

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 5th September, 2012*
Date of Decision: 18th April, 2013

+ **W.P. (C) 4976/2011**

INDUS TOWERS LIMITED

..... Petitioner

Through:

Mr. N Venkataraman, Sr. Advocate
with Mr. R. Satish Kumar, Mr.
Parivesh Singh and Ms. Anjali
Chauhan, Advocates.

versus

UOI AND ORS.

..... Respondents

Through:

Mr. Parag P. Tripathi, Sr. Advocate
with Mr. Siddhartha, Advocate on
behalf of R-3.
Ms Sonia Sharma, Sr. Standing
Counsel for Service Tax Department/
R-4.
Mr. Vaibhav Agnihotri, proxy for Ms.
Kanika Agnihotri, Advocate for
UOI/R-1.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

This is a writ petition filed by M/s Indus Towers Ltd., (hereinafter referred to either as “Indus” or as “the petitioner”) seeking the issuance of a writ of certiorari quashing the order of the Commissioner, Department of Trade and Taxes, Government of NCT of Delhi passed on 29.04.2011 on the ground that it is *ultravires* Articles 14, 19(1)(g) and 265 and entry 97 of List I (Union List) of the 7th Schedule to the Constitution of India. A prayer has also been made seeking directions to the Union of India, Ministry of Finance, New Delhi, which is the first respondent herein, to refund the taxes paid by the petitioner under the Finance Act, 1994 on the activity of the provision of “passive infrastructure services” or in the alternative to direct the said respondent to deposit the taxes paid under the Finance

Act, 1994 for appropriation towards the tax liability arising out of the impugned order.

2. The petition arises in the following circumstances. Indus, which is the petitioner herein, is a company incorporated under the Companies Act, 1956. Its business is to provide access to the telecom operators, on shared basis to the telecom towers installed by it as well as the shelter, diesel generator sets, air conditioners, electrical goods, DC power systems, battery etc. Indus is a company registered with the Department of Telecommunication for providing passive infrastructure services and related operations and maintenance services to various telecommunications operators in India on a shared basis. It is the policy of the Government of India to encourage extensive infrastructure sharing and in pursuance with the policy, the telecom operators were required to create a high quality, rapid and wide coverage of mobile telecommunications network in India. The passive infrastructure facilities or services could be shared by several telecom operators so that it becomes cost-effective. Indus provides such passive infrastructure services to the extent permitted by the applicable laws in India and was willing to offer them and share the equipment with several telecom operators to the extent permitted by the laws of India. Accordingly, it put up passive infrastructure facilities at several places. The arrangement works this way. Indus would put up the towers and a shelter which is a construction in which the telecom operators are permitted to keep and maintain their base terminal stations (BTS), associated antenna, back-haul connectivity to the network of the sharing telecom operator and associated civil and electrical works required to provide telecom services. The telecom tower and shelter, both put up by the petitioner, is called "the passive infrastructure". In addition to the tower and shelter, Indus also provides diesel generator sets, air conditioners, electrical and civil works, DC power system, battery bank etc. All these are known as passive infrastructure. The "active infrastructure" consists of the BTS, associated antenna, back-haul connectivity and other requisite equipment and associated civil and electrical works required to provide the telecommunication services by the telecom operator at a telecommunication site other than the passive infrastructure. Whereas the active infrastructure is owned and operated by the sharing telecom operator,

passive infrastructure is owned by Indus, the petitioner herein. There could be several operators who may use the tower and shelter which are parts of the passive infrastructure by keeping their BTS etc. therein and sharing the entire passive infrastructure on an agreed basis. The antennae belonging to the sharing telecom provider may be put up or installed at different heights in the tower as per the requirements of the sharing telecom operators.

3. The working of the telecom network basically involves the process of receiving and transmitting the telecom signals. The active infrastructure which is owned and put up by the sharing telecom operators needs certain conditions for proper functioning and uninterrupted telecom network/signals. These conditions are maintenance of a particular temperature, humidity level, safety etc. These conditions are ensured by the passive infrastructure made available by the petitioner to the sharing telecom operators. We may examine this in some detail at a later stage.

4. The impugned order is an order dated 29.04.2011 passed by the Commissioner, Department of Trade and Taxes to the Government of NCT of Delhi, who is the respondent No.3 in the present proceedings, in No.280/CDVAT/2010/13 in an application filed by the petitioner before him under Section 84 of the Delhi Value Added Tax 2004 (DVAT). The petitioner provided the passive infrastructure services to sharing telecom operators and received consideration therefor. The questions before the Commissioner, Department of Trade and Tax, in his words, were as follows :-

“Whether in the facts and circumstances the provision of Passive Infrastructure Services by the Applicant to Sharing Operator’s would tantamount to ‘Transfer of right to use goods’ as per Section 2(1)(zc)(vi) of the DVAT Act, 2004 and therefore become liable to tax under the DVAT Act.”

“If yes, then how should the sale price as per section 9(1)(zd) of the DVAT act be determined for the purpose of discharging the liability under DVAT Act?”

The Commissioner on an examination of the agreement entered into between the petitioner and M/s Sistema Shyam Tele Services Ltd., which was taken as

representative of the agreements entered into by the petitioner with various telecom operators, held that the entire amount of consideration received from the sharing telecom operators for providing access to the passive infrastructure would amount to consideration for the transfer of the right to use goods as defined in Section 2(1)(zc)(vi) of the DVAT Act and was exigible to tax under the said Act. He however held that since a separate bill was being raised for consumption of energy by each sharing operator as per actual consumption as detailed in the contract, the charges collected by the petitioner on this account shall be exempt from the levy of value added tax.

5. The contention of the petitioner in this writ petition is that the aforesaid order is contrary to law and ultra vires Articles 14, 19(1)(g) and 265 of the Constitution of India read with Entry 97 of the List I of the 7th Schedule to the Constitution and at any rate there was no transfer of the right in any goods by the petitioner to the sharing telecom operators and therefore the levy of VAT on the assumption to the contrary was wholly erroneous and untenable. The stand taken by the respondents is that there was a transfer of the right to use the goods and therefore the consideration therefor is chargeable to VAT.

6. In order to appreciate the rival contentions it is necessary to examine the specimen agreement entered into between the petitioner and M/s Systema Shoam Tele Services on 25.02.2009. The parties are agreed that this agreement can be taken as representative of all the agreements entered into by the petitioner with the sharing telecom operators. Since we have already referred to the description of “active infrastructure” and “passive infrastructure”, which is substantially as per the definition of these terms in the agreement, it is not necessary to refer to them again. Clause 2 provides for “site access”. Clause 2.1 provides for ‘provision of passive infrastructure’ by Indus. This clause reads as under: -

“2.1 Provision of Passive Infrastructure

2.1.1 Upon the Sharing Operator fulfilling its obligations in accordance with this Agreement, Indus shall provide Site Access Availability to the Sharing Operator in accordance with the terms and conditions of this Agreement.

2.1.2 Throughout the Term of this Agreement, the Sharing Operator shall be entitled to provide notice to Indus 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 In the event that the Service Orders received by Indus 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 Indus prior to another Service Order shall be given priority by Indus while allocating such Passive Infrastructure to the relevant applicants.

2.1.4 With respect to each Site in relation to which Indus 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 5 (Standard Site Access Terms). Each Service Contract shall be duly stamped and the applicable stamp duty shall be at the Sharing Operator’s expense.

2.1.5 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 at the mutually agreed place. The Sharing Operator shall have access to each such Site for all installation activities and Indus 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 the representatives of the Sharing Operator with proper identification or its properly authorised sub-contractors shall be allowed such access to the Sites.

2.1.6 The right, title and interest in and to the Site and Passive Infrastructure, including any enhancements carried out by Indus, shall vest with Indus and all such enhancements thereto shall be at the sole cost and expense of Indus. Enhancements in this context means the augmentation in capacity carried out by Indus to achieve increased sharing. The right, title and interest in and to the Sharing Operator Equipment shall always vest with the Sharing Operator subject to the provisions of this Agreement.

2.1.7 The Sharing Operator shall have Site Access Availability on “use-only basis” for installation, operation and maintenance etc of its Active infrastructure for which the Sharing Operator shall be liable to make payments to Indus in accordance with this Agreement and the Sharing Operator undertakes that neither does it have nor shall it ever have any right, title or interest over the Site or Passive Infrastructure. The Sharing Operator is not nor shall be deemed to

be the tenant of Indus and no tenancy shall be deemed to ever exist over the Site/ Passive Infrastructure.

2.1.8 It is expressly agreed by the Sharing Operator that nothing contained in this Agreement or otherwise shall create any title, right, tenancy or any similar right in favour of the Sharing Operator.”

As per clause 2.5, the right of site access availability is non-extensive and Indus 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 egress from such site by only the authorised representatives of the sharing operator or its properly authorised sub-contractors. Clause 3.2 requires Indus 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 by 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.

7. Clause 4 provides for the rights of Indus. Under clause 4.1, so far as the sites are concerned, Indus 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 Indus or its nominees. Indus 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 Indus may in its discretion decide to support from time to time.

Clause 4.2 delineates the rights of Indus 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 Indus to ensure that any other operators on the site 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 Indus (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.

8. Clause 5.3 provides for the warranties and 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 Indus, 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 Indus or of any other sharing operator of the site, and to generally share information with Indus and cooperate with and assist Indus in connection with the purpose of the obligations under the contract etc.

9. Clause 6 speaks of “charges”. Clause 6.1 provides that Indus 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 Indus 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.

10. Clause 10 confers upon Indus the right to advertise on the passive infrastructure. It says that Indus 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 Indus

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 such complaint from a telecom operator the hoardings/advertisement shall be removed.

11. Schedule 1 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 Indus to ensure proper access to the sites for all authorised 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 Indus to the Sharing Operator for failure to achieve the above Uptime Service Levels are as set out below.

<i>Operation and Maintenance Service Level</i>	<i>% of Total Rate payable by Indus</i>
<i>99.95% or greater</i>	<i>0.0%</i>
<i>99.90% or greater but less than 99.95%</i>	<i>5.0%</i>
<i>99.70% or greater but less than 99.90%</i>	<i>7.5%</i>
<i>99.50% or greater but less than 99.70%</i>	<i>10.0%</i>
<i>99.00% or greater but less than 99.50%</i>	<i>25.0%</i>
<i>Less than 99.00%</i>	<i>30.0%</i>

The Operation and Maintenance Service Credits payable by Indus 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 Indus 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, Indus is liable to pay service credits in accordance with pre-determined rates which are as follows :

<i>Time period of Indus Downtime</i>	<i>% of Total Rate payable by Indus</i>
<i>24 consecutive hours or more, but less than 36 consecutive hours</i>	<i>50%</i>
<i>36 consecutive hours or more, but less than 48 consecutive hours</i>	<i>75%</i>
<i>48 consecutive hours or more</i>	<i>100%</i>

12. Schedule 3 provides for “charges”.
13. 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 –

(29A) xxxxx xxxxx xxxxx
“tax on the sale or purchase of goods” includes –

(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”.

14. In the DVAT Act, 2004 the word “sale” is defined in section 2(1)(zc) in the following manner: -

“Section 2 – Definitions

(1) In this Act, unless the context otherwise requires, -

xxx

(zc) “Sale” with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and includes-

xxxxx

xxxxx

xxxxx

(vi) 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;”

15. In the light of the above provisions, the question for consideration is whether there is a transfer by Indus of the right to use any goods in favour of the sharing telecom operators which would attract value added tax within the terms of the DVAT Act, 2004.

16. The main point urged on behalf of the petitioner was that there was no transfer of the right to use any goods by Indus in favour of the sharing telecom operators since the provision of “Passive Infrastructure” was essentially a service which was taxed as a service provided “in relation to support services of business or categories, in any manner” under section 65 (105) (zzzq) of the Finance Act, 1994. It was contended that the same transaction which was treated as a taxable service cannot also be treated as a sale or deemed sale under the DVAT Act. It was contended that at any rate there was no transfer by Indus of the right to use any goods in favour of the sharing telecom operators.

17. We were taken through the agreement dated 25.02.2009 (which is referred to as the “master service agreement” or MSA) and it was contended on the basis of the terms thereof that the Passive Infrastructure provided by the petitioner does not involve any transfer of right to use any goods in favour of the sharing telecom

operators. Strong reliance, inter alia, was placed on the judgment dated 07.09.2011 of the Karnataka High Court reported as *Indus Towers Ltd. vs. Deputy Commissioner of Commercial Taxes Enforcement*, 2012 (285) ELT 3 (Kar), a judgment which disposed of several writ appeals filed by different petitioners of which the present petitioner was one. It was pointed out that the terms and conditions of the MSA were examined by the Karnataka High Court which came to the conclusion that no transfer of any right to use the goods was involved. It was submitted that the Karnataka High Court (supra) has concluded, for reasons stated in the judgment, that the petitioner provided services in relation to site access, power conversion, air-conditioning and safe keeping for which it received a consolidated service revenue from the sharing telecom operators and that there was neither a sale of goods nor a deemed sale so as to attract levy of tax under the Karnataka Value Added Tax, 2003.

18. 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 Indus in favour of the sharing telecom operators attracting the levy of value added tax.

19. We are in respectful agreement with the view taken by the Karnataka High Court in the judgment cited (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 Indus 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 Indus 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.

20. 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 authorised 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 Indus to the sharing operators for failure to achieve the uptime service levels and those prescribing payment of service credits by Indus to the sharing operators for non-submission of the reports and providing for stiff penalties for any failure on the part of Indus show that it is the responsibility of Indus 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 Indus to ensure uninterrupted and high quality service provided by the passive infrastructure, it is difficult to imagine how Indus 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.

21. When Indus 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 Indus. The sharing telecom operators did not therefore, have any right to use the passive infrastructure,

22. 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 pre-fabricated shelter with provision to have ingress and egress only to the authorised representatives of the mobile operator.

23. We find it difficult to agree with the criticism of the counsel for the respondents that the Karnataka High Court posed to itself a question which erroneously assumed the activity of Indus to be a service and consequently the answer given was also wrong. We do not find any trace of such an assumption permeating through the judgment, though the question as framed by the High Court refers to “.....the service provided by the assesseees to its customers.....”. It may be that the words used in the question were inaccurate but that does not take away anything from the substance of the judgment, if we may say so with respect. The substance of the judgment is what we have paraphrased in the previous paragraph.

24. Several authorities were cited before us, particularly on behalf of the petitioner. However, we do not think it necessary to refer to them since the question

whether there was any transfer of right to use the goods is essentially a question to be determined on the facts and circumstances of each case and having regard to the terms of the agreement entered into between the parties. We therefore do not think it necessary to burden this judgment with a discussion of the authorities.

25. In CM 3589/2005, the petitioner has prayed for quashing of the assessment order dated 16.1.2012 which was passed subsequent to the filing of the writ petition. Since we have accepted the contentions of the petitioner, the assessment order framed on the basis that the petitioner transferred the right to use the passive infrastructure to the sharing telecom operators is quashed, as also the impugned order dated 29.04.2011.

26. In the result the writ petition is allowed. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

APRIL 18, 2013
hs/vld