

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. *Abdul Jabbar.V.K, Joint Commissioner (Audit & Inspection), O/o.CCT, Tvpm.*
2. *T.V. Kamala Bai, Joint Commissioner (Law), O/o.CCT, Tvpm.*
3. *A. Asok Kumar, Deputy Commissioner (Internal Audit), O/o.CCT, Tvpm.*

Sub:- KVAT Act, 2003- Clarification U/s. 94 - Providing Passive Infrastructure Services to Telecommunication Operators and Tax Liability under the Act - Declined - Orders issued.

Read:- 1. Application from M/s. Indus Towers Ltd., Kochi dated 3/11/2010.
2. Letter No. 320721 - 09 - 433/2011 of the Deputy Commissioner (Intelligence), Ernakulam dated 1/4/2011.

ORDER No.C3/36312/10/CT DATED 20/4/2011.

1. M/s. Indus Towers Ltd., Kochi has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003, seeking clarification on providing Passive Infrastructure Services to Telecommunication Operators and the tax liability under the Act.

2. The applicant is registered with the Department of Telecommunication for providing Passive Infrastructure Services to various telecommunication operators in India on a shared basis. The applicant is registered with the Commercial Taxes Department also.

3. The applicant contends that the term **Passive Infrastructure Services** refer to providing access to the Telecommunication Operators (on a shared basis) of telecommunications sites owned, acquired, ***possessed and controlled*** by the Applicant which includes tower, shelter, diesel generator sets, air conditioners, electrical and civil works, DC power system, battery bank etc. The term ***providing access to telecommunications operators*** refers to making the passive infrastructure available to the Telecommunication Operators for the purpose of deploying their equipments such as base terminal station equipment, associated antennae, base transceiver station, back haul connectivity to Sharing Operator's network and other requisite equipments and associated civil or electric work (collectively called as 'active infrastructure') required to provide telecommunication services by the Sharing Operators to its customers.

4. In order to provide Passive Infrastructure Services, the Applicant enters into Master Services Agreement with the Sharing Operators wherein the roles and responsibilities of each party are clearly defined. The applicant has referred the relevant terms of the said agreement and described in detail the Definition and Clauses related to the Provision of passive infrastructure services, Right, ownership, possession and control of the telecommunication site, Exclusivity, Responsibilities for obtaining necessary approvals, Operation & maintenance, Consideration for providing passive infrastructure services etc.

5. The applicant contends that they are charging Service tax in terms of the Finance Act, 1994 under the category of Support Service of Business or Commerce Section 65(105)(zzzq) on the entire consideration received for providing Passive Infrastructure Services to Sharing Operators.

6. The applicant contends that the issue that arises in the present case involves applicability of the Kerala Value Added Tax on provision of passive infrastructure services by the applicant to the sharing operators.

7. The applicant has referred Section 2(xliii) of the Kerala Value Added Tax Act, 2003, which defines sale, goods under Section 2(xx) of the Act and contends that on a conjoint reading of both the definitions, it can be understood that for any transaction to be considered as sale under Explanation V to Sec.2 (xliii) of the Act, all the following conditions need to be satisfied:

- (i) There is a transfer of right;
- (ii) The right should be for use of any moveable property
- (iii) The right may be for any purpose; and
- (iv) The right is transferred for a consideration

8. The applicant has detailed the entire process of creating a passive infrastructure at a particular location and contends that it can be understood from the process that a passive infrastructure site would not be functional unless and until all the equipments / installations including the tower are permanently connected to each other. Further, whenever a passive infrastructure site has to be relocated, all these equipments / installations are required to be dismantled into individual components; then they are to be moved from existing site and reassembled at new site. It is the requirement of the applicant to have the entire passive infrastructure site functional as a whole and not any individual equipment for the purpose of providing service to the sharing operators.

9. Based on the above mentioned facts, the applicant contends that:

- (a) The predominant intention of the applicant is to provide a service which is further used by the sharing operator for providing the telecommunication service to its customers;
- (b) For the purpose of providing the passive infrastructure services, it is a prerequisite for the applicant to have a passive infrastructure ready which should be of high specific standards and completely uptime; and
- (c) The sharing operator intends to use the entire passive infrastructure as a whole and the individual components are of no use to him. The payment is also made for receiving the entire passive infrastructure service and not for using any individual equipment / component.

10. The applicant contends that in view of the above, as the activity of provision of passive infrastructure by the applicant to the sharing operator is a service, the same is not covered within the provisions of Kerala Value Added Tax Act at the first point and accordingly VAT is not payable on the consideration received towards the same.

11. The applicant would also contend that in the instant case, the parameter of a deemed sale i.e., transfer of right to use is also not satisfied in view of the settled position of law and the principles laid down by various judicial forums. The applicant has referred the judgments of the Hon'ble High Court of Andhra Pradesh in the case of Rashtriya Ispat Nigam Ltd. Vs. CTO [(1990) 77 STC 182 (AP)] affirmed by the Hon'ble Supreme Court in State of A.P. Vs. Rashtriya Ispat Nigam Ltd. [(2002) 126 STC 114 (SC)]; and the judgment in M/s. Ahuja Goods Agency VS. State of UP [(1997) 106 STC 540 (All)] to support his contentions.

12. The applicant contends that the legal position with respect to applicability of VAT on transfer of right to use goods was again dealt by the Constitution Bench of the Hon'ble Apex Court in its landmark ruling in the case of Bharat Sanchar Nigam Ltd. Vs. Union of India [(2006) 145 STC 91].

13. The applicant contends that in the instant case the dominant objective of the agreement is to provide infrastructure services for purpose of telecommunication activities of the sharing operators and hence there can be no transfer of any sort of right to use goods in the circumstances of this case.

14. The applicant has also referred the judgment of the Hon'ble Delhi High Court in the matter of Commissioner, VAT, Trade and Taxes Dept. Vs. International Travel House Ltd. [(2009) 025 VST 0653].

15. The applicant contends that in view of the above, it can easily be understood that the activity of provision of Passive infrastructure by the Applicant to the Sharing operator fails most of these parameters in as much as:

(a) The passive infrastructure always remains in the possession and control of the applicant and is only used for the provision of the service to telecom shared operators.

(b) All the permissions and licenses with respect to the passive infrastructure site always remains with the applicant.

(c) The applicant continuously uses the passive infrastructure.

(d) The applicant provides the same passive infrastructure to more than one sharing operator at one time.

16. The applicant contends that it is clearly evident from the above that the activity of provision of Passive Infrastructure Service clearly falls outside the purview of transfer of right to use goods as contemplated under the Kerala Value Added Tax Act, 2003. Therefore, the contract is clearly in the nature of a service contract and there is no transfer of right to use goods involved.

17. The applicant further contends that the applicant is already charging Service Tax on the consideration and both taxes cannot be levied. The applicant contends that it was held by the Apex Court in the matter of M/s. Imagic Creative (P) Ltd. V Commissioner of Commercial Tax [2008 (9) STR 337 (SC)] that service tax and VAT are mutually exclusive.

18. The applicant has requested to clarify the following points:-

(i) Whether in view of the above facts and circumstances, the provision of Passive Infrastructure Services by the applicant to sharing operators would tantamount to transfer of right to use goods as per Section 2(xliii) of the Kerala Value Added Tax Act, 2003, and therefore become liable to tax under the Act?

(ii) If so, how should the sale price as per Section 2(xliv) of the Act be determined and on what basis for the purpose of discharging the liability under the Act?

19. The authorised representative of the applicant was heard and the contentions raised were examined.

20. The Deputy Commissioner (Intelligence), Ernakulam vide letter read as 2nd paper above has reported that the same issue relating to M/s Tower Vision India Pvt. Ltd., Kochi has been processed by the Intelligence Officer (IB), Ernakulam vide Order No. IBE - VI/9E/OR - 13/2010 - 2011 dated 4/10/2010 and the appeal is pending with Deputy Commissioner (Appeals).

21. Sub - section 4 of Section 94 of the Kerala Value Added Tax Act, 2003, provides as under:

94 (4) Where any question arises from any order already passed or any proceedings recorded under this Act, or any earlier law no such question shall be entertained for determination under sub - section (1).

22. As an order already passed with regard to this issue is pending before the appellate authority, we decline the application for clarification and order accordingly.

Abdul Jabbar.V.K.
Joint Commissioner (A&I)
O/o CCT

T.V. Kamala Bai
Joint Commissioner (Law)
O/o CCT

A. Asok Kumar
Deputy Commissioner (IA)
O/o CCT

To,

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