

IN THE HIGH COURT OF KARNATAKA AT BANGALOREDATED THIS THE 7TH DAY OF SEPTEMBER 2011

PRESENT

THE HON'BLE Mr. JUSTICE N KUMAR

AND

THE HON'BLE MR.JUSTICE RAVI MALIMATHWA Nos. WA Nos. 3403-3439/2011 (T-RES)C/wWA Nos., 3373-3396/2011,WA No.3487/2011 & WA 3490-
3500/2011, WA No.3488/2011 & WA Nos.3502-3512/2011,WA Nos.3461-3472/2011, WA No.4454/2011 &WA Nos.5675-5697/2011, WA No.4455/2011 & WA Nos.5813-5871/2011, WA No.15226/2011& WA Nos.15304-15326/2011, WA 15227/2011& WA Nos.15293-15303/2011,WA Nos.15228-15229/2011 & 15519-15542 OF 2011, WANos.15230-15231/2011 & WA Nos.15259 to 15292 of 2011,WA No.5987/2011& WA Nos.15470-15480/2011WA Nos.3403-3439/2011BETWEENM/S INDUS TOWERS LTD
NO.12 TOWER-D, 7TH FLOOR, SUBRAMANYA ARCADE,
BANNERGHATTA ROAD

BANGALORE-560029
(REPRESENTED BY
SRI K M ASHWIN KUMAR
DGM-FINANCE)

...APPELLANT

(By SRI N. VENKATARAMAN, SENIOR ADV., FOR
SRIYUTHS V LAKSHMI KUMARAN, V SRIDHARAN,
SHIVADASS, HARISH R & SYED PEERAN, ADVS.)

AND

1. THE DEPUTY COMMISSIONER
OF COMMERCIAL TAXES
ENFORCEMENT I, SOUTH ZONE,
KORAMANGALA
BANGALORE-560 047.
2. THE COMMISSIONER COMMERCIAL TAXES IN
KARNATAKA,
"VANIJYA THERIGE KARYALAYA"
GANDHINAGAR
BANGALORE-560 009.
3. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY,
FINANCE DEPARTMENT,
VIDHANA SOUDHA
BANGALORE-560 001.
4. UNION OF INDIA
THROUGH ITS FINANCE SECRETARY,
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
NEW DELHI-110 001.
5. THE ASSISTANT COMMISSIONER OF SERVICE TAX
DIVISION III, HSIDC VANIJYA NIKUNJ

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UDYOG VIHAR, PHASE V,
GURGAON-122 002.

... RESPONDENTS

(By SRI N.R BHASKAR, SCGC FOR R4-5,
SRI ASHOK HARANAHALLI, SENIOR ADV.
& SPECIAL COUNSEL FOR SRI K.M SHIVAYOGI SWAMY,
HCGP FOR R1-3)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION 11508/11 & 12693-
727/11 DATED 11/4/11.

WA Nos. 3373-3396/2011

BETWEEN

M/S ATC TELECOM TOWER
CORPORATION PVT LTD
(FOMERLY M/S ESSAR TELECOM
INFRASTRUCTURE PRIVATE LIMITED)
NO.432, 3RD CROSS, 4TH BLOCK,
HBR LAYOUT, BANGALORE-560043
(REP. BY ANIL SOOD, REGIONAL HEAD,
SOUTH REGION)

...APPELLANT

(By SRI N VENKATA RAMANA, SR. COUNSEL FOR
SRI B G CHIDANANDA URS, ADV.)

AND

1. UNION OF INDIA
REPRESENTED BY ITS SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
GOVERNMENT OF INDIA, NORTH BLOCK
NEW DELHI-110 001.

2. THE STATE OF KARNATAKA
REF. BY ITS FINANCE SECRETARY
3. VIDHANA SOUDHA
BANGALORE-560 001.
4. DEPUTY COMMISSIONER OF
COMMERCIAL TAXES (AUDIT-52)
DVO-5, BANGALORE. ... RESPONDENTS

(By SRI N.R BHASKAR, SCGC FOR R1,
SRI ASHOK HARANAHALLI, SPL. ADV. &
SRI K.M SHIVAYOGI SWAMY,
HCGP FOR R2 & R3)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION NO.2459-2482/2011
DATED 07/04/2011.

WA No.3487/2011 & WA Nos.3490-3500/2011

BETWEEN

M/s. WIRELESS TT INFO SERVICES LTD
(PRESENTLY KNOWN AS VIOM NETWORKS LTD)
5TH FLOOR,SJR PRIMUS,
No.1, KOROMANGALA INDUSTRIAL LAYOUT,
7TH BLOCK, KOROMANGALA,
BANGALORE - 560095,
REPRESENTED BY ITS
DEPUTY MANAGER-LEGAL
SHRI GAUTHAM M S. ...APPELLANT

(By SRIYUTHS V LAKSHMI KUMARAN,
V SRIDHARAN, SHIVADASS HARISH R.
& SYED PEERAN, ADVS.)

AND

1. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY
FINANCE DEPARTMENT
VIDHANA SOUDHA
BANGALORE 560 001.
2. THE COMMISSIONER OF COMMERCIAL TAXES
IN KARNATAKA
"VANIJYA THERIGE KARYALAYA"
GANDHINAGAR,
BANGALORE 560 009.
3. THE ASSISTANT COMMISSIONER OF COMMERCIAL
TAXES
(AUDIT)-41, DVO-4, 4TH FLOOR,
ROOM No.403 , VTK-2,
NEAR NATIONAL
VILLAGE GAMES COMPLEX, RAJENDRA
NAGAR, KOROMANGALA
BANGALORE 560 047.
4. UNION OF INDIA
THROUGH ITS FINANCE SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
NEW DELHI - 110 001.
5. THE COMMISSIONER OF SERVICE TAX
BANGALORE
5TH FLOOR,S P COMPLEX,
NO.16, LAL BAGH ROAD,
BANGALORE 560 027. ... RESPONDENTS

(By SRI ASHOK HARANAHALLI, SPL. ADV., AND
SRI K.M SHIVAYOGI SWAMY, HCGP FOR R1-3,
SRI N.R BHASKAR, CGC FOR R4 & R5)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE ORDER PASSED IN THE WRIT PETITION Nos.22876-87/2010 DATED 11/04/2011.

WA No.3488/2011 & WA Nos.3502-3512/2011

BETWEEN

M/S WIRELESS TT INFO SERVICES LTD
(PRESENTLY KNOWN AS VIOM NETWORKS LTD)
5TH FLOOR,SJR PRIMUS,
NO.1, KORAMANGALA INDUSTRIAL LAYOUT,
7TH BLOCK, KORAMANGALA,
BANGALORE 560095,
REPRESENTED BY ITS
ASSISTANT MANAGER-LEGAL
SHRI GAUTHAM M S
ASSISTANT MANAGER-LEGAL. ...APPELLANT

(By SRIYUTHS V LAKSHMI KUMARAN, V SRIDHARAN,
SHIVADASS, HARISH R & SYED PEERAN, ADVS.)

AND

1. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY
FINANCE DEPARTMENT
VIDHANA SOUDHA
BANGALORE 560 001.
2. THE COMMISSIONER
COMMERCIAL TAXES IN KARNATAKA
"VANIJYA THERIGE KARYALAYA"
GANDHINAGARA
BANGALORE 560 009.
3. THE ASSISTANT COMMISSIONER OF

✓

COMMERCIAL TAXES
(AUDIT)-41, DVO-4, 4TH FLOOR,
ROOM NO.403 , VTK-2, NEAR NATIONAL
VILLAGE GAMES COMPLEX,
RAJENDRA NAGAR, KORAMANGALA
BANGALORE 560 047.

4. UNION OF INDIA
THROUGH ITS FINANCE SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
NEW DELHI - 110 001.
5. THE COMMISSIONER OF SERVICE TAX
BANGALORE,
5TH FLOOR,S P COMPLEX,
NO.16, LAL BAGH ROAD,
BANGALORE 560 027

...RESPONDENTS

(By SRI ASHOK HARANAHALLI, SR. ADV., AND SPL. ADV.
FOR SRI K.M SHIVAYOGI SWAMY, HCGP FOR R1-3,
SRI N.R BHASKAR, SCGC FOR R4-5)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION 22864-22875/10
DATED 11/4/11.

WA Nos.3461-3472/2011

BETWEEN

M/S ATC TELECOM TOWER CORPORATION
PRIVATE LTD (FORMERLY M/S ESSAR TELECOM
INFRASTRUCTURE PVT LTD), NO. 432,
3RD CROSS, 4TH BLOCK, HBR LAYOUT,
BANGALORE - 560 043

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(REP. BY MR. ANIL SOOD,
REGIONAL HEAD, SOUTH REGION) ...APPELLANT

(By SRI N VENKATA RAMAN, SENIOR COUNSEL FOR
SRI B G CHIDANANDA URS, ADV.)

AND

1. UNION OF INDIA
REP. BY ITS SECRETARY,
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE,
GOVERNEMENT OF INDIA,
NORTH BLOCK,
NEW DELHI - 110 001.
2. THE STATE OF KARNATAKA,
REF. BY ITS FINANCE SECRETARY,
VIDHANA SOUDHA,
BANGALORE - 560 001.
3. DEPUTY COMMISSIONER OF COMMERCIAL TAXES
(AUDIT-52),
DVO-5,
BANGALORE ...RESPONDENTS

(By SRI N. R BHASKAR, SCGC FOR R1,
SRI ASHOK HARANAHALLI, SPECIAL COUNSEL &
SRI K.M SHIVYOGISWAMY, HCGP FOR R2 & 3)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION NO.11361-
11372/2011 DATED 11/04/2011.

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WA 4454/2011 & WA 5675-5697/2011

BETWEEN

1. THE STATE OF KARNATAKA
BY ITS FINANCE SECRETARY,
VIDHANA SOUDHA,
BANGALORE - 560 001.
2. DEPUTY COMMISSIONER
OF COMMERCIAL TAXES,
AUDIT-52, DVO-5,
BANGALORE. ...APPELLANTS

(BY SRI ASHOK HARANAHALLI, SPECIAL COUNSEL &
SRI K.M SHIVAYOGISWAMY, HCGP)

AND

1. M/S ESSAR TELECOM
INFRASTRUCTURE PVT. LTD.,
104, 1ST MAIN ROAD, EAST OF
NGEF LAYOUT, KASTURINAGAR,
BANGALORE - 560 016,
BY NAGARAJU NARA - FINANCE
& ACCOUNTS EXECUTIVE.
2. UNION OF INDIA
BY ITS SECRETARY,
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE,
GOVERNMENT OF INDIA, NORTH BLOCK
NEW DELHI - 110 001 ...RESPONDENTS

(BY SRI N VENKATA RAM, SENIOR ADV. &
SRI B.G. CHIDANAND URS, ADV.)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER DATED 07/04/2011 IN WP.NOs.2459-2482/2011(T-

RES), PASSED BY THE LEARNED SINGLE JUDGE IN SO FAR AS IT PERTAINS TO QUASHING OF THE LEVY OF PENALTY AND INTEREST AND ALSO IN RESPECT OF DIRECTION TO THE STATE GOVERNMENT FOR RECOVERY OF THE TAX AMOUNT FROM THE SECOND RESPONDENT - UNION OF INDIA.

WA No.4455/2011 & WA Nos.5813-5871/2011

BETWEEN

1. DEPUTY COMMISSIONER OF
COMMERCIAL TAXES
ENFORCEMENT-1,
SOUTH ZONE,
KORAMANGALA
BANGALORE.
2. THE COMMISSIONER OF
COMMERCIAL TAXES IN KARNATAKA
VANIYA THERIGE KARYALAYA
GANDHINAGAR
BANGALORE-9.
3. THE STATE OF KARNATAKA
BY ITS PRINCIPAL SECRETARY
FINANCE DEPARTMENT
VIDHANA SOUDHA
BANGALORE-560 001.
4. ASSISTANT COMMISSIONER
OF COMMERCIAL TAXES
(AUDIT) 41, NEAR NATIONAL GAMES VILLAGE
COMPLEX,

RAJENDRA NAGAR
KORAMANGALA
BANGALORE-560 047

...APPELLANTS

(BY SRI ASHOK HARANAHALLI, SPECIAL COUNSEL &
SRI K.M SHIVAYOGISWAMY, HCGP)

AND

1. M/S INDUS TOWERS LTD
12, TOWER D, 7TH FLOOR
SUBRAMANYA ARCADE
BANNERGHATTA ROAD,
BANGALORE – 560 029
BY SRI K M ASWINI KUMAR
DGM - FINANCE.
2. UNION OF INDIA
THROUGH ITS FINANCE SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
GOVERNMENT OF INDIA
NEW DELHI-110 001.
3. ASSISTANT COMMISSIONER OF SERVICE TAX
DIVISION III,
HSIDC VANIJYA NIKUNJ
UDYOG VIHAR, PHASE V
GURGAON.
4. WIRELESS TT INFO SERVICES LTD
5TH FLOOR, SJR PRIMUS
1, KORAMANGALA INDUSTRIAL LAYOUT
7TH BLOCK, KORAMANGALA,
BANGALORE-95
BY ITS ASSISTANT MANAGER-LEGAL
SRI GAUTHAM M S.

5. COMMISSIONER OF SERVICE TAX
BANGALORE, 5TH FLOOR
SP COMPLEX,
16, LALBAGH ROAD
BANGALORE-27

... RESPONDENTS

(By SRIYUTHS V LAKSHMI KUMARAN, V SRIDHARAN,
SHIVADASS, HARISH, SRI SYED PEERAN, ADVs. FOR R1
SRI N.R. BHASKAR, CGC FOR R2 & R3)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER DATED 07/04/2011 IN WRIT PETITION
NOs.11508/2011 AND 12693-12727/2011 C/W 22876-
2887/2010 AND 22864-22875/2010 (T-RES) PASSED BY THE
LEARNED SINGLE JUDGE IN SO FAR AS IT PERTAINS TO
QUASHING OF THE LEVY OF PENALTY AND INTEREST AND
ALSO IN RESPECT OF DIRECTION TO THE STATE
GOVERNMENT FOR RECOVERY OF THE TAX AMOUNT FROM
THE SECOND RESPONDENT - UNION OF INDIA.

WA No.15226/2011& WA Nos.15304-15326/2011

BETWEEN

UNION OF INDIA
THROUGH ITS FINANCE SECRETARY
MINISTRY OF FINANCE,
DEPT. OF REVENUE
GOVT. OF INDIA, NORTH BLOCK,
NEW DELHI - 110 001

...APPELLANT

(By SRI N R BHASKAR, SCGC)

AND

1. M/S. ESSAR TELECOM

INFRASTRUCTURE PVT LTD.,
NO. 104, 1ST MAIN ROAD,
EAST OF NGEF LAYOUT,
KASTURINAGAR, BANGALORE-16
REP. BY NAGARAJU NARA,
FINANCE & ACCOUNTS,
EXECUTIVE.

2. STATE OF KARNATAKA
REP. BY ITS FINANCE SECRETARY
VIDHANA SOUDHA
BANGALORE-560 001.
3. DEPUTY COMMISSIONER OF
COMMERCIAL TAXES (AUDIT-52)
DVO – BANGALORE ...RESPONDENTS
(By SRI B G CHIDANANDA URS, ADV. FOR R1,
SRI K M SHIVAYOCI SWAMY, HCGP FOR R2 & 3)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION Nos.2459-82/11
DATED 7/4/11.

WA No.15227/2011& WA Nos.15293-15303/2011

BETWEEN

UNION OF INDIA
THROUGH ITS FINANCE SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
GOVERNMENT OF INDIA,
NORTH BLOCK,
NEW DELHI- 110 001

...APPELLANT

(By SRI N R BHASKAR, SCGC)

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AND

1. M/S ATC TELECOM TOWER CORPORATION PRIVATE LIMITED (FORMERLY M/S. ESSAR TELECOM INFRASTRUCTURE PRIVATE LIMITED) NO. 432, 3RD CROSS, 4TH BLOCK, HBR LAYOUT, BANGALORE- 560 001. REP BY MR ANIL SOOD, REGIONAL HEAD, SOUTH REGION.
2. STATE OF KARNATAKA REPRESENTED BY ITS FINANCE SECRETARY, VIDHANA SOUDHA BANGALORE- 560 001.
3. DEPUTY COMMISSIONER OF COMMERCIAL TAXES(AUDIT-52) DVO- BANGALORE ...RESPONDENTS

(By SRI B G CHIDANANDA URS, ADV. FOR R1,
SRI K M SHIVAYOGI SWAMY, HCGP FOR R2 & 3)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE ORDER PASSED IN THE WRIT PETITION Nos.11361-11372/11 DATED 11/4/11.

WA Nos. 15228-15229/2011 & WA Nos.15519-15542/11

BETWEEN

1. UNION OF INDIA THROUGH ITS FINANCE SECRETARY MINISTRY OF FINANCE DEPT. OF REVENUE,

NEW DELHI -110 001.

2. THE COMMISSIONER OF SERVICE TAX
BANGALORE,
5TH FLOOR, S P COMPLEX,
No.16, LALBAGH ROAD,
BANGALORE -560 027 ...APPELLANTS

(By SRI N R BHASKAR, SCGC)

AND

1. M/S. WIRELESS TT INFO SERVICES LTD.,
(PRESENTLY KNOWN AS
VIOM NETWORKS LTD)
5TH FLOOR, SJR PRIMUS,
No. 1, KOROMANGALA
INDUSTRIAL LAYOUT, 7TH BLOCK,
KOROMANGALA, BANGALORE 560095
REP. BY ITS ASST. MANAGER - LEGAL
SHRI. GAUTHAM M S.
2. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY
FINANCE DEPARTMENT
VIDHANA SOUDHA
BANGALORE - 560 001.
3. THE COMMISSIONER,
COMMERCIAL TAXES
IN KARNATAKA,
"VANIJYA THERIGE KARYALAYA"
GANDHINAGARA
BANGALORE - 560 009.
4. THE ASSISTANT COMMISSIONER
OF COMMERCIAL TAXES (AUDIT)-41,

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DVO-4, 4TH FLOOR,
ROOM No.403 , VTK-2, NEAR NATIONAL
VILLAGE GAMES COMPLEX,
RAJENDRA NAGAR,
KORAMANGALA
BANGALORE - 560 047 ... RESPONDENTS

(SRIYUTHS V. LAKSHMIKUMARAN, SREEDHARAN,
SHIVADASS, HARISH R., ADVs., FGR R1
SRI K.M. SHIVAYOGISWAMY, HCGP., FOR R2 TO R4)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION 22864-75/10 DATED
11/4/11.


WA Nos.15230-15231/2011 & WA Nos.15259-15292/2011

BETWEEN

1. UNION OF INDIA
THROUGH ITS FINANCE SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE,
NEW DELHI- 110 001.
2. THE ASSISTANT COMMISSIONER OF SERVICE TAX
DIVISION III, HSIDE VANIJYA NIKUNJ
UDYOG VIHAR, PHASE V,
GURGAON - 122 002 ...APPELLANTS

(By SRI N R BHASKAR, SCGC)

AND

1. M/S INDUS TOWERS LTD
NO-12, TOWER-D,
7TH FLOOR, SUBRAMANYA
ARCADE, BANNERGHETTA ROAD,
BANGALORE-560 029
- 

(REPRESENTED BY SRI K M ASHWIN KUMAR
DGM- FINANCE)

2. THE DEPUTY COMMISSIONER
OF COMMERICAL
TAXES ENFORCEMENT I , SOUTH ZONE,
KORAMANGALA
BANGALORE – 560 047.
3. THE COMMISSIONER
COMMERCIAL TAXES IN KARNATAKA
"VANIYA THERIGE KARYALAYA"
GANDHINAGAR,
BANGALORE – 560 009.
4. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY,
FINANCE DEPARTMENT,
VIDHANA SOUDHA,
BANGALORE- 560 001 ... RESPONDENTS

(By SRIYUTHS V LAKSHMI KUMARAN,
V SRIDHARAN, ADVS., FOR R1
SRI K.M SHIVYOGI SWAMY, HCGP FOR R2 TO 4)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION 11508/11 & 12693-
727/11 DATED 11/4/11.

WA No.5987/2011& WA Nos.15470-15480/2011

BETWEEN

1. THE STATE OF KARNATAKA
BY ITS FINANCE SECRETARY,
VIDHANA SOUDHA,
BANGALORE – 560 001.

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2. DEPUTY COMMISSIONER
OF COMMERCIAL TAXES,
AUDIT-52, DVO-5,
BANGALORE

...APPELLANTS

(By SRI ASHOK HARANAHALLI, SPECIAL COUNSEL &
SRI K.M SHIVAYOGI SWAMY, HCGP FOR STATE)

AND

1. M/S ATC TELECOM TOWER
CORPORATION PVT LTD.,
(FORMERLY M/S EASSAR
TELECOM INFRASTRUCTURE
PVT. LTD.)
#432, 3RD CROSS, 4TH BLOCK,
HBR LAYOUT, BANGALORE - 560 043.
BY MR. ANIL SOOD,
REGIONAL HEAD,
SOUTH REGION.
2. UNION OF INDIA
BY ITS SECRETARY,
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE,
GOVERNMENT OF INDIA,
NORTH BLOCK,
NEW DELHI - 110 001

...RESPONDENTS

(By SRI N. VENKATA RAM, SENIOR ADV. &
SRI B.G. CHIDANANDA URS, ADV. FOR R1
SRI N.R. BHASKAR, ADV., FOR R2)

THESE WRIT APPEALS ARE FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER DATED 11/04/2011 IN WP. NOS. 11361-372/2011 (T-
RES), PASSED BY THE LEARNED SINGLE JUDGE IN SO FAR
AS IT PERTAINS TO QUASHING OF THE LEVY OF PENALTY
AND INTEREST AND ALSO IN RESPECT OF DIRECTION TO

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THE STATE GOVERNMENT FOR RECOVERY OF THE TAX AMOUNT FROM THE SECOND RESPONDENT – UNION OF INDIA.

THESE APPEALS COMING ON FOR HEARING – INTERLOCUTORY APPLICATION THIS DAY, **N. KUMAR J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

All these writ appeals are preferred against the common order passed by the learned single Judge. None of the parties are happy with the order. Therefore, everyone has preferred appeal against the said order to the extent they are aggrieved of such order. Therefore, these appeals are taken up for consideration together and disposed of by this common order. For the purpose of convenience, the parties are referred to as they are arrayed to in writ appeal No.3403-3439/2011 arising out of W.P. No.11508/2011 and 12693-12727 of 2011.

FACTUAL MATRIX

2. The assessee – M/s. Indus Towers Limited is a Company incorporated under the Companies Act, 1956, having its registered office in New Delhi and engaged in providing

Passive Infrastructure and related operations and maintenance services to various telecommunication operators in India on a shared basis. The assessee is registered with the Department of Telecommunications (**DoT**) for providing Passive Infrastructure Services to mobile phone operators. The nature of services provided by the assessee was envisaged by Government of India initiative "**MOST**" (Mobile Operators Shared Towers). The 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.

3. 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. This concept was mooted and promoted by the Ministry of Telecommunications, Government of India, under the project nick-named as 'MOST', with an objective of reducing the number of towers and thus, optimizing the capital and

operational expenditure of the Mobile Service Providers. Under this project, the concept of possibility of multi-technology (GSM and CDMA) and multi-operators (up to six operators) sharing a single tower with a view to bring down cost and enhance spread of affordable services continued to be carried out successfully by the industry.

4. The assessee has been registered with DoT for providing such shared Passive Infrastructure Services to various telecommunication operators in India. For the said purpose, the assessee owns or acquires and possesses or will acquire or possess certain telecommunication sites, infrastructure and equipments in various licensed Circles in India. For providing the said services, the assessee has entered into identical Master Services Agreements with telecom operators such as Airtel, Tata Tele Services Limited, Vodafone, Reliance, BSNL, Loop, Uninor, Idea Cellular Limited etc. Under the agreements, the telecom service providers are charged by the assessee for the "Site Access Availability" i.e., for the access granted to them to the passive infrastructure, owned and

possessed by the assessee and for the related operation and maintenance services offered by the assessee 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 passive infrastructure is not just tower as erroneously understood in the notice, but, also other equipments such as DG sets, air conditioners, power management systems, batteries and other electrical works. The assessee 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 operators, while other equipments at the site like air conditioner, power grid connection, D.G. 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 assessee 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 assessee receives a consolidated service revenue from its customers.

5. 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 assessee vest solely with the assessee.

6. 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 Operators would remain with such operators' only.

7. Prior to placing the service order, the Sharing Operator should provide its requirements and technical specifications to the assessee for passive infrastructure. The assessee will, within the time frame as prescribed in the agreement, respond to such service requests with its comments, suggestions and its plans for meeting the requirements of the operators. The requirements may be met either through the existing sites of the assessee or by the creation of new sites. The Sharing Operator will subsequently deliver a Site Request indicating its site options in order of priority. The assessee upon receiving such Site Request sends the Site Proposal indicating an outline of its implementation plan along with service fees. Only upon receiving the Site Proposal, will the Sharing Operator issue a Service Order within the time frame as prescribed in the agreement, setting out the details of site required along with technical requirements for the installation and setting up of the Sharing

Operator's equipments. The assessee would confirm the order and further, in accordance with the terms of the agreement, issue a "Ready For Active Installation" (**RFAI**) Notice confirming the Site Access Availability to the Sharing Operator. Prior to confirming the site access availability, the assessee should ensure among other things that the Sharing Operator is able to move his equipments into the site for installation and that the site is capable of accommodating Sharing Operator's equipments in accordance with the standard configuration set out in the agreement. It is thereafter, that the assessee and the Sharing Operator will execute a Service Contract, which will include the terms as specified in the agreement. The said contract provides for Site Access Availability and Operation and Maintenance Services of the Site in relation to which the contract is executed. Site Access Availability means that the Sharing Operators are granted access on non-exclusive basis to the passive infrastructure owned, controlled and operated by the assessee and located at the site. Authorized employees/sub-contractors of the Sharing Operator shall have access to install the Sharing Operator's Equipments. The assessee will

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also provide for the Operation and Maintenance Services in relation to each site. All the infrastructure and equipments including passive infrastructure located at the site is controlled, managed and owned by the assessee. However, the Sharing Operator will be responsible for the operation and maintenance of their equipments, for which purpose, access will be provided to the authorized employees / sub-contractors of the Sharing Operator. The assessee retains the right to provide access to the site including any infrastructure to other telecom service providers, for any purpose at, its discretion. The Sharing Operators also retain the right to seek passive infrastructure services from other Passive Infrastructure Service Providers. The assessee is responsible for obtaining the necessary clearances / permissions / approvals from local / municipal authorities / departments. For undertaking the said infrastructure sharing activity, the assessee collects service fees. The fees shall be determined in accordance with the Master Service Agreement. The charges that are determined in the said agreement are in the nature of service charges. The Sharing Operators are charged by the assessee for the Site



Access Availability. The assessee is also assessed under the Finance Act, 1994 and is paying service tax.


8. The assessee was served with a notice under Section 39(1) of the Karnataka Value Added Tax, 2003, (hereinafter referred to as 'the **KVAT Act**'), wherein it was proposed to re-assess the tax liability for the period from April 2008 to May 2010. The said notice proposed to demand VAT amounting to Rs.119.82 Crores leviable on the consideration received as "passive infrastructure fee" from the telecom operators for the passive telecom infrastructure services provided to them during the assessment period from April 2008 to May 2010. The notice also sought to demand interest and penalty. This notice sought to categorize the activity of leasing the telecommunication towers to various mobile telephone operators, as a deemed sale within the meaning of Section 2(29)(d) of the KVAT Act, 2003. The assessee filed a reply contending that their activity does not involve any sale or any transfer of right to use and therefore, the same cannot be subjected to VAT. They also filed additional statement of



objections pointing out the errors in the computation of turnover for the relevant periods. Overruling their objection, the first respondent passed the re-assessment order and issued demand notice dated 11.03.2001 under Section 39(1) of the KVAT Act confirming the proposals made in the proposition notice. However, the respondents accepted the correction of calculation error. Aggrieved by the said order, the assessee preferred writ petition before this Court in W.P. No.11508/2011 and 12693-12727/2011 on the ground that the orders are bad in law and contrary to the provisions of the KVAT Act.

9. The State filed a statement of objections in the Writ Petition contending that the assessee is engaged in providing cellular telephone networking towers to the various telecom companies for their commercial use. This equipment is constructed and equipped by the assessee and the same is provided to different telecom companies on lease rentals for the specific periods as per the agreement entered into between the assessee with the telecom companies. By using the different

commodities set out in para 6 of the statement of objections, the assessee has constructed and assembled the equipments and has provided them on lease to the different telecom companies for their use on rental basis as per the agreement entered into between the assessee and the other telecom companies. Respondent has verified the agreement entered into between the parties. On verification of the agreement they noticed that the cellular operator shall maintain on all the active infrastructure equipment identification marks to show that the equipment is the property of the cellular operator. Under the terms and conditions in the lease agreement, it is evident that the infrastructure provider has given their right to use the equipment exclusively to the telecom company. No immovable property like land or building has been transferred or the right to use any immovable property has been transferred. The right to use the said equipment has been transferred exclusively to the telecom company. Therefore, the assessee is liable to pay the tax on the transfer of right to use goods and the levy cannot be found fault with. After referring to various other clauses it is stated that, the fuel charges are



paid by the cellular company and the equipments are maintained on behalf of cellular company and only the possession and effective control lies with the cellular operator. Any changes of security or any other factors have to be intimated in advance to the cellular operator and hence the effective control always with the cellular operator. When the cellular operator is having effective control and paying lease rentals to the assessee, the assessee is liable to pay the tax under the provisions of the Act. Therefore, the activities of the assessee and the turnover of lease rentals received is exigible to tax under the provisions of Section 4(1)(b) of the Act. They have not levied any tax on the service transaction as sale of goods. They have levied tax on the transfer of right to use goods. They have visited the assessee's premises and have verified the infrastructure in respect of the telecom towers. As per the enquiry conducted, the salient features of the construction of the towers is as follows: The assessee select sites for these infrastructure on the roof of the building and sometimes on the land itself as per the requirements of the infrastructure and also the availability of sites. These sites are

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hired from various private parties who own the land in question. The assessee under an agreement hire sites for specific period and for specific rents. The assessee fixes the cellular telephony networking towers on these hired sites. The terms and conditions of rentals will be agreed between the assessee and the site provider. Therefore, the assessee do not have their own sites. If any dispute arises between the assessee and the site owner, in such circumstances, the tower along with the equipments will be shifted to some other sites. As the investments for each tower requires more than 15 to 20 lakhs, the assessee will always have to construct these towers enabling the assessee to dismantle and to shift the same to some other places and re-fixed at the different sites. The copies of some of the photographs of the towers are produced. A perusal of the said photographs shows that the equipments provided along with the tower are D.G. sets, air conditioners, etc., which facilitated the telecom company to operate their telecom service activity. In all the circumstances, the assessee ensured that the equipments are equipped properly. From the photographs it is clear that these towers are provided bolts and



nuts and it can be easily moved to any other place. The temporary shelter where DG and other equipments are kept can also be moved to the required place. From the perusal of the photographs, it is also seen that all the cable wires are outside and not laid into the earth or not embedded to any civil structure and these cables are movable. From the above facts and narration of the transactions of the assessee and the activities carried on by the assessee, the telecom towers are movable property and the leasing of these towers by collecting rentals are deemed to be a sale exigible to tax under the provisions of the KVAT Act, 2003.

10. The learned single Judge, after clubbing all the writ petitions, which were pending before him, where identical issues were raised, passed the impugned order disposing of all the writ petitions. The reasoning of the learned single Judge in holding that the activity carried on by the assessee falls under Article 366 (29-A)(d) of the Constitution is as under:-



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

So far as imposition of penalty is concerned, of course penalty or interest thereof cannot be imposed as, in the usual course petitioner having

exercised his bonafides, having registered under the Service Tax, went on paying service tax. For the assessment years in question, the amount is paid by the petitioner to the 1st respondent and it is for the State to seek for recovery of the amount so paid by the petitioner to the 1st respondent in a separate proceedings based on the judgment rendered herein. Further, in future, it is for the petitioner to file returns/assessment under the provisions of S.3 and 4 (1b) of the VAT Act, 2003.

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

11. Aggrieved by the said order, we have three batches of writ appeals before us. The first batch of appeals is preferred by the assessee challenging the finding of the learned single Judge that the activity of providing access of the passive

infrastructure to the Sharing Operators constitute deemed sale. The second batch of appeals are by the revenue - State of Karnataka challenging the finding of the learned single Judge that they have to recover the Value Added Tax (VAT) due to them from the first respondent - Union of India. In addition to that, they are also challenging the order passed by the learned Single Judge who has set aside the interest and penalty levied. The Union of India has filed third batch of writ appeals where, if the order of the learned Single Judge is given effect to, they have to return the service tax collected from these assesseees under the provisions of the Finance Act, 1994.

RIVAL CONTENTIONS

12. The learned Senior Counsel Sri.Venkataraman appearing for these assesseees, assailing the impugned order contended that the assesseees are the owners 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 assessee under the agreement entered into between the assessee 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 assessee exclusively. No portion of the tower or any other infrastructure is handed over to the service providers either physically, notionally or symbolically. The assessee 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.

13. 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 assessee nor the

transaction entered into between the assesseees and the shared operators constitutes a deemed sale so as to fall within the 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 assessee 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 assessee 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

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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 assessee 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 assessee, 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 Single Judge without proper application of mind, has erroneously held that the transaction in question falls within the mischief of Article 366 (29A)(1)(d) of the Constitution of India.

14. Sri N. R. Bhaskar, learned Counsel appearing for Union of India contended, that the nature of activity carried on by the assessee and also the nature of transaction under the agreement is a case of simple service contract. The assesseees

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have rightly registered themselves as service providers under the Finance Act, 1994 and they have been paying the service tax. There is no element of sale involved. It is a pure case of extending service and therefore, the question of imposing VAT on the same aspect would not arise. The learned Single Judge has not properly appreciated this aspect and committed an error in holding that the nature of the activity amount to deemed sale and the State Government has to recover the VAT from the service providers paid by the assessee to Union of India. The said order is illegal and requires to be set aside.

15. Per contra, the learned Senior Counsel for the revenue Sri.Ashok Haranalli, Special Counsel engaged by the State of Karnataka contended that, the terms of the agreement as well as the specific case pleaded by the assessee before the Assessing Authority as well as in the writ petition, makes it clear that they have provided access to the passive infrastructure. In other words, the assessee are permitted to use the passive infrastructure. The terms of the agreement makes it very clear that this infrastructure is installed at the

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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's case. 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

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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. However, he contends that the learned Single Judge was not justified in issuing a direction to the State to collect the said tax from the Union of India. Similarly, the learned Single Judge was not justified in setting aside imposition of interest and penalty as no tax is paid under the Act at all. That portion of the order is illegal and requires to be set aside. He also contended, under the statute, a statutory appeal is provided to the Appellate Commissioner against the order passed by the Assessing Authority whose order can be challenged before the Karnataka Appellate Tribunal and therefore there is no justification for the assesseees to bypass a statutory remedy and approach this

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Court under Article 226 of the Constitution of India, as the appellants have an alternative and efficacious remedy of an appeal. Hence, these writ appeals are not maintainable.

POINT FOR CONSIDERATION

16. In the light of the aforesaid facts and the rival contentions, the point that arise for our consideration in these appeals is,

Whether activity carried on and the service provided by the assesseees to its customers constitute a deemed sale as defined under Article 366 (29A) (1)(d) of the Constitution of India and therefore liable to value added tax.

Let us see how the Assessing Officer has approached this question.

FINDING OF THE ASSESSING OFFICER

17. The Assessing Officer formulated the point for consideration as under:-

“Whether allowing the mobile operators to use telecom tower amounts to transfer of right to use the tower?”

18. The Assessing Officer referred to clause (29A) of Article 366 of the Constitution of India and then referred to the Judgment of the Apex Court in **20th Century Finance Corporation**'s case as well as **Modern Decorators** case and the judgment of the Andhra Pradesh High Court in the case of **Jasper Acqua Exports (Pvt.) Ltd.**, and held as under:

19. The above decisions of the Hon'ble High Courts and Supreme Court has clearly held that the physical delivery of the goods is not necessary for a transaction of “Transfer of Right to use” goods. What is relevant for Article 366(29A) (d) of the Constitution is, there must be transfer of legal right to use the goods during the period of contract. After the transfer of the legal right, whether the transferee uses the goods or not is immaterial. Even if the physical possession is retained by the transferer, the transaction comes within clause 29A(d) if the

transferee has the freedom and choice of selecting the manner, time and nature of use of the goods.

20. Working of the telecommunication network, involves the process of receiving, amplifying and transmitting the signals. The set of instruments dealing with the above process is termed as "Active Infrastructure" belonging to the mobile operators. For functioning of Active infrastructure maintenance of a particular temperature, humidity, safety and also positioning of the Radio/MW antennae at a particular height is required. These requirements are achieved by using the "passive infrastructure", i.e., Tower and other equipments.

21. How the mobile operator is permitted to use the passive infrastructure is described in Schedule-1 of M.S.A. in the present case. That means the mobile operators are permitted to mount their Radio/MW antennae at desired heights and direction coupled with the use of equipments providing other technical requirements. By using this passive infrastructure, the mobile operators communicate with the mobile signals. This right of use is acquired legally by means

of a contract called "Service Contract" read with M.S.A. Though the nomenclature of the contract is termed as "service contract", the reading of the terms of M.S.A. clearly indicates that there is a contract for "Transfer of Right to use passive infrastructure" which is "goods".

22. Neither under Article 366 (29A)(d) nor under Section.2 (29)(d) of KVAT Act, is there a clear prohibition for permitting multiple use of goods like mobile towers. What is important is that the legal right transferred to use the goods in favour of a person should not get affected during the period of contract by permitting another person for similar use. In case of Telecom Towers, two or more mobile operators can be permitted to use, by clearly demarcating the space in the towers without affecting each other rights. Here as per the requirement of mobile operator, a fixed space on the tower at a particular height/direction is allotted along with other infrastructure. By means of a contract, Indus (Transferer) transfers the right to use passive infrastructure in favour of

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(transferee) mobile operator, by which the transferee gets the legal right to access/use the passive infrastructure.

23. It is the argument of the assessee that since he is maintaining the passive infrastructure, the effective control is retained by him. This is not correct, because as per the terms of the agreement (M.S.A.) it is the duty of Indus to maintain 24 hours/7 days/365 days required temperature, humidity, power etc., for allowing use of telecom tower. Only with these requirements mobile operators have sought right to use towers. Accordingly they have been permitted through a contract. It is mobile operators who have the freedom to select the type of tower, height/direction in the tower, temperature, humidity, 24 hour power and so on. Indus cannot decide on behalf of anyone once contract is executed. Therefore, there is effective control exercised by the mobile operators not by Indus.

24. In the decision of BSNL case, the Hon'ble Supreme Court has prescribed certain attributes for a transaction to constitute a "Transfer of Right to use goods".

- (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 therefore should be available to the transferee.
- (d) for the period during which the transferee has such legal right, it has to be 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 license 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 right to others.

25. The goods i.e., passive infrastructure are identifiable and available for delivery. The assessee has



entered in to contract with the mobile operators authorizing them with a legal right to use the passive infrastructure subject to the conditions of Master Service Agreement. Hence, first three conditions are satisfied.

26. It is the submission of the assessee that last two conditions are not satisfied in the present case. Since the assessee is authorizing the use of same 'passive infrastructure' to multiple operators (up to 4 operators) he argues that the condition of 'non-executive' clause is not met. For the same reason, the condition of prohibition of owner transferring the same right to others is also not satisfied.

27. The examination of terms and condition of the MSA relating to providing access to the passive infrastructure or execution of "service contract" reveals that to start with, sharing operator indents requirement of access to the tower through "forecast". In response to the above request, Indus gives suggestions, comments and its plans for meeting the operator's requirement either with the existing sites or a new



site. Then the operator sends a "site request" for which Indus will issue "site proposal indicating its place to implement site request along with applicable charges either at an existing site or creation of new site. If the 'site proposal' is acceptable to the sharing operator, he will issue a "service Order" in the prescribed form setting out the details of site required along with the technical requirement for installation of sharing operators equipment. Then, Indus would confirm the order by issuing "Ready for Installation Notice". After receipt of the above notice; the sharing operator will inspect and approve the site if it is acceptable for all his technical requirements. After approval of the site as above, the sharing operator and Indus execute a "contract" called "Service Contract" which provides the sharing operator right to use/access the passive infrastructure owned/acquired by Indus along with the terms and condition of operation and maintenance of the site.

28. The above facts clearly indicates that the mobile operator has the freedom and choice of selecting the manner time and nature of use and enjoyment of the passive

infrastructure starting from the time of entering into the contract, of course subject to the terms and conditions of MSA. The customer has also the freedom to increase the power of access by increasing the number of antennae, weight on the tower, power consumption etc., over and above the standard configuration specified in clause-1 of Schedule-1 subject to the payment of extra charges specified in clauses 3,4,5,6,7,8 and 9 of Schedule-3. He also has the freedom to use any type of passive infrastructure located at various types of sites such as premium sites, strategic sites, in-building solutions, Pico and micro sites, Built to suit sites subject to payment of extra charges specified in 2.1, 2.2 and 2.3 of Schedule-3. Once a mobile operator is permitted to use passive infrastructure as per his requirement with regard to allotment of a space in the tower at a particular height, direction or other equipments, Indus does not have freedom to allot the same height, direction or other equipments to any other new operator in the same tower. The new operator has to select some other height or direction on the same tower or select another site. Suppose if the capacity of the existing equipment is just sufficient to the

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requirement of one operator Indus cannot entertain new operator unless existing equipments/infrastructure is upgraded. In case for any reason, Indus ceases to operate any site, then such site has to be transferred to the customers for operation. In case of multiple customers operation has to be given in the chronological order of their contracts as per Clause 3 of Schedule 6.

29. This clearly establishes that the customer has the effective control over the manner time and nature of use of the passive infrastructure by the virtue of his "right to use" acquired through the contract subject to the conditions of M.S.A.

30. On the other hand, Indus does not have the effective control over the manner, time and nature of use of a specified access to passive infrastructure allotted to a particular operator. Once contract is executed with specified access to the passive infrastructure, Indus is not free to either self use or to allot the same to any other operator. However,

only on termination of the contract, Indus re-acquires the allotted access and is free to allot the same to any other operator if it is suitable for him. Though Indus can allot use of passive infrastructure to more than one operator, he is not free to change specified allotted use to a particular mobile operator. Hence, it is not true that Indus has got right to transfer the specified use of the passive infrastructure to more than one operator, though he may allow sharing of entire passive infrastructure by two or more operators at a particular site. For the same reason specified use or access granted to an operator cannot be treated as on "non-exclusive basis".

Conclusions:

31. In other words clauses (d) and (e) are satisfied in the present facts and circumstances of the case. Thus there is a transfer of right to use specified passive infrastructure from Indus to the mobile operator, which comes within the ambit of Article 366(29-A)(d) of the constitution of India. There is a possession and effective control of the specified access of the passive infrastructure by the transferee i.e., mobile operators

who are also entitled to take physical delivery of the entire infrastructure for operation when Indus ceases to operate as per clause 3 of Schedule.6. That to say that physical delivery of the passive infrastructure is not transferred anytime from Indus to the mobile operator is factually incorrect. In other words, during the period of contract the transferee shall have exclusive right to use the allotted access even if Indus ceases to operate. Hence the transfer of right to use passive infrastructure from Indus to mobile operator is a 'sale' as defined under Section 2(29)(d) of KVAT Act and the consideration received by Indus for allowing the use of passive infrastructure forms part of sale consideration liable for VAT."

Underlining by us

It is the correctness of these findings, which is affirmed by the learned single Judge is challenged before us.

32. Article 366(29A)(d) of the Constitution reads as under: ✓

“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;”

33. This provision was introduced by the 46th Constitutional Amendment. The objects and reasons appended to the Constitutional (Forty-sixth Amendment) Bill, 1981 insofar as this provision is concerned gives an insight into the reasons for enacting the provision.

“Device by way of lease of films has also been resulting in avoidance of Sales Tax. The main right in regard to a film relates to its exploitation and after exploitation for a certain period of time, in most cases, the film ceases to have any value. It is, therefore, seen that instead of resorting to the outright sale of a film, only a leased or transfer the right to exploitation is made.”


34. The cause for such amendment is the judgment rendered by the Madras High Court in the case of A.V.MEIYAPPAN vs COMMISSIONER OF COMMERCIAL

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TAXES, BOARD OF REVENUE, MADRAS AND ANOTHER
((1967) 020 STC 0115), it was held as under:

"The question that we have to examine is whether the grant of the lease for exploiting the film by distribution for purposes of exhibition to the public amounts, in what are claimed to be special circumstances of the case by the department, to a sale of goods. Before advertng to these special circumstances relied upon by the department, we may turn to the terms of the agreement. What purports to be granted by way of lease are "the entire world negative rights" of the film and those rights are defined in the relevant clause 4(d) of the contract in this manner"

"In buttressing this argument that what is really contemplated is not a lease of a right to exploit but an outright sale of the copyright in the production regarded as incorporeal movable property, reliance is placed by the department upon its assertion that what may be called the marketable value of the film becomes nil at the end of three years. In the counter-affidavit, it is said



that " the value of a film is completely wiped out by exhibition in the course of ten years or so"

The impugned order says that the normal life of a film is less than three years. If the film as an exploitable commodity has no value beyond a period of three years, the apparent tenor of the transaction as a lease to exploit the right of the owner of the copyright is in substance only an outright sale of all such rights of the owner-so it is argued. In support of this argument, reliance is placed upon the fact that under the income-tax law, depreciation of the value of the film as an income-earning asset is allowed over a period of three years only and thereafter the income-tax department treats the book value of the asset as having been completely exhausted by such depreciation. It seems to us that the procedure adopted by the income-tax department for a particular purpose cannot give any clue to the real nature of the transaction between the lessor and the lessee. On the other side, it is equally emphatically urged that where a statute recognises a right in the owner of a copyright to ensure for as long a period as fifty years and in fact provides for the protection of such a right, it would be illogical to

claim that the value of the property becomes nil at the end of a much lesser period. Virtually, this argument of the department would equate the right of the owner of the copyright to the actual material that is produced by him. What is contemplated by the arrangement between the parties is only the supply of certain material to the lessee in order to serve the exploitation of the right of the owner in the copyright of the film. If the argument of the department is accepted, any lease transaction such as mere hire even for as short a period, as say five years, must be regarded as a sale, solely for the reason that period is in excess of the period of three years, which the department alleges is the normal life of a film. It is also easy to see that the mere sale of a film regarded as material to another person by the owner of the copyright would count for nothing at all unless there is the conferment of a right to exploit the film. In a transaction of this kind, it is this latter right which is more valuable and the supply of the film is ancillary to the exercise of that right. We are therefore unwilling to accept this argument based upon income-tax procedure as leading to any positive conclusion. It seems to us therefore that even if copyright is regarded as a species of movable property, the



transactions in question do not connote sales at all."

35. This constitutional provision has been the subject matter of interpretation by various Courts. Firstly, Andhra Pradesh High Court in the case of RASHTRIYA ISPAT NIGAM LTD vs COMMERCIAL TAX OFFICER, COMPANY CIRCLE, VISAKHAPATNAM ((1990) 077 STC 0182) dealing with the taxable event under the provisions of the Andhra Pradesh General Sales Tax Act (6 of 1957) held as under:

"The taxable event under section 5-E is the transfer of the right to use any goods. What does this phrase connote? This means that unless there is a transfer of the right to use the goods, no occasion for levying tax arises; providing a facility which involves the use of goods nor even a right to use the goods is not enough, there must be a transfer of that right.

"The Transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee, and loss of it by the transferor.

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The vestitive fact, if considered with reference to the transferee is a derivative title, while from the point of view of the transferor it is an alienative fact."


(Salmond on Jurisprudence – Twelfth Edition at pages 332 and 333.)

In Corpus Juris Secundum "transfer" is defined:

"The common use of the word 'transfer' is to denote the passing of title in property, or an interest therein, from one person to another, and in this sense the term means that the owner of property delivers it to another person with the intent of passing the rights which he had in it to the latter."

(Corpus Juris Secundum, Vol. 87, page 892.)

The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word "transfer" due regard must be



had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this difference.

Whether there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be a transfer of the right to use".

36. The Apex Court in appeal against the said judgment in STATE OF ANDHRA PRADESH vs RASHTRIYA ISPAT NIGAM LTD. ((2002) 126 STC 114) upholding that view held as under:

“3.The respondent is owning Visakhapatnam Steel Project. For the purpose of steel project, it allotted different works to contractors. The respondent undertook to supply sophisticate machinery to the contractors for the purpose of being used in execution of the contracted works and received charges for the same. The appellant Here italicised. Made provisional assessment levying tax on hire charges under section 5-E of the Act. The respondent filed writ petition seeking declaration that the tax levied, exercising power under section 5-E of the Act on the hire charge collected during the period 1988-89, was illegal and unconstitutional. The appellant filed a counter-affidavit in the writ petition contending that the respondent was lending highly sophisticated and valuable imported machinery to the contractors engaged in the execution of the project work on specified

hire charges; the machinery was given in the possession of the contractor and he was responsible for any loss or damage to it and in view of the terms and conditions contained in the agreement, there was transfer of property in goods for use and on the amounts collected by the respondent as charges for lending machinery attracted tax liability under section 5-E of the Act.

4. The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contracts were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to clauses 1,5, 7,13 and 14, it becomes clear that the transaction did not involve transfer of


right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery".

37. Reliance is placed by the Revenue on the Constitution Bench judgment of the Apex Court in **20TH CENTURY FINANCE CORPORATION LTD & ANOTHER vs STATE OF MAHARASHTRA ((2000) 119 STC 0182)** wherein, determining the situs of sale, the Supreme Court has laid down the criteria as under:

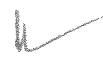
"21. It may be noted that the transactions contemplated under sub-clauses (a) to (f) of clause



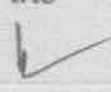

(29A) of article 366 are not actual sales within the meaning of "sale" but are deemed sales by legal fiction created therein. The situs of sale can only be fixed either by the appropriate Legislature or by judge made law, and there is no settled principles for determining the situs of sale. There are conflicting views on this question. One of the principles providing situs of sale was engrafted in Explanation to clause (1)(c) 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. "The next question that arises for consideration is, where is the taxable of the right to use any goods. Article 366 (29A) (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(29A) (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.

38. The Apex Court in the case of STATE OF U.P. VS. UNION OF INDIA ((2003)3 SCC 239 applying the said law in the case of providing telephone service by DoT, installation of

instrument/apparatus and appliances to subscribers held as under:

“26. It was then urged that in providing telephone service by DoT, installation of instrument/apparatus and appliances is insignificant and in many cases subscribers themselves have their own instruments; the more important part is access to the area exchange and the whole system connected thereto without which the installation is of no consequence and the same remains under the possession and full control of DoT so there was no transfer of the right to use any goods so as to attract liability under the U.P Act. We are not persuaded to accept this submission. It is true that under the Rules, referred to above, as service, a number is allotted, an instrument/apparatus and other appliances are installed at the premises of a subscriber and the same are connected with the area exchange to enable him to have access to the whole system, to dial and to receive calls. In our view, it makes no difference whether any subscriber replaces instruments of DoT with his own instrument because the most important thing is the connection of the subscriber's telephone number with the area

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exchange and that was provided by DoT. Insofar as the contention of giving possession or control of the whole system of exchange is concerned, which is said to comprise mostly of immovable property, it needs to be borne in mind that handing over of the possession is not since qua non of completing the transfer of the right to use any goods. It was so held by a constitution Bench of this Court in 20th Century Finance Corpn. Ltd. v. State of Maharashtra. A "transfer of the right to use any goods" will be complete according to the law laid down by the majority in that case, on completion of the contract to transfer of the right to use the goods. The contention that the area telephone exchanges and other systems would remain under the control of DoT, is irrelevant to complete such a transfer. Even otherwise, after installation of the instrument and other appliances, once DoT connects the telephone line of the assigned number of the subscriber to the area exchange, access to other telephones is established. There cannot be denial of the fact that giving such an access would complete the transfer of the right to use the goods. However, reliance is placed on the decision of the High Court of Andhra Pradesh in Rashtriya Ispat Nigam Ltd. v. CTO which was affirmed by this

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Court in State of A.P v. Rashtriya Ispat Nigam Ltd. It is unnecessary to deal with these cases in any detail; suffice it to say, in that case there was a finding of fact that the transaction did not involve transfer of the right to use the machinery in favour of contractors and that determined the issue.

27. It may be mentioned that during the relevant period (1988) no service tax was enforced. It was in 1994 that service tax was levied for the first time as per Chapter V of the Finance Act, 1994. Section 66 thereof created charge of service tax in regard to taxable services. "Service tax" is defined in clause (34) of Section 65 to mean tax chargeable under the provisions of that chapter. "Taxable service" is defined [under sub-clause (b) of clause (41) of Section 65] to mean any service provided to, inter alia, a subscriber by the telegraph authority in relation to a telephone connection. No provision of the U.P Act or the said Finance Act, 1994 or the Constitution of India is brought to our notice to hold that rentals collected by DoT from the subscriber cannot be subjected to tax as is done under the U.P. Act. Merely because service taxes imposed by Parliament under the said Finance Act in respect of telephone connection to a

subscriber, is no ground to hold that the state cannot levy tax under the U.P. Act.

28. For the aforementioned reasons, we hold that providing telephone service by DoT which comprises allotment of number installation of an instrument/apparatus and other appliances at the premises of a subscriber, which are connected with a telephone line to the area exchange to enable him to have access to the whole system, to dial and to receive calls, in effect falls within the meaning of the extended definition of "sale" viz. Within the meaning of "the transfer of the right to use any goods" and the fact that it is described as service under the ITA, 1885 and the Rules made thereunder or under the Finance Act, 1994 would not militate against the same being a "sale" within the meaning of the U.P. Act.

39. As this view was not in conformity with the judgment rendered by the Constitution Bench, yet another co-ordinate Bench of the Apex Court, seeking to disagree with the aforesaid view rendered by the co-ordinate Bench, sought for referring the said question to a larger Bench. Accordingly the

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said question was referred to a larger Bench consisting of Three Judges in the case of BHARAT SANCHAR NIGAM LTD & ANOTHER vs UNION OF INDIA & OTHERS ((2006)3 SCC 1). In the said case, after referring to the aforesaid points in controversy, the Supreme Court held that the said view is not correct and laid down as under:

“72. In State of U.P. v. Union of India it was also held: (SCC p.258, para 26)

Handing over of possession is not sine qua non of completing the transfer of the right to use any goods, as was held by a Constitution Bench of this Court in 20th Century Finance Corpn. Ltd. v. State of Maharashtra. Once DoT connects the telephone line of the assigned number of the subscriber to the area exchange, access to other telephones is established. There cannot be denial of the fact that giving such an access would complete the transfer of the right to use the goods.

73. With respect, the decision in 20th Century Finance Corpn. Ltd. v. State of Maharashtra cannot be cited as authority for the

proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purposes of Article 366 (29-A)(d) of the Constitution. In that decision the Court had to determine where the taxable event for the purposes of sales tax took place in the context of sub-clause (d) of Article 366 (29-A). Some States had levied tax on the transfer of the right to use goods on the location of goods at the time of their use irrespective of the place where the agreement for such transfer of right to use such goods was made. Other States levied tax upon delivery of the goods in the State pursuant to agreements of transfer while some other States levied tax on deemed sales on the premise that the agreement for transfer of the right to use had been executed within that State (vide para 2 of the judgment as reported). This Court upheld the third view, namely, merely that the transfer of the right to use took place where the agreements were executed. In these circumstances the Court said that: (SCC p. 42, para 28)

"28. No authority of this Court has been shown on behalf of the 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.”

74. In determining the situs of the transfer of the right to use the goods, the Court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasised portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the

goods takes place. The Court also recognised that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment).

75. In our opinion, the essence of the right under Article 366 (29-A) (d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.

76. In *State of A.P v. Rashtriya Ispat Nigam Ltd.* it was claimed by the Sales Tax Authorities that the transaction by which the owner of certain machinery had made them available to the contractors was a sale. The Court rejected the submission saying that: (SCC p. 315, para 4)



“The transaction did not involve transfer of right to use the machinery in favour of contractors. ... the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent Company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or....”

77. *But in Aggarwal Bros. v. State of Haryana when the assessee had hired shuttering in favour of contractors to use it in the course of construction of buildings it was found that possession of the shuttering materials was transferred by the assessee to the customers for their use and therefore, there was a deemed sale within the meaning of sub-clause (d) of clause (29-A) of Article 366. What is noteworthy is that in both the cases there were goods in existence which were delivered to the contractors for their use. In one case there was no intention to transfer the right to use while in the other there was.*

78. *But if there are no deliverable goods in existence as in this case, there is no transfer of*

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user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.

79. Therefore whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable. To the extent that the decision is *State of U.P. v. Union of India* held otherwise, it was, in our humble opinion erroneous.

96. The entire infrastructure/ instruments /appliances and exchange are in the physical control and possession of the petitioner at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatuses.

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 license 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.

40. The Apex Court in the case of **AGARWAL BROTHERS VS. STATE OF HARYANA & ANOTHER** **REPORTED IN 1999 (9) SCC 182**, has held as under:-

In the aforesaid case, "the assessee's were hire shuttering to builders and contractors who use it in the course of construction of buildings. It is on the hire charges, sales tax was levied. Challenging the said imposition of tax, writ petition was filed before the Punjab and Haryana High Court. The argument was that the said imposition was unconstitutional. The High Court found as a matter of fact, the possession of the shuttering material was transferred by the assessee to their customers for use during the construction of buildings. The customers were in effective control of the shuttering during the periods it remained in their possession. Therefore, it held, the transactions fell within the amended definition of the word 'sale' as there was a transfer of the right to use the shuttering.

Challenging the said finding before the Apex Court, it was contended having regard to the Entry 54 of Part II of Schedule VII, the transfer contemplated by Sub-clause (d) of clause (29-A) of Article 366 is a legal transfer of the right in the goods. It has to be a transfer of goods. It has to be permanent. It has to be something like a lease. The giving of goods on hire is not such a transfer and, therefore, falls outside the ambit of sub-clause (d) of clause (29-A) of Article 366."

In the case of **DHAMPUR SUGAR MILLS LTD., VS. COMMISSIONER OF TRADE TAX, U.P. REPORTED IN (2006) 5 SCC 624**, the Apex Court held as under:-

"In the said case, a deed of licence was executed by the Company in favour of the assessee. Thereafter, the assessee executed a performance guarantee to ensure performance of the said deed of licence dated 3.9.1987. In terms of the said agreement dated 3.9.1987, a performance guarantee was executed by the appellant herein, wherein it was agreed to by and between the parties that a major part of the licence fee would be paid in the shape of molasses. The contention of the appellant all along was and still is that it is in lieu

of the consideration for the right to use the said sugar mill i.e., the licence fee. The appellant was required to hand over molasses to the said company for an amount equivalent to the licence fee and such a transaction would not constitute a sale of molasses so as to attract the provisions of the Act.

In the said case, as a matter of fact, it was found that the assessee carried on the business of manufacture of sugar and molasses. It does not use the molasses itself. The stock of molasses has not been transferred by the assessee. The stock of molasses, indisputably, used to be transferred to the Company. The Company was the owner of the mill. The premises of the mill had been taken on lease, although, termed as a licence for a period of 10 years. By reason of the purported deed of licence, the assessee has been allowed exclusive use of the sugar mill along with its plant, machinery, fixtures and fittings, etc. the assessee had taken over the whole sugar mill. The Company has not retained any control over the operation of the said mill. In terms of the said deed, the assessee was to pay a sum of Rs.56 lakhs per annum by way of licence fee for the use of the entire sugar mill complex. By reason of the provisions of

the said licence, the ultimate control over the affairs of the sugar mill vested with the assessee. Clause 11 provides that the licensee was granted full liberty to repair/replace the plant and machinery, if necessary, for the proper running of the sugar mill and to carry out the civil construction work, wherever considered necessary. In terms of Clause 18 of the purported deed of licence, the licensee was required to execute a performance guarantee in favour of the owner to ensure performance on its part and the Company was required to assure the appellant that it would not in any manner put any hindrance to the running of the mill during the period of the licence and the Company would also ensure that none of its creditors as on date including its bankers, take any steps to hinder the working of the mill."

In the background of these facts, the Apex Court held as under:-

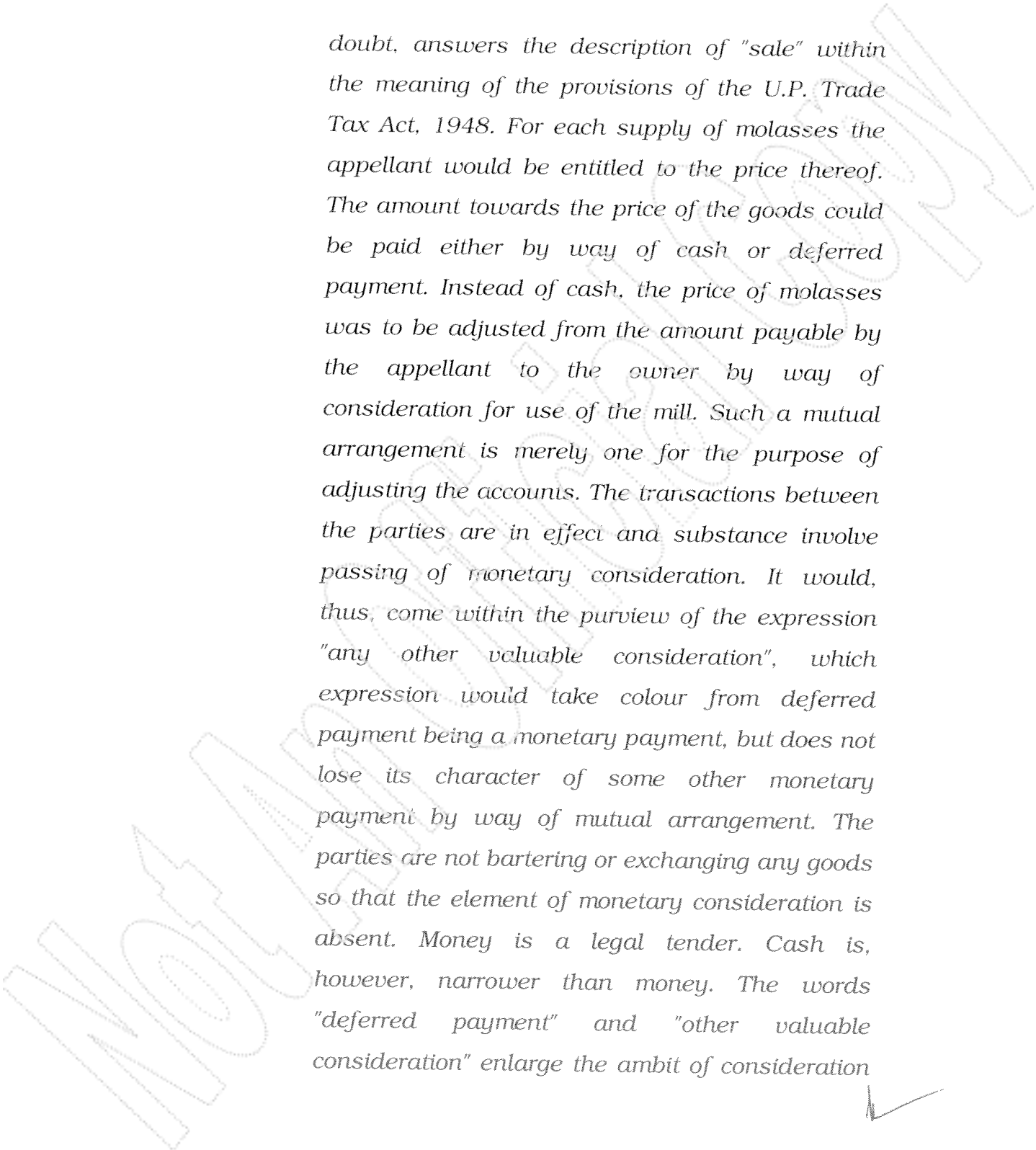
"A transfer of the right to use any goods for any purpose either for cash or deferred payment or other valuable consideration, would come within the purview of definition of sale. By reason of Clause 29-A of Article 366, the ratio in Gannon Dunkerley & Co. has been overcome, as

title to the goods, although, may remain with the transferee, a transfer of right to use the goods would also be a sale. Even a lease of goods would be a sale. Thus, by reason of the said definition, though an essential ingredient of a sale as defined in the Sale of Goods Act, 1930, may be absent, the transaction may amount to a sale for the purpose of levy of sales tax under the Act. What has not been altered by reason of the said provision is the meaning of the word "goods". In this case, the concept of goods is not in dispute. Molasses is indisputably goods. It can be transferred for a definite price.

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Molasses manufactured in the sugar mills, was the property of the appellant and it answers the description of "goods". In view of the terms and conditions of the deed of licence, the appellant was the owner thereof. The Company was to use the molasses for the purpose of manufacture of sugar in its factory. Transfer of such molasses by the appellant to the Company, would not be a transfer by way of transfer of stock. It is transfer of the ownership in goods wherefor the Company was to pay the price to the appellant. The transaction, therefore, beyond any

doubt, answers the description of "sale" within the meaning of the provisions of the U.P. Trade Tax Act, 1948. For each supply of molasses the appellant would be entitled to the price thereof. The amount towards the price of the goods could be paid either by way of cash or deferred payment. Instead of cash, the price of molasses was to be adjusted from the amount payable by the appellant to the owner by way of consideration for use of the mill. Such a mutual arrangement is merely one for the purpose of adjusting the accounts. The transactions between the parties are in effect and substance involve passing of monetary consideration. It would, thus, come within the purview of the expression "any other valuable consideration", which expression would take colour from deferred payment being a monetary payment, but does not lose its character of some other monetary payment by way of mutual arrangement. The parties are not bartering or exchanging any goods so that the element of monetary consideration is absent. Money is a legal tender. Cash is, however, narrower than money. The words "deferred payment" and "other valuable consideration" enlarge the ambit of consideration



beyond cash only. Entry 54 of List II of the Seventh Schedule to the Constitution of India provides for "sale of goods". Once a sale of goods takes place, the State becomes entitled to impose tax on sale or purchase of goods. For construction of the words "sale of goods", now the Court is not necessarily required to fall upon the definition of sale of goods, as contained in the Sale of Goods Act, 1930. It has to be governed by its enlarged definition under Clause (29-A) to Article 366 of the Constitution of India. Once an essential component of sale takes place, Sales tax would, indisputably, be payable. By reason of such an arrangement by the parties, the State is not creating a new taxable event nor imposing a new tax which was unknown in law."

In the case of **STATE OF ORISSA AND ANOTHER VS. ASIATIC GASES LTD.**, reported in (2007) 5 SCC 766, wherein the Apex Court held at para 6 as under:-

"6. Secondly, it is not in dispute that under the contract in the present case it was open to the customer to buy the gas cylinder or to borrow it on loan from the assessee. For the first 14 days the

loan was free from payment of any charges. However, thereafter a fixed amount was levied by the assessee as a charge for overretention. According to the impugned judgment the said charge for overretention was in the nature of penalty imposed on the customer in order to dissuade the customer from retaining the cylinders. The assessee required empty cylinders to be returned so that the said cylinders could be refilled and sold/transferred by way of loan. In our view when the said goods (cylinder containing medical oxygen) were given on loan to the customer the transfer of the right to use the said goods came into existence. It may be that for the first 14 days the said loan is free from payment of any charges. However, exemption from payment would not militate against the concept of transfer of the right to use the goods."

Again, the Apex Court in the case of **ASSOCIATION OF LEASING AND FINANCIAL SERVICE COMPANIES VS. UNION OF INDIA AND OTHERS** reported in (2011) 2 SCC 352, at paras 35, 51 and 54 it held as under:

"35: According to Chitty on Contract, a hire-purchase agreement is a vehicle of instalment credit. It is an agreement under which an owner lets

chattels out on hire and further agrees that the hirer may either return the goods and terminate the hiring or elect to purchase the goods when the payments for hire have reached a sum equal to the amount of the purchase price stated in the agreement or upon payment of a stated sum. The essence of the transaction is bailment of goods by the owner to the hirer and the agreement by which the hirer has the option to return the goods at some time or the other [See paras 36.242, 36.243]. Further, in the bailment termed "hire" the bailee receives both possession of the chattel and the right to use it in return for remuneration to be paid to the bailor [See para 32.045]. Further, under the head 23 "equipment leasing", it is explained that it is a form of long-term financing. In a finance lease, it is the lessee who selects the equipment to be supplied by the dealer or the manufacturer, but the lessor [finance company] provides the funds, acquires the title to the equipment and allows the lessee to use it for its expected life. During the period of the lease the risk and rewards of ownership are transferred to the lessee who bears the risks of loss, destruction and depreciation or malfunctioning. The bailment which underlies finance leasing is only a device to provide the finance company with a security interest (its

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reversionary right). If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realisable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the return of the capital) (para 32.057). In the case of hire-purchase agreement the periodical payments made by the hirer is made up of:

- (a) consideration for hire
- (b) payment on account of purchase.

51. Thus, reliance placed by the appellant(s) on the expression "splitting up" in K.L.Johar case is misconceived because the "splitting up" referred to in K.L.Johar case was, as stated above, in regard to valuation and not in regard to legislative competence.

54. There are different types of financial leases, namely, a tax-based financial lease, a leverage lease and an operating lease. In the present case, there is no adjudication of the matter. The appellant(s) approached the High Court directly without proper adjudication by the competent authority under the Finance Act, 1994. Even in the matter of allocation between the principal and

finance/interest charges, adjudication under the Act was warranted which has not been done. One must also bear in mind that Article 366(29-A) is essentially sales tax specific. It was brought in to expand the tax base which stood narrowed down because of certain judgments of this Court. That is the reason for bringing in the concept of "deemed sale" under which tax could be imposed on mere "delivery" on hire purchase [see clause (c)] which expression is also there in the second limb of the said article."

From the aforesaid judgments, it is clear that law on the point is fairly well settled.

41. Once access is provided, transferee uses the infrastructure. However, while using such infrastructure, there is no transfer of any interest in the infrastructure in favour of the transferee. The infrastructure continues to be in possession of the transferor. What is used by the transferee is the service which is provided by the transferor. The transferee never gets the possession of the infrastructure. Getting access to infrastructure does not tantamount putting the transferee in

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possession of the infrastructure. Except having access to the facility which the service provider is providing by virtue of possessing such infrastructure, no such right either in the infrastructure or in the other property of the transferor is transferred to the transferee. Providing access does not amount to right to use goods. Providing a facility involves the use of goods. A right to use the goods is not enough. There must be a transfer of that right. The transfer of right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. 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, transfer 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. Unless there is a transfer of right to use the goods, no occasion for levying tax arises. Thus the delivery

of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods.

42. The essence of right to use under Article 366 (29A)(d) is, that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use the goods, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods would not arise. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction from a sale of goods is that the user would be in possession of the things or

goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred. Whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable.

43. In the case of lease, there is a transfer of interest. Though no absolute interest is transferred, partial interest in the property is transferred and therefore by virtue of the contract, the transferee gets right to use the property. It presupposes that there is transfer of such right to use.

44. As pointed out by the Apex Court in *RASHTRIYA ISPAT NIGAM LTD.*, case, whether there is a transfer of right to use or not, is the question of fact, which has to be determined in each case having regard to the terms of the contract under which there is said to be a transfer of the right to use goods.. Therefore, the question whether there is transfer of right to use cannot be decided in vaccum. It has to be decided in the light

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of the terms of the contract, intention of the parties and their attendant circumstances.

45. In this background it is necessary to look into the terms of the contract entered into between the parties, which is not in dispute.

46. On record we have several contracts. Though most of the terms are common, there are some variations. Therefore, it is necessary to look into the terms of the contract to understand the nature of the activity the assessee is carrying on and what is the subject matter of these agreements.

TERMS OF THE CONTRACT

47. First of the contracts dated 07.03.2008 is entered into between M/s. Indus Infratel Limited and Bharti Airtel Limited. Clause (1) of the said agreement defines and interprets various phrases used in the said contract. The relevant definitions which is to be noticed are:

- (1) *“Active Infrastructure” includes base terminal station equipment, associated*

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antennas, backhaul 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.

(2) "Good Industry Practice" means the exercise of that degree of skill, care, diligence, prudence, foresight and judgment which would reasonably be expected from a skilled and experienced operator engaged in the provision of services similar to the passive infrastructure services to be provided by Indus;

(3) "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 tower, shelter, diesel generator sets, air conditioners and electrical and civil works;

Clause (2): Site Access

2.1) Provision of Passive Infrastructure



- 2.1.1 *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 *Indus 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 Indus in respect of any Site(s) mean that the available Passive Infrastructure at such Site(s) are over-*

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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.

2.1.5 *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 6 (Standard Site Access Terms). Each Service Contract shall be duly stamped and the applicable stamp duty shall be at the Sharing Operator's expenses.*

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*

Indus shall provide to the Sharing Operator the necessary means of success for the purpose of Ingress and egress from each such Site in accordance with the terms of the Service Contract. Provided, however, that only authorised employees of the Sharing Operator or its properly authorised 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 Indus, shall vest with Indus and all such enhancements thereto shall be at the sole cost and expenses of Indus. Enhancements in this context means the augmentation in capacity carried out by Indus to achieve increased sharing.

Clause 3 – Operation and Maintenance Services:

3.1 Provision of Operation and Maintenance Services:

3.1.1 Indus shall provide Operation and Maintenance Services in relation to each

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Site and the Indus Infrastructure at each site in accordance with the terms set out in Schedule 2 (Operators and Maintenance Services)

3.1.2 *The Sharing Operator shall be responsible for the operation and maintenance of all Sharing Operator Equipment. In order to conduct such operation and maintenance activities, the Sharing Operator shall have the right to replace, repair, add or otherwise modify the Sharing Operator Equipment or any portion thereof and the frequencies over which such Sharing Operator Equipment operates . The Sharing Operator shall be provided access to the Sites in accordance with paragraph 2.9 of Schedule 2 (Operation and Maintenance Services) unless otherwise specified in the relevant Service Contract, for the purpose of carrying out such operation and maintenance activities and Indus shall provide to the Sharing Operator the necessary means of access for the*

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purpose of ingress and egress from each Site. Provided, however, that only authorised employees of the Sharing Operator or its properly authorised sub-contractors shall be allowed such access to the Sites.

3.2 Standard of Operation and Maintenance Services:

3.2.1 Indus shall ensure that the Operation and Maintenance Services are provided:

(i) in accordance with Good Industry Practice;

*(ii) in compliance with all Laws;
and*

(iii) by an adequate number of suitably qualified, skilled and experienced Personnel.

3.2.2 Indus shall ensure that the Operation and Maintenance Services meet or exceed the Operation and Maintenance Service Levels specified in Schedule 2 (Operation and Maintenance Services).

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3.2.3 *Indus shall ensure that it puts in place processes and procedures to monitor its performance against the Operation and Maintenance Service Levels and shall report such information to the Sharing Operator on a monthly basis.*

3.3 *Operation and Maintenance Service Levels*

3.3.1 *If Indus fails to provide the Operation and Maintenance Services in accordance with the Operation and Maintenance Service Levels then Operation and Maintenance Service Credits shall become payable in accordance with Schedule 2 (Operation and Maintenance Services). The Sharing Operator may, on a quarterly basis and with a notice of 30 days, deduct any such Operation and Maintenance Service Credits from the next invoice due under this Agreement or, if no further invoices are due, may recover the Operation and Maintenance Service Credits as a debt from Indus due and payable within 30 days of demand.*

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3.3.2 The Parties agree that the Operation and Maintenance Service Credits are an estimate of the adjustment to the Charges to reflect the value of services and are not a penalty, and are, at the amounts stated in this Agreement, reasonable.

3.4 Service Failures

If Indus fails to perform the Operation and Maintenance Services in accordance with this Agreement, then, without prejudice to any other rights or remedies it may have under this agreement or otherwise, the Sharing Operator may require Indus by notice in writing to carry out an investigation into the causes of such failure. Indus shall carry out such an investigation at its own cost and shall provide a report of that investigation to the Sharing Operator.

4. Indus Rights:

4.1 Sites

Indus shall have the right:

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- 4.1.1 *where the Sharing Operator, any Approved Contractor or any other third party requires access to any Site for any reason, to require that such access is supervised by Indus or its nominee; and*
- 4.1.2 *to use and grant access to any Site, including any Indus infrastructure, for the provision of such other services to any party or for such other purposes as Indus may in its discretion decide to support from time to time.*

6. Charges

6.1 Payment of Charges

Indus shall charge and invoice the Sharing Operator for the Charges in accordance with Schedule 3 (Charges). The Charges set out in Schedule (3) (Charges) shall be revised on an annual basis, commencing on the first anniversary of the Effective Date. Provided, however, that such annual revision of the Charges shall not affect any other provision of a Service Contract existing at the time of such annual revision.

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6.2 Payment Terms

6.2.1 Subject to clause 6.4, all invoices submitted by Indus in accordance with the Schedule 3(charges) shall be paid by the Sharing Operator within 15 days of receipt.

6.2.2 All Charges, Taxes, costs and expenses due under this Agreement must be invoiced by Indus as part of the Charges within six (6) months of the date Indus is first entitled to invoice such sums.

6.3 Late Payment

If either Party has not paid any invoices by their due date, all such unpaid sums will accrue interest at a rate equal to the then prevailing State Bank of India Prime Lending Rate. If the Sharing Operator fails to pay any amount in an invoice, other than Disputed Amounts (as defined below) for a period of 90 days subsequent to receipt of the invoice from Indus, the Operation and Maintenance Service Levels in respect of

the Circle to which such invoice relates shall cease to apply until such time as the relevant invoice is paid in full. In addition, upon the expiry of the 90 days period, Indus my , at any time, choose to terminate the relevant Service Contracts and the relevant Exit Amounts shall be payable by the Sharing Operator in accordance with the relevant Service Contracts.

6.4 Disputed Items

If the Sharing Operator or Indus reasonably and in good faith disputes:

- (i) an obligation to pay part or all of an invoice submitted by Indus under this Agreement;
or*
- (ii) part or all of a Site Access Service Credit or an Operation and Maintenance Service Credit.*

then notwithstanding anything to the contrary in this Agreement.

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- 6.4.1 *the Party disputing the invoice or Site Access Service Credit or Operation and Maintenance Service Credit, as the case may be, must notify the other party in writing of the amount of the invoice or Site Access Service Credit or Operation and Maintenance Service Credit which it disputes (the "Disputed Amount") together with detailed reasons why it considers it is not obligated to pay the Disputed amount.*
- 6.4.2 *Such party's failure to pay the Disputed Amount will be deemed not to be a breach of this Agreement.*
- 6.4.3 *Such Party must pay the undisputed balance of the invoice or Site Access Service Credit or Operation and Maintenance Service Credit in accordance with this Agreement;*
- 6.4.4 *The Parties must as soon as reasonably discuss and use their respective reasonable endeavours to agree how*

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much of the Disputed Amount is payable; and

6.4.5 *If the Parties are unable to reach agreement pursuant to clause 6.4.4 within 10 Business Days, then either party may refer the matter to dispute resolution in accordance with the Dispute Resolution Procedure.*

6.5 *Other Costs*

The Parties agree that the Sharing Operator is not liable to pay any amount under this Agreement unless expressly stated in the Agreement.

10. *Right to Advertise on Passive Infrastructure*

10.1 *Third Party Advertisement*

Indus shall have the exclusive right to lease, licence or grant space on each Site or Passive Infrastructure on a Site to any third party for the purpose of placing hoardings, banners and other advertisements. Indus shall be solely responsible for complying with all Laws in relation to such lease, licence or grant.

10.2 *Impact on the Sharing Operator*

Indus shall use its best endeavours to ensure that the lease or licence of space on a Site or Passive Infrastructure on a Site for advertising does not adversely affect the connectivity, network or Active Infrastructure of the Sharing Operator. Indus shall promptly remove or relocate any advertisement from a Site or Passive Infrastructure on a Site if such advertisement causes a material adverse effect to the connectivity, network or Active Infrastructure of the Sharing Operator."

48. The 2nd agreement is entered between Essar Telecom Infrastructure Private Limited and Vodafone Essar Limited and Vodafone Essar Mobile Services Limited and others, which is styled as Master Services Agreement on 23rd November 2007. The relevant clauses are as follows:

4.2 Power Supply

4.2.1 For each site DC power supply shall be continuously available within the specified voltage limit without any interruptions. Uptime of DC power should be 99.98%, the

battery back up shall be designed to provide 4 hrs back up for single BTS DC load of 4/4/4 configuration.

4.2.2 The Infrastructure Provider shall take care to utilize the cheaper source of power source like SEB power over DG set power as a measure to reduce fuel cost. All fuel reimbursement bill shall be accompanied by site wise DG running log sheet and Cellular operator shall have the right to carry out random fuel reconciliation audit at Cellular Operator's own discretion.

4.2.3 The power consumption between sharing operators shall be divided based on the DC current consumption of the respective systems and the Infrastructure Provider shall install suitable measuring mechanism to measure and bill accordingly. All power reimbursement bills shall be accompanied by site wise calculation sheets and Cellular Operator shall have right to carry our random power reconciliation audit at Cellular Operators's own discretion.

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5. *Service Level Agreement*

Infrastructure Provider shall provide the following services:

5.1 *Infrastructure Provider shall provide supervision, operation and control of the Services relating to all infrastructure equipments provided by Infrastructure Provider at the sites.*

5.2 *To carry out periodic servicing/overhauling of Diesel Generator sets based on actual running hours, Air Conditioners & other infrastructure items.*

5.3 *Uptime: Infrastructure Provider shall ensure the monthly uptime of all infrastructure equipments, provided by Infrastructure Provider, of 99.98% measured on an average on an average across all sites taken from the Infrastructure Provider in a service area/circle on the first day of the following month.*

xxxxx

xxxxx

xxxxx



5.13 Infrastructure Provider will ensure power supply of:

-24/48 Volt DC Power supply.

-Surge and lighting protection at the input of AC power supply.

xxxxx

xxxxx

5.16 Infrastructure Provider shall ensure proper access to Shelter/Room and Tower in terms of lighting, access ladders, 24X7.

The third agreement is entered into between Bharat Sanchar Nigam Limited and Wireless TT Info Services Ltd., which is styled as Infrastructure Sharing Agreement, which is dated 6th of October 2008.

The relevant clauses in this agreement are as follows:

SCOPE OF SERVICES

1.0 INTRODUCTION

This document contains the technical requirements between the Infrastructure Provider & the BSNL.

2.0 ASSUMPTIONS

- 2.1 The Infrastructure provider has the capability to acquire, build, operate and maintain telecom infrastructure.
- 2.2 This document lays down the generic requirements of BSNL, which is a broad scope of activity. All activities/sub-activities to meet the KPL/SLA are assumed to be under Infrastructure Provider Scope.
- 2.3 Infrastructure Provider shall be responsible for complete site development starting from site acquisition to site RFI, O & M, warranty support, preventive & routine maintenance, AMC services and availability of equipment/facility as per SLA for all passive infrastructure elements.
- 2.4 Infrastructure Provider is responsible for all statutory compliance, regular liaisoning with municipal/Government bodies, payment of statutory levies, monthly consumption charges of power, fuel etc.
- 2.5 To eliminate ambiguity the passive infrastructure elements include but are not strictly restricted to, the following elements (In the case of Outdoor BTS, Shelter/Room, Power Plant, Battery and Air Conditioner are excluded)

- Tower
- Shelter/Room
- Battery Sets
- Power Plant
- Diesel Generation set
- Servo stabilizers, static stabilizer, line conditioning equipment.
- Air Conditioners
- Incoming EB connection
- Site electrical system
- Site earthing system.
- Lightning protection system
- Civil Construction
- Fire Alarm System

The Infrastructure Provider will provide space for installation.

2.6 The SLA's shall be applicable for each of the Infrastructure elements, functions as well as for the complete system.

2.7 BSNL shall carry out maintenance, upgrade or replace the hardware/software as and when required within the allotted space during the contract period.

2.8 Any consequences due to delay in payment/penalties of power, fuel, other

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utilities bills and statutory payments in time, shall be to the Infrastructure Providers account.

2.9 The Infrastructure Provider shall ensure good housekeeping of site and BSNL or its authorized representative shall have 24 hours 365 days access to the site.

2.10 The Infrastructure Provider shall have necessary skilled manpower at the cluster level to administer the operation and maintenance. The organization chart detailing the fault monitoring arrangement clearly showing own employees and outsourced resources shall be made available to BSNL.

2.11 The Infrastructure Provider will construct/provide the tower for enabling BSNL to install Cellular and Microwave antenna of required size and quantity. The towers shall be provided with suitable cable-ladders for facilitating BSNL to install and fix up RF cables along towers up to shelter. The site provisioning fee should include hoisting of a microwave antenna of diameter up to 1.2 meter and 3 nos. of GSM antennae on the tower. For additional 3 numbers of GSM

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antennae and Microwave antennae each of 0.6 meter diameter and 1.2 meter diameter rates may be quoted separately.

2.12 The Infrastructure Provider will maintain fuel levels in DG sets and maintain DG in working condition.

2.13 IP shall provide floor-space for installation of telecom equipment to the BSNL.

2.14 The Infrastructure Provider shall provide space on rooftop/ground based tower for enabling BSNL to put GSM and Microwave antenna.

3.0 BUILD, OPERATE AND MAINTAIN TELECOM SITES

It is assumed that while acquiring and constructing new sites the Infrastructure Provider shall be responsible for:

- a) Right of way*
- b) Agreement with the landlords*
- c) Technical & environmental suitability, including availability of SEB power with sufficient connected load, no disturbance from neighborhood etc.,*

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4.0 SITE DEVELOPMENT PROCESS SHALL
BE AS FOLLOWS

a) In case of a new Site

- ❖ BSNL will provide Infrastructure Provider with a list of towns (in order of priority) for potential coverage.
- ❖ Infrastructure Provider will conduct their field surveys and revert to BSNL within 10 working days with the nominals of the proposed sites
- ❖ BSNL will revert to Infrastructure Provider with a confirmation on the nominals within 3 working days of receiving the nominals.
- ❖ Infrastructure Provider will give report of 'site ready-to-be-handed-over' to BSNL within a stipulated number of days (from the date of confirmation of nominals)
 - i) All RTT Sites - 60 days
 - ii) All GBT sites - 75 days
- ❖ Once the "site-is-ready-to-be-handed-over" report is received by BSNL, BSNL will conduct a Layout Finalization/Antenna Location/Cable Entry & Quality of Workmanship within

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3 working days to Infrastructure Provider.

b) In case of an existing Site

If it's an existing site of the Infrastructure Provider, it will be offered in 10 days

5.0 POWER PLANT (NOT APPLICABLE IN CASE OF OUTDOOR BTS)

IPL shall provide SMPS power plant with weather proof enclosure (IP-55) of appropriate capacity with spare modules.

6.0 BATTERY SET (NOT APPLICABLE IN CASE OF OUTDOOR BTS)

IPL shall provide 2 sets of Maintenance-free Batteries of appropriate capacity with a power backup of 6-8 hours.

7.0 POWER REQUIREMENT

- IP shall be provide AC-Mains/DG Supply as per SLA.
- The infrastructure Provider shall provide 2 nos 50 Amps DC MCB for connecting the BTS along with the Power Plant.

- Up to 4 nos 16Amps MCBs for Radio equipments
- AC power from SEB grid, with suitable connected load at ACDB.
- Power back up from a Diesel Generator of suitable capacity.
- Neutral to Earth voltage should be less than 2 volts
- Class B & C surge Protection should be provided in the Power lines in parallel for non lightening prone areas. However in lightening prone areas, surge filter should be provided in power line before entering into shelter.

8.0 AIR CONDITIONING (IN CASE OF INDOOR BTS)

- ❖ Room Temperature 25+/-2 deg C
- ❖ Sensible cooling capacity of A/C Above 90%
- ❖ Relative Humidity 40 to 85%
- ❖ Redundancy should be available for for A/C units
- ❖ Condensation and hot spots should not be generated inside the Shelter/Room.
- ❖ Major fault resolution time:
 - a) For sites within city limits 2 hrs
 - b) For upcountry sites 4 hrs



9.0 EARTHING SYSTEM

- Earthing system with multiple earth pits, which confirm to Indian standard IS: 3043: 1987 and IEEE:1100:1999. It should confirm to following,
- The earth resistance value should be less than 0.5 ohms.
- Internal Earth Distributor Bar (IEDB) made of electrolytic grade copper with 24 holes of 8 mismanagement dia. (staggered) to be provided inside the shelter. The IEDB should be directly connected to an earth pit. The direct connection should be using 35 sq.mm Cu cable and the connected earth pit should be a Cu Plate Earth Pit.
- External Earth Distribution Bar (IEDB, same as that of IEDB) shall be provided near to wave-guide entry plate out side the shelter for grounding of the RF cables.
- Antenna ground bars shall be provided on tower near antenna mounts and same connected to earthing system at bottom of the tower.

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- *Equi-potential bonding: All earth pits should be inter-connected at ground level. All metallic parts as site and also in the vicinity (i.e., within 5 meters of site including fencing) should be connected to site earthing. External and internal cable trays shall be interconnected at joints and earthed at ends.*
- *Earth pits: All earth pits shall conform to IS:3043:1987, All Earth pits should give an earth resistance less than 0.5 ohms, if required earth enhancement compound may be used to get the required earth resistance.*

10.0 LIGHTENING PROTECTION

Lightening arrester provided on the tower shall be connected to the earth pits using down-conductor. Down conductor should go directly to the earth-pit and it should also be connected to the tower body at the base of the tower. The down conductor should be 35 sq.mm. Cu cable, and to be routed through the tower leg away from the cable ladder. In areas which experience heavy lightning,



active/specialized lightning protection based on advanced technologies need to be provided. The tower legs should be earthed with an earth ring.

11.0 FIRE ALARM SYSTEM

The Fire Alarm system should have following features:

- A digital temperature sensor with settable high temperature alarm independent of air conditioner alarms shall be provided*
- Potential free contacts of the below mentioned alarms shall be wired to the alarm termination box through shields/armoured cable, Infrastructure Provider for their fault management centre may use same alarms.*
- Input power fail*
- Fire*
- System fault*
- High room temperature*

12.0 TOWER

The tower shall be for specified wind zone and antenna loading; tower designs should be

independently checked and certified by institutes like SERC.

- ❖ Tower material sourcing, fabrication, and erection shall be done as per relevant IS codes and standard detailing practices.
- ❖ Tower erection shall be done as per accepted industry practices. Foundation base assembly shall be leveled within tolerance given in IS-5613. All bolts shall be properly tightened to correct torque. There shall be any open holes and bend members in tower.
- ❖ Tower shall be complete with all accessories like Antennae mounts, Access ladder, Cable ladder, resting platforms, working platforms, lightening arrester, and Aviation lamp as per ICAO rules, Vertical and Horizontal cable trays and earthing arrangement. Antenna mounts as per Customers loading requirements should be provided on the tower as given below

- a) GSM Antenna mount-76mm dia. X 3000mm
- b) M W Antenna mount -114mm dia. X 2000mm
- c) Tower shall be painted as per International Aviation Regulations
- d) Vertical and horizontal separation as required by manufacturers specification



shall be adhered to when antennas of different operators are loaded on the same tower

13.0 SITE INFRASTRUCTURE OPERATION AND MAINTENANCE SERVICES

- ❖ *Infrastructure provider will deploy Field Maintenance teams in each cluster of sites, to monitor health of sites*
- ❖ *Infrastructure provider will carry out house-keeping on daily basis for keeping site clean*
- ❖ *Infrastructure provider will regularly procure diesel on behalf of the Customer for filling up in the DG sets provided by the Infrastructure provider*
- ❖ *Infrastructure provider will maintain logbook of fuel consumption and bill the Customer on actual consumption basis as per schedule 3*
- ❖ *Infrastructure provider will keep the passive Telecom Infrastructure in operating condition*
- ❖ *Infrastructure provider will get the infrastructure serviced through periodic routine maintenance.*
- ❖ *On report of fault for any of passive equipment and infrastructure, infrastructure provider technical/engineer will visit the site within agreed timelines, attend to the problem and set right.*

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- ❖ *Infrastructure provider will also ensure manufacturer's support for passive Telecom infrastructure maintenance, through Annual Maintenance Contracts.*
- ❖ *Infrastructure provider will provide for extension of all the infrastructure alarms on a alarm panel enabling customer to extend these alarms to their system.*


14.0 ELECTRICITY BOARD SUPPLY (EB SUPPLY)

Infrastructure provider shall be responsible for providing the electricity board connection of the required rating at the site. However, if the site is ready in all respects including DG set and if the EB connection is not available then BSNL at its own discretion can start its operations on the site. Till such time EB connection is not available, site shall run on DG. And the expenses for the DG shall be born by the BSNL as detailed in Schedule 3

15.0 READY FOR INSTALLATION (RFI)

While the infrastructure provider declares the site Ready for Installation (RFI), BSNL should be able to move in their Communication equipment for installation. While RFI is communicate to BSNL, following aspects are assumed to be completed.

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- ❖ Shelter/Equipment room is fully ready and all debris are cleared off to move the equipment.
 - ❖ Electrical wiring completed, energized and tested.
 - ❖ Air-conditioner commissioned, tested and operational
 - ❖ Tower erection, Earthing, vertical and horizontal cable tray complete. Painting complete (if not complete, BSNL and Infrastructure Provider can take a mutually agreed decision on a case by case basis)
 - ❖ DG set with Acoustic enclosure installed, tested for Sound suppression, Vibration elimination and operational in all respects. Sound suppression is as per CPCB norms.
 - ❖ SEB power available and extended to equipment room (if not available, BSNL and the Infrastructure provider can take a mutually agreed decision on a case by case basis)
 - ❖ Final acceptance test by the Infrastructure provider for all Infrastructure equipment, Tower and Earthing completed and report available for BSNL audit.
 - ❖ All statutory clearances like Municipal, Pollution Control Board, obtained.
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16.0 RFI OF INFRASTRUCTURE PROVIDERS EXISTING SITE

If BSNL identifies an existing site of the Infrastructure provider for their BTS installation and if its being offered for sharing, the Infrastructure Provider need to arrange for all the necessary up-gradation of existing infrastructure to make it suitable for BSNL equipment. BSNL's standard requirement remains same as listed above, however based on the site conditions and availability of resources, the site specific requirement can be modified on a case by case basis.

17.0 GENERAL POINTS

17.1 The Infrastructure Provider shall ensure that equipment installation are as per manufactures stipulated guidelines and all the teams working at the site follow safe installation practices. The infrastructure provider would be responsible for safety of the men, material, public/private property and people.

17.2 The Infrastructure Provider is responsible for getting all statutory clearances like municipal approval, pollution control board clearances,

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electrical inspectorate clearances etc. and all related payments.

17.3 *Infrastructure provider shall be responsible for compliance of all labour enactments, such as provident fund, minimum wages act, workmen compensation act, contract labor act, gratuity and ESI rules of workmen and their payment to workers and respective government agencies.*

18.0 DOCUMENTATION

Infrastructure Provider shall submit one set of following documents to Customer along with site RFI declaration/hand over:

- ❖ Site access plan, showing and route map and visible identification marks and contact details for reaching the site.*
- ❖ Location of Tower, Shelter and DG in a layout plan, with as built measurements*
- ❖ Location of Earth pits & Earthing conductor layout plan.*
- ❖ Layout of Shelter/room with identification for Customer MCB, space for BTS marked, IEDB & EEDB holes for Customer marked*
- ❖ Cable tray layout O/D and I/D and area marked for Customer cables.*

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- ❖ *List of equipment, capacity, serial numbers, Infrastructure Provider name, service engineer's contact name and telephone number*

SERVICE LEVEL AGREEMENT

This Service Level Agreement (SLA) is for Round the Clock Operation and Maintenance of Passive infrastructure forming part of the infrastructure sharing agreement dated ___ 2008.

1.0 SCOPE OF WORK

The infrastructure Provider shall provide the following services:

- 1. Supervision, Operator and control of the Services relating to passive infrastructure equipments as per schedule 1 including their maintenance, service, supervision, repairs etc. at the specified site.*
 - 2. Carry out periodic servicing/overhauling of Diesel Generator sets based on its actual running hours.*
 - 3. Shall ensure DC Power uptime in a circle - 99.99%, measured on monthly basis.*
 - 4. Shall attend/resolve all the infrastructure related alarms twenty fours hours, seven days a week i.e., @ 24X7.*
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5. Shall ensure that minimum level of diesel in the fuel tank of DG sets is maintained at 25% capacity of tank.
6. Shall endeavour to maintain the temperature inside the shelter at the level of 25+/-2 deg C.(This clause is not applicable in case of Outdoor BTS site)
7. Shall render monthly reports to BSNL specifying consumption of Fuel and Electricity in a format to be mutually agreed between the parties.
8. Shall render monthly Fault Analysis Report to BSNL in format to be mutually agreed between the parties.
9. Shall ensure that all the items/equipments, which are under warranty, are handled/attended by authorized dealers only. The responsibility of ensuring the availability of the spare parts/items and that the above are attended by the authorized dealers shall be that of Infrastructure provider.
10. Shall provide Security Guard at GBT site (as per Master Agreement). The Security Guard shall allow access to the authorized representative of BSNL for carrying out the Maintenance Services of the installed equipments. BSNL shall provide the list of such authorized representatives.


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11. In the event of any defect/failure of passive infrastructure at any of the sites, BSNL shall report the same to the nominated representative of Infrastructure provider through SMS, followed by an email. It is agreed between the parties that Infrastructure Provider shall attend all critical alarms which can lead to outage, within a maximum time 2.5 hrs plus traveling time of maximum 2 hrs for remote sites between 6 AM and 10PM and within 3.5 hrs plus traveling time of maximum 2 hrs for remote sites between 10 PM and 6AM, from the time of receipt of intimation of such defect by the Infrastructure provider's nominated representative. In case there are more than one alarm at any site(s) falling under same technician, then the priorities to attend the same shall be decided by the BSNL, whose decision will be final and binding in this respect.
12. The outage shall be calculated from the time the alarm is generated up to the time when DC power is restored by the Infrastructure Provider.
13. Infrastructure Provider to ensure availability of AC main connection at the Site. In case of mains failure, Infrastructure Provider shall ensure DG power within 2 hours from mains failure alarm



message received by infrastructure Provider's filed engineer. This will be ensured for 99.99% availability.

- 14. Infrastructure Provider Surge and lightning protection at the input of AC power supply.*
- 15. Infrastructure Provider to provide 3 phase EB, 50 Hz line voltage 240V-480V (Line to line) and 140 V to 280 V (Line to neutral)*
- 16. Infrastructure Provider to provide Dust free and clean shelter room. Also periodic Rodent/Pesticide control has to be undertaken by Infrastructure Provider.*
- 17. Infrastructure Provider to ensure Leakage free Shelter room.*
- 18. Infrastructure Provider to provide quality antistatic flooring.*
- 19. Infrastructure Provider to ensure Earth resistance not more than 0.5 ohm under normal soil condition. A yearly check on the value of Earth resistance to be conducted and necessary action be taken by Infrastructure Provider under the knowledge of Cellular Operator.*
- 20. Infrastructure Provider to provide suitable Fire Extinguishers (ABC type or similar) with periodic check on their refilling.*



21. Infrastructure Provider to provide Aviation Light & Lightning Arrestor (with separate Earthing)
22. All electrical equipment such as Microwave, Antennas, Cables, PIU, BTS, TRX will be installed by Cellular Operator and do not fall within the scope of this agreement.

2.0 ADDITIONAL RESPONSIBILITIES OF INFRASTRUCTURE PROVIDER

1. Infrastructure Provider shall be responsible for security, maintenance, operation of the infrastructure assets at sites (including replacements of DGs or air conditioners on their end of life).
2. Infrastructure Provider shall ensure that the Identified Assets (Room/Shelter, Air Conditioner, DG, Electrical Wiring, Commercial Power) are maintained in good working condition.
3. Infrastructure Provider shall be the single point of contact with the site landlord, and all other local authorities (viz., Municipal, Electricity Board etc.,) However, BSNL shall be responsible for obtaining SACFA clearance for Frequency use only.
4. Maintenance of PIU/DG/AC/Shelter by the Infrastructure Provider shall be conducted by

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taking the concurrence from the officer of at least J AG level of BSNL.

5. In case of failure in the site, the Infrastructure Provider shall intimate the nominated person of BSNL thru SMS. In case failure extends beyond 30 minutes, the failure is escalated to the CTO of the Infrastructure Provider & BSNL. Once the failure is resolved, intimation to be conveyed thru SMS by the Infrastructure Provider to BSNL. For critical failures, Root Cause Analysis to be conducted and shared by Infrastructure Provider.
6. Placement of GSM/MW Antenna shall be mutually on agreed heights between Infrastructure Provider & BSNL.
7. Infrastructure Provider shall ensure that the Passive Telecommunication installation shall not become a safety hazard and shall not be in contravention of any statute, rule, or regulation and public policy.”

49. The contract entered into between the parties is styled as 'Master Services Agreement'. Under the agreement, the assessee is willing to offer its passive infrastructure and share its equipment with the sharing operator to the extent



permitted by applicable laws in India and subject to the terms and conditions of this agreement. As is clear from the aforesaid words, it is an agreement to share equipment and such sharing is by way of permission and not by way of transfer. What is passive infrastructure and active infrastructure is defined in the Master Agreement. 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 tower, shelter, diesel generator sets, air conditioners and electrical and civil works. At the site, the service provider will erect a tower. In order to operate and maintain the tower, he needs diesel generator sets, air conditioners and electrical equipment. All these have to be kept in a room which is called a shelter. The active infrastructure includes base terminal station equipment, associated antennae, backhaul connectivity to the sharing operator's work and other requisite equipment and associated civil and electrical works required to provide telecommunication services by the sharing operator at a telecommunications site other than passive infrastructure. It



means, that the sharing operator mounts his antennae on the tower which is a part of passive infrastructure. To operate that antennae at the base, he keeps his equipment and by operating those equipment, he provides telecommunication services to their clients.

50. Working of the telecommunication network, involves the process of receiving, amplifying and transmitting the signals. As indicated supra the set of instruments dealing with the above process is termed as 'active infrastructure' belonging to the mobile operators. For functioning of the active infrastructure maintenance of a particular temperature, humidity, safety and also positioning of the Radio/MW antennae at a particular height is required. These requirements are achieved by using the passive infrastructure, i.e., tower and other equipments. The mobile operators are permitted to mount their Radio/MW antennae at desired heights and direction coupled with the use of equipments providing other technical requirements. By using this passive infrastructure, the mobile operators communicate the mobile

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signals. This right of use is acquired legally by means of contract called service contract read with MSA.

51. What the assessee provides in the passive infrastructure to the mobile operator is the power connection to the mobile operator. The power rating of the Sharing Operator's equipment of a Site will be determined on the basis of measurement of the actual consumption by the installed equipment on a full load basis. This measurement will be conducted whenever new equipment is installed by the Sharing Operator on the Site. A detailed measurement process shall be agreed between the parties. The power connection at a Site shall be provided in accordance with the following :

(a) DC power at 48 volts, or AC power at 200 volts, as required. For the avoidance of doubt, the Sharing Operator shall be responsible for conversion of equipment to 48 volts, if necessary;

(b) Two (2) 50 Amp Dc MCBs for connecting BTS; and



(c) Up to two (2) 16 Amp MCBs for Radio equipment.

52. Space for a maximum of 4 single radios in the case of GBT and 3 single radios for RTT in a 19-inch rack shall be provided by Indus to the Sharing Operator to support the above standard configuration on a shared basis at each Site.

53. This is the service rendered by the assessee through passive infrastructure to the mobile operator to operate as active infrastructure.

54. Clause 2 deals with Site access. A careful reading of the aforesaid provision makes it clear that, what the assessee is expected to provide the mobile operator is, Site access availability to the Sharing Operator in accordance with the terms and conditions of this agreement. Under the terms of the agreement, the assessee shall ensure that each site is capable of accommodating Sharing Operators equipment in accordance with the standard configuration. In other words, the assessee has to provide accommodation to the Sharing



Operator to keep his equipments i.e., the permission to keep his equipments in the shelter, provided by the assessee. On execution of the service contract, the Sharing Operator shall have the right to install the Sharing Operator's equipment or any portion thereof at such Site. The Sharing Operator shall have access to each such site for all installation activities and the assessee shall provide to the Sharing Operator the necessary means of access for the purpose of ingress and egress of each site in accordance with the terms of the service contract. In other words, possession of the site is not handed over to the mobile operator. Mobile operator is permitted to keep his installations in the property belonging to the assessee of which he is in possession. The right given to the mobile operator is right to ingress and egress that too for the purpose of operating his active infrastructure. Further it is made clear that such ingress and egress is not available to all the employees of the mobile operator. It is available only to authorised employees of the Sharing Operator or its properly authorised sub contractors. Having conferred this benefit on the mobile operator, it is categorically declared in the contract

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that the right, title and interest in and to the passive infrastructure including any enhancements carried out by the assessee shall vest with the assessee. Therefore, the intention of the parties is clear. The intention was not to transfer at any point of time, any right, title or interest in the infrastructure to the mobile operator under the terms of the contract. It is also made clear that, while the assessee is responsible for operating the passive infrastructure by providing access to the mobile operator, the assessee has no corresponding responsibility of maintaining the active infrastructure of the mobile operator. It is categorically stated that the Sharing Operator shall be responsible for the operation and maintenance of all Sharing Operator equipment. In order to enable the Sharing Operator to maintain his equipment, the Sharing Operator will be provided access to the Sites in accordance with paragraph 2.9 of Schedule 2. It is further made clear that the assessee shall provide to the Sharing Operator, the necessary means of access for the purpose of ingress and egress from each site. Clause 10 of the agreement reserves in the assessee the right to advertise on passive infrastructure. Further it makes it clear that the

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assessee shall have the exclusive right to lease, licence or grant space on each Site or passive infrastructure on Site to any third party for the purpose of placing hoardings, banners and other advertisements. The assessee shall be solely responsible for complying with all law in relation to such lease, licence or grant. However, the assessee shall use its best endeavours to ensure that the lease or licence of space on a Site or passive infrastructure on a Site, for advertising does not adversely affect the connectivity, network or active infrastructure of the Sharing Operator.

55. Therefore, it is clear that not only no portion of the infrastructure is transferred to the mobile operator after providing access to the mobile operator to have the use of the passive infrastructure, the assessee has retained the right to lease, licence, the passive infrastructure to any advertising agency, the only limitation being that such advertising act should not hinder the right of the mobile operator to have uninterrupted access of the infrastructure.

56. Schedule 2 to the contract deals with operation and maintenance services. Apart from other things mentioned in the Schedule, the operation and maintenance services to be provided by the assessee in respect of each Site shall include general upkeep of tower and site premises including ensuring that the Sharing Operator has space to access its cables laid in the cable trays at all times; the Sharing Operator has space to access its antennae at all times; mountings are kept tight and rust free and tower bolts are tight as per torque requirements. This is in so far as tower is concerned. In so far as power supply is concerned, the assessee has to ensure power supply to the Site in accordance with paragraph 1 of Schedule 1 at all times including Class B and Surge Protection in the power lines at Sites where AC power is provided. The assessee is also under an obligation to maintain earthing system, i.e., earth resistance value of less than 2 ohms, internal earth distribution bar of electrolytic grade copper with 24 holes of 8mm diameter to be provided inside the shelter, direct connection by use a 35 square mm copper/galvanised iron/aluminum cable and the connected earth pit should be a

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copper plate earth pit. External earth distribution bar, in accordance with above, shall be provided near to the waveguide entry plate outside the shelter for grounding of the RF cables and equi-potential bonding of all earth pits should be inter-connected at ground level. External and internal cable trays shall be interconnected at joints and earthed at ends. In addition to the aforesaid services the assessee is also liable to provide periodic stability checks of the tower; timely payment of electricity bills, as applicable; provision of fuel and filling the same in DG set at the Site as required, maintenance of DG set, security services, provision and maintenance of air conditioning as set out below. i.e.,

- (a) Room temperature to be maintained at 35 +/- 5 degrees Centigrade measured on top of the BTS; and
- (b) Relative humidity at the Site should be between 40% and 85%.




- (c) In so far as maintenance of fire-alarm system is concerned, in case of an outdoor BTS, a covered plinth of suitable dimensions; provision of a cable tray inside the shelter; provision of space around the BTS for maintenance; and antistatic flooring and proper earthing; provision and maintenance of fire-alarm system are all to be made available by the assessee.
- (d) The assessee is also liable to provide lightning protection as set out in the schedule.

57. This is the facility which the assessee provides to a mobile operator. In fact the passive infrastructure consists of the following :-

- 1) *Towers (including antennae mounting, roof top poles, other accessories pole mounts for earthing system)*
- 2) *Prefabricated shelter.*
- 3) *Diesel generator sets (including acoustic type).*



- 4) Servo stabilizers, static stabilizers, line conditioning equipments.
 - 5) Power Management system.
 - 6) Air Conditioners.
 - 7) Electrical Panel.
 - 8) Electrical – DCDB, ACDB, lights, switches, sockets, cables, clamps.
 - 9) Servers Racks.
 - 10) Cables & Wires.
 - 11) Switch Gear.
 - 12) Transformer.
 - 13) Surge protection system.
 - 14) Lighting protection system.
 - 15) Cable entry panel.
 - 16) Fire Alarm System.
 - 17) Fire Extinguishers/protection system.
 - 18) Battery Bank.
 - 19) SMPS (rectifiers).
 - 20) Aviation Lamp.
 - 21) Cable Tray.
 - 22) UPS & Power Inventors.
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- 23) *Flooring/Ceiling panel.*
- 24) *Non-conventional energy sources-Solar power system windmill power generation systems, Fuel Cell, Free Cooling Unit & Passive cooling Material.*
- 25) *All IBS related infra-RF cables, Distributed Antennae system, repeaters, amplifiers, splitters, etc.,*
- 26) *All Machinery equipment, parts, spares, components, accessories, consumables & other items for use in telecommunication network or in generation or distribution of electricity.*
- 27) *High speed diesel & Lubricant oil for use in DG set.*
- 28) *Acoustic Material.*
- 29) *All types of Transmission cables.*
- 30) *All other goods for use in the telecommunication network/generation or distribution of electricity or any other form of power.*
- 31) *Spare parts, accessories and components of goods mentioned above.*

58. The entire infrastructure/ instruments/ appliances and exchange are in the physical control and possession of the assessee/service provider at all times and there is neither any

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physical transfer of such goods nor any transfer of right to use such equipment or apparatus.

59. The assessing authority seems to be under the impression that under the terms of the contract there is a transfer of right to use the aforesaid equipments which constitute the passive infrastructure. The sharing operator has no use for any of those equipments individually. That is the network which the assessee utilises in setting up a passive infrastructure. What the mobile operator wants from the assessee is permission to install their antennae in the tower erected by the assessee, uninterrupted supply of electrical energy at a particular temperature, permission to keep the active infrastructure in the pre-fabricated shelter, right of ingress and egress to operate his equipments so that he can utilize his active infrastructure for rendering service to his customers. In other words, he wants the permission of the assessee to keep the active infrastructure in the Site and permission to have access to the passive infrastructure in particular to the electricity generated at a particular

temperature and to mount the antennae on the network at a particular height. Therefore, a harmonious reading of these provisions make it very clear there is no transfer of right to use goods conferred on the mobile operator under the contract. Under the contract a permission is granted to the mobile operator to have access to the passive infrastructure. That permission to have access to passive infrastructure is loosely termed as right to use the passive infrastructure. There is no intention to transfer the right to use. Even after the contract, after providing access, the right, title and interest of the passive infrastructure continues to remain with the assessee. No portion of the infrastructure is delivered to the mobile operator. He is not put in possession of any portion of the passive infrastructure. No right as such in the passive infrastructure is transferred to the mobile operator. No goods is delivered to the mobile operator. At no point of time the assessee loses right, control, possession and custody of the passive infrastructure. Merely because after providing access to the mobile operator, that access which is provided to him cannot be transferred by the assessee during the period of contract to

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a third party will not amount to the assessee losing control over the infrastructure as held by the assessing authority. As is clear from the material on record, at a times, the assessee can provide access of the passive infrastructure to its mobile operators at different heights. As long as there is a contract and he wants to honour the contract certainly during the period of contract he cannot make available the same facility to another mobile operator. There is nothing in law which prevents him from putting an end to the contract and providing access to another mobile operator. It is not a case where he has to go to a Court of law to recover possession of a property which is delivered to the mobile operator. Therefore, none of the tests which are prescribed to constitute a sale of goods or the extended meaning of the sale of goods in as much as deemed sale is present in the instant case.

60. In this context it is useful to notice the nature of right the mobile operator, in substance, gets under the contract. It is in the nature of a licence as defined under Section 52 of the Easements Act, 1982 which reads as under : -



52. **“Licence defined”**. When one person grants to another or to a definite number of others persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.

61. A licence is a grant of authority to do a particular thing. It enables a person to do lawfully what he could not otherwise lawfully do. It transfers an interest to a limited extent. A licence does not, in law, confer a right. It only prevents that act from being unlawful which, but for the licence, would be unlawful. A licence gives no more than the right to do the thing actually licensed to be done. Licences may be exclusive, or non-exclusive. A non-exclusive licence is the grant of authority to do a particular thing with no right of exclusion whatsoever. It never conveys, by itself, an interest in property. It merely enables a person to do that which he could not otherwise do, except unlawfully. ✓

62. An exclusive licence is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. It confers no interest, or property in the thing but only makes an action lawful, which, without it, would have been unlawful. A licence is a permission to do something that would otherwise be unlawful.

63. The right conferred by the assessee on the mobile operator is in the nature of a personal right granted to him to do something upon the passive infrastructure belonging to the assessee. It does not amount to creation of an interest in the passive infrastructure itself. It is purely a permissive right and is personal to the grantee. The licence has no other effect than to confer a liberty upon the licensee to go upon the land which would otherwise be unlawful. A dominant legally creating leave and licence in favour of the licensee cannot create encumbrance on the immoveable property for the simple reason that whenever the licence is created in favour of the

licensee, the licensee is always treated to be in permissive possession. He is given only an authority to enter into the premises. The possession is always with the licensor. Only entry in the premises is made legal. It does not create any title in favour of the licensee. A licence is a mere grant of a personal privilege to do something upon, without conferring an estate in the land. If a document gives only a right to use a property in a particular way under certain terms while it remains in the possession and control of the owner thereof, it will be a licence. The legal possession thereof continues to be in the owner of the property but the licensee is permitted to make use of the premises for the particular period. But for the permission his occupation would be unlawful, and does not create in his favour any estate or interest in the property.

64. It is well settled that, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of

the transfer. From a close reading of all the clauses in the agreement it appears to us that under the terms of the contract there is no transfer of right to use the passive infrastructure conferred on the sharing operator/mobile operator. What is permitted under the contract is, a permission in the nature of a licence to have access to the passive infrastructure and permission to keep the equipments of the mobile operator in the pre-fabricated shelter with permission to have ingress and egress only to the authorised representatives of the mobile operator. It is because an owner of a property has a bundle of rights, namely right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc., Therefore, to constitute a deemed sale under Article 366 (29A) (d) having regard to the object with the 46th Constitutional Amendment was inserted, it is clear the right that is transferred under a contract should be a bundle of rights minus right to title. It is because of the earlier Constitution Bench judgment of the Apex Court where the right to use the property was transferred by the person who retained the title as only a nominal owner with the benefit of the goods

has been passed on to the transferee, without paying taxes to the exchequer, that the Constitution was amended to bring within its fold such transactions which are styled as deemed sales. Therefore, in deciding whether a transaction falls within Article 366(29A)(d) so as to constitute a deemed sale, the purpose of the 46th Amendment, the mischief sought to be remedied and the object sought to be achieved by the said provision cannot be lost sight of. In that background, in the facts of this case, if we look into the various terms of the agreement it is clear under the contract, the assessee has not transferred any right in the passive infrastructure to the mobile operators. The right that is conferred on the mobile operator is a permission to have access to the passive infrastructure, a permission to keep the active infrastructure in the site belonging to the assessee, a permission to mount the antennae on the tower erected by the assessee and to have the benefit of a particular temperature so as to operate the equipments belonging to the mobile operator. No sale of goods or transfer is involved in the transaction in question. Therefore, it does not fall within the mischief of Article 366 (29A) (d) of the

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Constitution as held by the learned Judge as well as the assessing authority. Therefore, the impugned order passed by the learned single Judge as well as the assessing authority cannot be sustained.

In the result, we pass the following order: -

(a) The appeals preferred by the assesseees as well as by the Union of India are allowed.

(b) The impugned orders passed by the learned single Judge as well as the assessing authority are hereby set aside.

(c) It is declared that under the contract entered into between the parties there is no sale of goods and at any rate there is no deemed sale so as to attract levy of tax under the Karnataka Value Added Tax Act, 2003.



(d) In so far as the State appeals are concerned, the appeals preferred against the order of the learned single Judge in so far as denying the penalty and interest are rejected as we have held there is no liability to pay tax at all.

(e) In so far as the direction issued by the learned single Judge that the State has to recover the tax from the Union of India, in view of our finding that there is no liability to tax, that portion of the order of the learned single Judge is hereby set aside.

(f) The payments made by the assesseees either in terms of the order of the assessment order or in terms of any interim order passed in the Writ Petitions or in pursuance of the final order shall be refunded to the assesseees within three months from the date of receipt of a copy of this order, failing which the said amount to be refunded would carry

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*simple interest at 9% after the expiry of 90 days till
the date of payment.*

(g) *No costs.*

Sd/-
JUDGE

Sd/-
JUDGE

Sp/ksp/ckl/prs/suma/ujk