournments.

15. The Petitioner shall appear before the first appellate authority on 9th March, 2015, who shall endeavor and dispose of the proceedings before him expeditiously thereafter and by 14th April, 2014. The Bank Guarantee shall not be encashed for a period of four weeks from the date of communication of the order of the first appellate authority, if adverse to the Petitioner.

16. The Petition is disposed of accordingly. Rule is made absolute in the aforesaid terms. No costs.