HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

D.B.: Hon'ble Shri P.K. Jaiswal and
Hon'ble Shri Tarun Kumar Kaushal, JJ.

Writ Petition No.5340/2013

Bharti Infratel Ltd.
Versus
State of Madhya Pradesh & others

Writ Petition No.11739/2013

Bharti Infratel Ltd.
Versus
State of Madhya Pradesh & others

Writ Petition No.13352/2013

Bharti Infratel Ltd.
Versus
State of Madhya Pradesh & others

Writ Petition No.6827/2014

Bharti Infratel Ltd.
Versus
State of Madhya Pradesh & others

Writ Petition No.2175/2015

Bharti Infratel Ltd.
Versus
State of Madhya Pradesh & others

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Shri N. Venkataraman, learned Senior Counsel with Shri Sumit Nema, learned counsel for the petitioner / Bharti Infratel Ltd.
Shri Pushyamitra Bhargava, learned Deputy Advocate General for respondent No.1 to 3 / State of Madhya Pradesh.
Shri Deepak Rawal, learned Assistant Solicitor General for respondents No.4 and 5 / Union of India.
Shri Prasanna Prasad, learned counsel for respondent No.6 / Commissioner, Customs, Central Excise & Service Tax, Indore.

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O R D E R

(Passed on this 20th day of August, 2015)

Per P.K. Jaiswal, J.

All these five writ petitions are filed by M/s. Bharti Infratel Limited, seeking the issuance of writ of *certiorari*, quashing the revisional order of the Additional Commissioner, Commercial Tax, Indore Region-I, Indore passed on 13.03.2013 (Annexure P/1) on the ground that its activity of providing passive infrastructure and related operations and maintenance services to various telecommunication operators in India is a service activity and hence not liable to pay any value added tax under Entry 54 of List-II of the Seventh Schedule to the Constitution and provisions of Madhya Pradesh Value Added Tax Act, 2002 (herein after referred to as 'the VAT Act, 2002'). A prayer has also been made seeking directions to the Union of India, Ministry of Finance, New Delhi, which is the 4th respondent herein, to refund the taxes paid by the petitioner under the Finance Act, 1994 on the activity of the provisions of “Passive Infrastructure and Related Operations and Maintenance Services”, or in alternative, to direct the State of Madhya Pradesh (respondents No.4 to 6) to deposit the taxes under the Finance Act, 1994 for appropriation towards the tax liability arising out of the same impugned order.

2. The issue involved in these writ petitions are similar and identical, and therefore, these writ petitions are taken up for consideration together and are being

disposed of by this common order. For the purpose of convenience, the parties are referred to as they are arrayed to in Writ Petition No.5340/2013.

3. The petitioner – M/s. Bharti Infratel Limited is a company incorporated under the Companies Act, 1956 is a subsidiary company of M/s. Bharti Airtel Limited. The petitioner is engaged in providing passive infrastructure and related operations and maintenance services to various telecommunication operators in India on a shared basis.

4. The nature of service provided by the petitioner was envisaged by the Government of India initiative Mobile Operators' Shared Towers (MOST). The Department of Telecommunications (DoT) in a bid to create a high quality, low cost, rapid, wide coverage mobile telecommunication network in India sought to propose through the Project "MOST", a system of sharing of Passive Infrastructure by the various telecom service providers.

5. The main object of sharing the infrastructure is for ensuring economy by avoiding multiple telecom sites for different Mobile Service Providers in the same area.

6. The petitioner has been registered with the DoT for providing such shared Passive Infrastructure Services to various telecommunication operators in India. For providing the said services, the petitioner has entered into identical Master Services Agreements (MSA) with telecom operators such as Airtel, Vodafone, Reliance, BSNL,

Uninor, Idea Cellular Limited etc. Under the agreements, the telecom service providers are charged by the petitioner for the "Site Access Availability" i.e., for the access granted to them to the passive infrastructure, owned and possessed by the petitioner and for the related operation and maintenance services offered by the petitioner for the effective and efficient use of the passive infrastructure. These charges are in the nature of service charges and are not in the nature of consideration received for transfer of property or for transfer of right to use any goods. The petitioner provides required services along with the sharing of passive infrastructure i.e. Tower sites and shelter rooms for installation and safe keeping of equipments like antenna, microwave radios and Base Transceiver Station (BTS) belonging to telecom operations, while other equipments at the site like air conditioner, power grid connection, DG sets, power management systems, batteries, electrical wiring etc. are used to ensure 24 x 7 power supply and to convert 240 Volts AC current into -48 DC current required for smooth running of BTS and other equipments. The air conditioners are used to keep the temperature below 35 degrees Celsius inside the shelter room for smooth running of BTS. The petitioner is also responsible for safety of the operators equipments at its site. For all these services (site access, power supply, power conversion, air conditioning and safe keeping), the petitioner receives a consolidated service revenue from its customers.

7. The right, title, possession and control in the passive infrastructure located at the telecommunication site including and not limited to the tower, shelter, diesel generator sets. batteries, air conditioners and electrical and civil works including any enhancement carried out by the petitioner vest solely with the petitioner.

8. The sharing operator i.e., the telecom service providers, on execution of a service contract, has the right to install equipments such as BTS equipment, associated antennae and active infra network equipments and other requisite equipments required to provide telecommunication services by them to their customers. The right, title and interest in all such equipments installed on the site by the Sharing Operations would remain with such operators only.

9. The petitioner commenced operations in April, 2007 and started establishing passive infrastructure at different sites for offering the infrastructure on sharing basis. They have entered into Passive Infrastructure Sharing Agreements with various telecom operators for providing the said service on a shared basis.

10. The petitioner provides the developed facilities on shared basis to the Cellular Telecom Operators. The telecom operators install their Cellular & Microwave Antenna along with other requisite equipment which receives and send the electronic signals in the infrastructure facility. The petitioner is responsible for the

supervision, operation and control of the services relating to passive infrastructure equipment, including maintenance, service, supervision, repairs etc. The petitioner should ensure uninterrupted power and periodic servicing / overhauling of DG sets and should also ensure minimum level of diesel in fuel tank of DG sets is maintained. The agreement between the petitioner and the Cellular Telecom Operator is on non-exclusive basis and the petitioner retains the right to provide access to the site including any infrastructure to other telecom service providers, for any purpose at its discretion and the telecom operators also retain the right to seek passive infrastructure services from other passive infrastructure providers.

11. The petitioner is treating the said transaction viz. provision of passive telecom infrastructure support service as rendition of services which is amenable to service tax under the taxable category of 'Business Support Service' and are accordingly discharging service tax liability at the applicable rates on the consideration received for the purpose of providing the infrastructure support service. The petitioner has been regularly filing its returns in Form ST-3 as specified under Section 70 of the Finance Act, 1994 before the Service Tax Authorities and the same has been regularly assessed by the authorities from time to time. The petitioner filed returns and relevant documents for the period from 01.04.2009 to

31.03.2010. The dispute for assessment by the authority under the VAT Act, 2002. The Deputy Commissioner, Commercial Tax, on 27.02.2012 (Annexure P/4) in Case No.23/2010/VAT held that passive infrastructure sharing agreements with various telecom operators was not within the scope of levy of value added tax under the VAT Act, 2002.

12. An intimation letter under Section 47 (2) of the VAT Act, 2002 was issued to the petitioner by the Additional Commissioner, Commercial Tax, Indore Circle No.1 to show cause as to why tax should not be imposed on Passive Infrastructure Sharing Agreements with various telecom operators during revision of the determination order. The petitioner, in reply to the said letter, filed detailed arguments as to why the proceedings to reopen the assessment could be done and also that no tax should be levied on Passive Infrastructure Sharing Agreements under the VAT Act, 2002.

13. Respondent No.3 by the impugned order dated 18.03.2013 (Annexure P/1) relying on the decision of the Single Bench of the Karnataka High Court in the case of **M/s. Essar Telecom Infrastructure (P) Ltd.** v. **Union of India** reported in **(2012) 21 STJ 311 (Karnataka),** wherein the learned Writ Court of the Karanataka High Court has held that right to use the goods has been transferred by the petitioner therein to the telecom operators and that very much fall within Article

366 (29A) (d) of the Constitution and determined the total tax liability of Rs.8,33,15,503/-.

14. Shri N. Venkantraman, learned Senior Counsel appearing for the petitioner / company assailing the impugned action contended that the petitioner / company is the owner of Passive Infrastructure. It consists of a tower on a piece of land or roof top of a building, pre-fabricated shelters, DG sets, battery bank, power plant, power interface unit, air conditioners with some electrical works accessories like antennas, duplexers, combiners, transceivers, alarm extensions buses, control system etc. The same is operated and maintained by the petitioner under the agreement entered into between the petitioner and the shared operators. They give restricted access of their infrastructure to the service providers on non-exclusive terms. All rights, title, interest and ownership of the passive infrastructure always remains with the petitioner exclusively. No portion of the tower or any other infrastructure is handed over to the service providers either physically, notionally or symbolically. The petitioner continues to have possession and control of its infrastructure at all times of the contract with the service provider and, therefore, the transaction is purely a service transaction which attracts service tax, as per Finance Act, 1994.

15. As is clear from the terms of the contract as well as the intention of the parties as could be gathered from

the terms of the contract, there is no intention to transfer the right to use the passive infrastructure to the shared operators. Therefore, neither the activity carried on by the petitioner nor the transaction entered into between the petitioner and the shared operators constitutes a deemed sale so as to fall within Article 366 (29-A) (1) (d) of the Constitution of India. He also submitted that it is settled law that on the same aspect both the State Legislature and the Parliament cannot Impose tax. Once it is covered by a parliamentary legislation exclusively, the power of the State to levy any tax in respect to the same aspect is totally lacking and therefore, no sales tax or value added tax could be imposed on the same aspect. The agreement between the petitioner and the service providers is for providing access. The right to use, if it is to be construed as a deemed sale, then, it requires transfer of possession of goods along with the effective control of the goods which is not there in the instant case. The terms of the agreement makes it abundantly clear that 24 x 7 x 365 days, the petitioner has to operate and maintain the infrastructure to render the requisite service to the shared operators and therefore, at no point of time, the shared operators either get the possession of the passive infrastructure or control much less effective control over the passive infrastructure. The terms of the agreement makes it very clear that the shared operator has no obligation to operate and maintain the infrastructure. Always, at all point of time. it is the duty of the petitioner to maintain infrastructure, to be

eligible for the consideration mentioned in the agreement. They have to operate and maintain the infrastructure at 99.98% for efficiency, as otherwise they would not be entitled to consideration at all. Therefore, he submits that having regard to the nature and the terms of the contract, the activity carried on by the petitioner, the purpose for which, the shared operators have access to passive infrastructure, it is a contract of pure services and no element of sale is involved. Therefore, the learned authority without proper application of mind, has erroneously held that the transaction in question falls within the mischief of Article 366 (29-A)(1) (d) of the Constitution of India.

16. Per contra, Shri Pushyamitra Bhargava, learned Deputy Advocate General for the State of Madhya Pradesh, contended that the terms of the agreement as well as the specific case pleaded by the petitioner in the writ petitions, makes it clear that they have provided assess to the passive infrastructure. In other words, the petitioner / company is permitted to use the passive infrastructure. The terms of the agreement makes it very clear that this infrastructure is installed at the site preferred by the shared operators and it is installed in the manner the shared operators requires it and after installation, he is provided site access upon which the shared operators install their machinery which is known as "active infrastructure" in the very same site and in fact, on the tower in the very same site. Keys of

the site are handed over to the shared operators. The capacity is increased according to the requirements and specification of the shared operators and therefore when all these aspects are taken together, it shows that there is a transfer of right to use the passive infrastructure to the shared operators. It is settled law that to constitute a 'sale', actual delivery is not required. When once the right to use is granted to the shared operators, it presupposes the transfer of that right to use, as held by the Constitution Bench of the Apex Court in the **20th Century Finance Corporation Limited** v. **State of Maharashtra** reported in **2000 (6) SCC 12**. Therefore, he submits that the tax is imposed on this aspect of transfer. The very purpose of the 46th amendment to the Constitution is to tax these types of transactions which directly do not fall within the definition of sale of goods but nonetheless the effect of such transaction is the transfer of right to use the goods. It is in order to avoid evasion of payment of tax by entering into such transaction, that the Constitution was amended and Clause (d) of Article 366 (29-A) was inserted. Keeping in mind the object with which these provision is inserted, the Courts have to interpret this provision in such a manner to advance the cause of the Constitutional amendment and therefore, he submits that the authority was justified in treating it as a deemed sale and levying of tax. It is in accordance with law and therefore no case for interference is made out and prayed for dismissal of all the writ petitions.

17. The Additional Commissioner on examination of the Master Service Agreement (MSA) entered into between the petitioner and M/s. Bharti Airtel Limited held that the entire amount of contract received from the sharing telecom operators for providing access to the passive infrastructure would amount to contract for transfer of the right to use goods, as defined in Section 2 (u) (vi) of the MP VAT Act, 2002 and was exigible to tax under the said Act.

18. In order to appreciate the rival contentions, it is necessary to examine the MSA / agreement entered into between the petitioner and M/s. Bharti Airtel Limited. The parties agreed that this agreement can be taken as representative of the agreements entered into by the petitioner with the sharing telecom operators.

19. Relevant clauses of Clause 1.1 of the MSA (Annexure P/2) are, as under: -

> "**1.1 Definitions**
>
> In this Agreement, the following terms shall have the following meanings unless the context otherwise requires: -
>
> "**Active Infrastructure**" includes base terminal station equipment, associated antennae, back-haul connectivity to the Sharing Operator's network and other requisite equipment and associated civil and electrical works required to provide telecommunications services by the Sharing Operator at a telecommunications site other than Passive Infrastructure.
>
> "**Passive Infrastructure**" means at any site, any infrastructure located at such site which is permitted by Law to be shared by the Parties, including but not

limited to the towner, shelter, diesel generator sets, air conditioners and electrical and civil works.

"**Service Contract**" means each service contract to be executed between the Sharing Operator and Infratel in relation to any particular Site, in respect of which the Sharing Operator is being provided Site Access Availability and Operation and Maintenance Services and such other services as may be agreed between the Parties, which shall in each case be in accordance with the Standard Site Access Terms set out in Schedule 6 (Standard Site Access Terms).

"**Sharing Operator Licence**" means any mobile telecommunications licence granted by the DoT to the Sharing Operator for the Permitted use."

20. Clause 2.1 of the MSA provides for provision of passive infrastructure by the petitioner, which reads, as under: -

"**2.1 Provision of Passive Infrastructure**

2.1.1 Infratel shall provide Site Access Availability to the Sharing Operator in accordance with the terms and conditions of this Agreement.

2.1.2 Throughout the Terms of this Agreement, the Sharing Operator shall be entitled to provide notice to Infratel of those Sites in relation to which it wishes to be granted Site Access Availability (a "**Service Order**"). The process for issuing a Service Order shall be as specified in Schedule 1 (Site Access Availability).

2.1.3 Infratel shall ensure that each site is capable of accommodating Sharing Operator Equipment in accordance with the standard configuration set out in paragraph 1 of Schedule 1 (Site Access Availability). Any additional requirements shall be specified by the Sharing Operator in the Service Order.

2.1.4 In the event that the Service Orders received by Infratel in respect of any Site (s) mean that the available Passive Infrastructure at such

Site (s) are over-subscribed, an applicant whose Service Order was received by Infratel prior to another Service Order shall be given priority by Infratel while allocating such Passive Infrastructure to the relevant applicants.

2.1.5 With respect to each Site in relation to which Infratel is able to grant Site Access Availability, the Parties shall execute a Service Contract in accordance with the procedure set out in Schedule 1 (Site Access Availability), and the provisions of each Service Contract shall include the standard terms set out in Schedule 6 (Standard Site Access Terms). Each service Contract shall be duly stamped and the applicable stamp duty shall be at the Sharing Operator's expense.

2.1.6 Upon the execution of a Service Contract in respect of a Site, the Sharing Operator shall have the right to install the Sharing Operator Equipment or any portion thereof at such Site. The Sharing Operator shall have access to each such Site for all installation activities and Infratel shall provide to the Sharing Operator the necessary means of access for the purpose of ingress and egress from each such Site in accordance with the terms of the Service Contract. Provided, however, that only authorized employees of the Sharing Operator or its properly authorized sub-contractors shall be allowed such access to the Sites.

2.1.7 The right, title and interest in and to the Passive Infrastructure, including any enhancements carried out by Infratel, shall vest with Infratel and all such enhancements thereto shall be at the sole cost and expense of Infratel. Enhancements in this context means the augmentation in capacity carried out by Infratel to achieve increased sharing."

21. As per clause 2.1.5, the right of site access availability is non-extensive and petitioner would retain

the right to provide site access availability to other telecom operators and the sharing operator would retain the right to seek passive infrastructure services from other passive infrastructure providers. Clause 3 provides for operation and maintenance of the equipment of the sharing operator. Under clause 3.1.2, the equipment installed by the sharing operator shall be operated and maintained by the sharing operator and in order to conduct the operation and maintenance activities, it shall have the right to replace, repair, add or otherwise modify the sharing operator equipment and the frequencies over which the equipment operates. In order to do so, the sharing operator shall be provided access to the sites by providing ingress and aggress from such site by only the authorised representatives of the sharing operator or its properly authorized sub-contractors. Clause 3.2 requires petitioner to ensure that the operation and maintenance services which are provided by it to the sharing telecom operators are in accordance with "good industry practice" and only be suitably qualified, skilled and experienced personnel. The information relating to processes and proceedings to monitor the performance shall be shared with the sharing operators on a monthly basis. Certain consequences follow if operation and maintenance service levels fall short of the required standards which are not relevant for the present purpose.

22. Clause 4 provides for the rights of petitioner.

Under clause 4.1, so far as the sites are concerned, petitioner shall have the right to require that whenever any access is needed by the sharing operator or its approved contractor, such access is supervised by petitioner or its nominees. Petitioner shall also have the right to use and grant access to any site including the infrastructure provided by it (which obviously means the passive infrastructure) for the provision of such services to any party or for such other purposes as petitioner may in its discretion decided to support from time to time. Clause 4.2 delineates the rights of petitioner to ask for relocation of the equipment of the sharing telecom operator; such relocation may occur due to acquisition of a site or action by a Government authority or any order of a Court of law etc. Under clause 5.2 it shall be the responsibility of petitioner to ensure that any other operators on the side do not cause any damage or install any equipment which would harmfully interfere or physically obstruct the equipment of any sharing operator existing at the site. The infrastructure of the petitioner (the passive infrastructure) shall be maintained by it in proper state of repair and condition. There are certain other responsibilities and covenants which are not very relevant for our purpose.

23. Clause 5.3 provides for the warranties and the covenants of the sharing operator. It is generally to ensure that its employees and agents and sub-contractors comply with the terms and conditions of the contract, to comply

with all applicable laws and desist from doing anything which might cause or otherwise result in a breach by petitioner, maintain its equipment in a good and safe state of repair and condition, to desist from installing equipment or machinery of a type or frequency which would cause harmful interference or physical obstruction to any equipment belonging to petitioner or of any other sharing operator of the side, and to generally share information with petitioner and cooperate with and assist petitioner in connection with the purpose of the obligations under the contract etc.

24. Clause 6 speaks of "charges". Clause 6.1 provides that petitioner shall charge the sharing telecom operator the charges in accordance with Schedule 3. The charges can be revised or reviewed on an annual basis. Clause 6.2 provides that all invoices submitted by petitioner shall be paid within 15 days of the receipt thereof. Clause 6.3 provides for consequences of late payment which are not relevant for our purpose.

25. Clause 10 confers upon petitioner the right to advertise on the passive infrastructure. It says that petitioner shall have the exclusive right to lease, licence or grant space on each site or passive infrastructure on the site to any their party for the purposes of placing hoardings, banners and other advertisements and the sharing telecom operator shall not have any right of objection. However, the right of petitioner to do so shall

not adversely affect the connectivity network or passive infrastructure of the sharing telecom operator in any manner; in case of any complaint from a telecom operator the hoardings / advertisement shall be removed.

26. Schedule I to the contract provides for "site access availability" and provides for several technical details and requirements relating to the antenna, ground based tower, roof top tower, time lines for site deployment, site access service credit for acquisition and deployment etc. Schedule 2 provides for "operation and maintenance service". Only 3 clauses need to be noticed. Clause 1.8 obliges petitioner to ensure proper access to the sites for all authorized personnel of sharing telecom operator for the purposes set out in Clause 3.1.2 which we have already noticed. Clause 1.9.3 sets out the rates at which the petitioner has to pay the operation and maintenance service credits to the sharing operator for its failure to ensure the required uptime service levels. The said clause may be reproduced since considerable emphasis was laid by the petitioner on it, which we shall notice later:

> 1.9.3 The Operation and Maintenance Service Credits payable by petitioner to the Sharing Operator for failure to achieve the above Uptime Service Levels are set out below.

Operation and Maintenance Service Level	**% of Total Rate payable by petitioner**
99.95% or greater	0.0%
99.90% or greater but less than 99.95%	5.0%
99.70% or greater but less than 99.90%	7.5%

99.50% or greater but less than 99.70%	10.0%
99.00% or greater but less than 99.50%	25.0%
Less than 99.00%	30.0%

> The Operation and Maintenance Service Credits payable by petitioner in accordance with the table above shall be applicable in respect of those Sites in the relevant Circle which are below the Operation and Maintained Service Level Specified in paragraph 1.9.2 above."

Clause 1.10 obliges petitioner to submit a report of the reasons for any unplanned downtime, to the sharing operator within five business days of the rectification of the downtime. In case of breach of this condition, petitioner is liable to pay service credits in accordance with pre-determined rates which are as follows:

Time period of petitioner Downtime	**% of Total Rate payable by petitioner**
24 consecutive hours or more, but less than 36 consecutive hours	50%
36 consecutive hours or more, but less than 48 consecutive hours	75%
48 consecutive hours or more	100%

27. Schedule 3 provides for "charges".

28. Sub-clause (d) of clause (29A) of Article 366 of the Constitution of India reads as follows: -

> "**366.Definitions.** - In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say -

xxxxx xxxxx xxxxx

(29-A) "tax on the sale or purchase of goods" includes -

xxxxx xxxxx xxxxx

(d) a tax on the 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."

Clause (12) defines "goods" to include "all materials, commodities and articles".

29. In MP VAT Act, 2002, the words 'goods' and 'sale' are defined under Section 2 (m) and 2 (u), which read, as under: -

"**Section 2 Definitions**

In this Act, unless there is anything repugnant in the subject or context, -

(m) 'Goods' means all kinds of movable property including computer software but excluding actionable claims, newspapers, stocks, shares, securities or Government stamps and includes all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of movable or immovable property, and also includes all growing crops, grass, trees, plants and things attached to, or forming part of the land which are agreed to be served before the sale or under the contract of sale.

(u) 'Sale' with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes, -

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

(ii) a transfer of property in goods whether as goods or in some other form, involved in the execution of works contract;

(iii) a delivery of goods on hire purchase or any system of

payment by installments;

(iv) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(v) a supply, by way of or as part of any service or in any other manner whatsoever, of goods being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;

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

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made, but does not include a mortgage, hypothecation, charge or pledge."

30. In the light of the above provisions, the question for consideration is: -

> "**Whether in the facts and circumstances, the provisions of Passive Infrastructure Services by the petitioner to share operator's would tantamount to 'transfer of right to use goods' as per Section 2 (u) (vi) of the Madhya Pradesh Value Added Tax Act, 2002, and therefore, become liable to value added tax under the MP VAT Act?**"

31. The constitutional bench of the Apex Court in the case of **20th Century Finance Corporation Ltd. & another** v. **State of Maharashtra** reported in **2000 (6) SCC 12**, wherein while determining the situs of 'sale', has laid down the criteria, as under:

"21. It may be noted that the transactions contemplated under sub- clause (a) to (f) of clause (29A) of Article 366 are not actual sales within the meaning of sale but are deemed sales by legal fiction created therein. The situs of sale can only be fixed either by the appropriate legislature or by judge made law, and there is no settled principles for determining the situs of sale. There are conflicting views on this question. One of the principles providing situs of sale was en-grafted in Explanation to clause (1) (a) of Article 286, as it existed prior to the Constitution (Sixth Amendment) Act, which provided that the situs of sale would be where the goods are delivered for consumption. The second view is, situs of sale would be the place where the contract is concluded. The third view is, that the place where the goods are sold or delivered would be the situs of sale. The fourth view is, that where the essential ingredients, which complete a sale, are found in majority would be the situs of sale. There would be no difficulty in finding out situs of sale where it has been provided by legal fiction by the appropriate legislature. In the present case, we do not find Parliament has, by creating any fiction, fixed the location of sale in case of the transfer of right to use goods. We, therefore, have to look into the decisional law.

26. Next question that arises for consideration is, where is the taxable event on the transfer of the right to use any goods. Article 366 (29-A) (d) empowers the State legislature to enact law imposing sales tax on the transfer of the right to use goods. The various sub-clauses of clause (29A) of Article 366 permit the imposition of tax thus: sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services. The words and such transfer, delivery or supply. In the latter portion of clause (29A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed

sale in the cases of sub-clauses (a) and (b), the delivery of goods will be a deemed sale in case of sub-clause (c), the supply of goods and services respectively will be deemed sales in the cases of sub-clauses (e) and (f) and the transfer of the right to use any goods will be a deemed sale in the case of sub-clause (d). Clause (29A) cannot, in our view, be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in sub-clause (d) of clause (29A) be equated with the third sort of bailment referred to in Bailment by Palmer, 1979 edition, page 88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (d), the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use the goods. In our view, therefore, on a plain construction of sub-clause (d) of Clause (29A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods.

27. Article 366 (29-A) (d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any

goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

28. No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed."

32. In the case of **Bharat Sanchar Nigam Limited & another** v. **Union of India & others** reported in **(2006) 3 SCC 1**, the Apex Court has held, as under: -

"97. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

a. There must be goods available for delivery;

b. There must be a consensus ad idem as to the identity of the goods;

c. The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others. ”

33. Strong reliance, *inter alia*, was placed on the judgment of the Division Bench of the Karnataka High Court in the case of **M/s. Indus Towers Limited** v. **The Deputy Commissioner of Commercial Tax & four others** reported in **2012 (285) ELT 3 (Kar)**.

34. The contention put forward on behalf of the respondents (VAT department) is that the question whether there was any transfer of the right to use the goods can be decided only on the basis of the facts of the case. It was in this context submitted that the Karnataka High Court had posed to itself an erroneous question for decision, the question making an erroneous assumption that the petitioner was carrying on an activity which was a service provided by it and since the question itself was framed on an erroneous assumption, the answer given by the Court was consequently wrong and, therefore, the entire matter needs to be looked into afresh. It was submitted that having regard to the terms and conditions of the MSA and the facts brought on record, the conclusion

that is inescapable is that there was a transfer of the right to use the "Passive Infrastructure" by petitioner in favour of the sharing telecom operators attracting the levy of value added tax.

35. We are in respectful agreement with the view taken by the Karnataka High Court in the judgment sited (supra). The right to use the goods – in this case, the right to use the passive infrastructure – can be said to have been transferred by the petitioner to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. They would have the right to use the passive infrastructure if they were in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the passive infrastructure. There is none in the present case. The passive infrastructure is an indispensable requirement for the proper functioning of the active infrastructure which is owned and operated by the sharing telecom operators. The passive infrastructure is shared by several telecom operators and that is why they are referred to as sharing telecom operators in the MSA. The MSA merely permits access to the sharing telecom operators to the passive infrastructure to the extent it is necessary for the proper functioning of the active infrastructure. The MSA also defines "site access availability" as meaning the availability of access to the sharing operator to the passive infrastructure at the site. Clause 2 of the MSA which has been quoted above provides for "site access" and Clause 1.7 limits the site access availability to the sharing operator on use – only basis so far as it is necessary for installation, operation and maintenance etc.

of the active infrastructure; the clause further states that the sharing operator does not have, nor shall it ever have, any right, title or interest over the site or the passive infrastructure. The Clause also takes care to declare that the sharing operator shall not be deemed to be the tenant of petitioner and no tenancy rights shall be deemed to exist over the site/passive infrastructure. Clause 2.1.8, presumably by way of abundant caution, states that it is expressly agreed by the sharing operator that nothing contained in the MSA or otherwise shall create any title, right, tenancy, or any similar right in favour of the sharing operator.

36. There are other provisions in the MSA which control the right of the sharing operator to gain access to the site and the passive infrastructure . For instance, Clause 3.1.2 states that the access shall be limited to the purpose of carrying out operation and maintenance activities and that too only to the authorised representatives or properly authorise sub-contractors of the sharing operator. Clause 1.8 of the Schedule 2 of the MSA has to be read along with the above clause. The tables set out in this schedule providing for payment of service credits by petitioner to the sharing operators for failure to achieve the uptime service levels and those prescribing payment of service credits by petitioner to the sharing operators for non-submission of the reports and providing for stiff penalties for any failure on the part of petitioner show that it is the responsibility of petitioner to ensure that the passive infrastructure functions to its full efficiency and potential, which in turn means that it has to be in possession of the passive infrastructure and cannot part with the same in favour

of the sharing telecom operators. With several such restrictions and curtailment of the access made available to the sharing telecom operators to the passive infrastructure and with severe penalties prescribed for failure on the part of the petitioner to ensure uninterrupted and high quality service provided by the passive infrastructure, it is difficult to imagine how the petitioner could have intended to part with the possession of part of the infrastructure. That would have been a major impediment in the discharge of its responsibilities assumed under the MSA. The limited access made available to the sharing telecom operators is inconsistent with the notion of a "right to use" the passive infrastructure in the fullest sense of the expression. At best it can only be termed as a permissive use of the passive infrastructure for very limited purposes with very limited and strictly regulated access. It is therefore difficult to see how the arrangement could be understood as a transfer of the right to use the passive infrastructure.

37. When the petitioner has not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, the limited access provided to them can only be regarded as a permissive use or a limited licence to use the same. The possession of the passive infrastructure always remained with the petitioner. The sharing telecom operators did not therefore, have any right to use the passive infrastructure.

38. A careful perusal of the judgment of the Karnataka (supra) shows that the following propositions were laid down: -

a) No operation of the infrastructure is transferred to

the sharing telecom operator. The latter is only provided access to use the passive infrastructure, but Indus has retained the right to lease, licence etc. the passive infrastructure to any advertising agency;

b) The entire infrastructure is in the physical control and possession of Indus at all times and there is no parting of the same nor any transfer of the right to use the equipment or apparatus;

c) The permission granted to the telecom operator to have access to the passive infrastructure for limited purposes is loosely termed by the taxing authorities as "a right to use the passive infrastructure";

d) There is no intention on the part of the Indus to transfer the right to use; it is only a licence or an authority granted to telecom operator as defined in Section 52 of the Easements Act, 1952. A licence cannot in law confer any right; it can only prevent an act from being unlawful which, but for the licence, would be unlawful. A licence can never convey by itself any interest in the property;

e) The entire MSA has to be read as a whole without laying any undue emphasis upon a particular word or clause therein. What is permitted under the MSA is a licence to the telecom operators to have access to passive infrastructure and a permission to keep equipments of the sharing telecom operator in a prefabricated shelter with provision to have ingress and aggress only to the authorized representatives of the mobile operator.

39. In the matter of **Indus Towers Limited** v. **Union of India** decided on **18th April, 2013** [**Writ Petition (C) No.4976/2011**] almost a similar question was raised by the petitioner therein before the Delhi High Court and the Division Bench of Delhi High Court in complete agreement with the view taken by the Karnataka High Court in the case of **M/s. Indus Towers Limited** v. **The Deputy Commissioner of Commercial Tax &**

four others (supra) has allowed the writ petition.

40. For these reasons, we are of the view that the judgment of the Karnataka High Court will be fully applicable in the present facts and circumstances of the case. The order dated 13.03.2013 (Annexure P/1) passed by the Additional Commissioner, Commercial Tax, Indore (Respondent No.3) on the basis that the petitioner transferred the right to use passive infrastructure to the sharing telecom operators is quashed.

41. In the result, Writ Petition No.5340/2013, Writ Petition No.11739/2013, Writ Petition No.13352/2013, Writ Petition No.6827/2014 and Writ Petition No.2175/2015 are allowed. There shall be no order as to costs.

(P.K. Jaiswal)
Judge

(Tarun Kumar Kaushal)
Judge

Pithawe RC