BEFORE THE HIMACHAL PRADESH TAX TRIBUNAL, DHARAMSHALA, CAMP AT SHIMLA

Appeal No.	:	82 to 85/2017
Date of Institution	:	06-11-2017
Date of order	:	14-02-2023

In the matter of:

M/s Bharti Infratel Ltd. Airtel Towers, Mehli, Shimla.

.....Appellant

Vs

1. The Addl. ETC-Cum-Appellate Authority, (SZ), HP Shimla.
2. Assessing Authority, Dhalli Circle, Shimla.

.....Respondents

Parties represented by:-

Shri Goverdhan Sharma and Sh. Amar Pratap Singh, Advocates for the Appellant
Shri Sandeep Mandyal, Sr. Law Officer for the Respondent

Appeal under Section 12 of the HP Entry Tax Act, 2010 read with Section 45 (2) of the Himachal Pradesh, Value Added Tax Act, 2005

Order

1. The present appeals have been filed by M/s Bharti Infratel Ltd., Airtel Towers, Mehli, Shimla against the orders of the Additional Commissioner ST&E-Cum- Appellate authority, SZ, Shimla dated 19-05-2017 vide which an additional demand of Entry Tax amounting to Rs. 2,54,23,848/- assessed for the assessment years 2010-11, 2011-12, 2012-13 and 2013-14 by the

Assessing Authority, Dhalli Circle, Shimla vide order dated 21-01-2016, against the appellant under the HP TEGLA Act, 2010 and the HP VAT Act, 2005, were upheld, by the 1st Appellate Authority.

2. The brief facts of the case are that M/s Bharti Infratel Ltd., Airtel Towers, Mehli, Shimla (hereinafter referred to as 'appellant') is engaged in the business of making ***"entry of goods into a local area from any place outside thereof including a place outside the State for consumption, use or sale therein"*** and *"brings or causes to be brought into a local area"* goods like towers, shelters, PIU, SMPS, DG, sets etc. for use by telecom operators like Vodafone, BSNL etc. within the State of Himachal Pradesh. The Assessing Authority, Dhalli Circle vide his orders dated21.1.2016.assessed the appellant under the HP VAT Act, 2005 read with the Rules made there under which are applicable for levying Entry Tax vide section 12 of the Entry Tax Act, 2010. The Assessing Authority found that the dealer had caused entry of goods into local area of Himachal Pradesh by way of interstate purchases- in the course of import into India and by way of stock transfers inward. The goods were used in construction/erection of telecommunication tower network in the State by different telecommunication players. The Ld. Assessing Authority found that the above goods have been used for the purpose specified in Entry No. 5 of Schedule-II of the HP Tax on Entry of Goods into Local Area Act, 2010 and held that these goods were liable to Entry Tax as per section 3 of the Act ibid. Accordingly, an amount of Entry Tax was assessed which resulted into a demand of Rs. 2,54,23,848/-. Against this order of the Ld Assessing Authority, the appellant preferred an appeal to the Ld. Appellate Authority (South Zone), H.P. Shimla. The Ld. Appellate Authorty (South Zone) passed the order dated 19-05-2017 and by upheld the orders dated 21-01-2016 of

the Ld. Assessing Authority and the demands created therein. The appellant has thereafter filed the present appeals against the said appellate order dated 19th May, 2017.

3. Aggrieved by the orders of the Ld. Appellate Authority, the Appellant has filed these appeals before this Tribunal on the following grounds:

I. *In the absence of Entry Tax Rules and machinery provisions for collection of entry tax till June 19, 2012, it was not possible for a dealer to pay entry tax.*

II. *The Goods imported by the Appellant into the State of Himachal Pradesh are not covered under entry no. 5 of Schedule-II of Entry Tax Act.*

III. *The goods imported by the Appellant into the State of Himachal Pradesh are not for consumption, use or sale and thus not covered under the scope of Section 3(1) of Entry Tax Act.*

IV. *The Appellant has not purchased these goods in the 'course of business' and thus not liable to pay Entry Tax.*

V. *Cryptic and non-speaking order has been wrongly affirmed by Ld. Additional Commissioner (Appeal).*

4. The Ld. Counsel for the appellant argued that the appellant has been providing passive infrastructure support services to telecom operators in the State. On the contrary, the intent of the legislature in Entry 5 of Schedule II of the Himachal Pradesh Tax on Entry of Goods into Local Area Act, 2010 is to tax the use of goods for works contract including hydro power projects for transmission & distribution etc. In the instant case, it has been stated that the goods have been brought on to the site by the Appellant either by way of purchase or by stock transferred by the Appellant from out of the State, for its own use and there is no works contract involved with respect to these

goods. These goods are not supplied under a contract for work. The goods are the property of the Appellants for their own use and as such not used in works contract/turnkey projects. It is further argued that use of words 'erection, installation' in the definition of works contract means that there is contract for 'erection or installation' and there is transfer of property in goods in the course of such erection or installation. If the contract is solely for 'erection or installation' and there is no sale of goods in the course of erection or installation, the contract needs to be treated 'labour' or service' contract and not a works contract.

5. Sh. Sandeep Mandyal, Sr. Law Officer for the respondent, stated that the issues raised by the counsel have already been dealt in detail vide impugned order dated 19-05-2017. He further argued that 1/3rd amount of the demand created was deposited by the appellant as per order dated 31-12-2010 in terms of the interim order dated 22-01-2013 passed in CWP No, 492 of 2013 of HP High Court wherein "*.....the writ petitioner had to deposit 1/3rd for the demand notice, i.e. payment of entry tax and had to execute security for balance 2/3rd....*". He also submitted that the High Court has modified its above order in CWP No. 7172 of 2010 dated 14-12-2015 stating that in terms of the orders supra, the petitioner has to deposit 50% of the demand notice and has to execute security for balance amount i.e. 50% in pending cases of Entry Tax. Keeping in view the modified High Court order, he emphasized that appellant should be directed to deposit rest of 17 % amount of the demand notice at the earliest till the HP Tax on Entry of Tax into Local Area Act, 2010 is legally applicable and the matter is pending with the Supreme Court and High Court.

6. I have heard the Ld. Counsel for the Appellant and the Ld. Counsel for the respondents in detail and perused the record and the relevant

provisions of law contained in the HP Tax on Entry of Tax into Local Area Act, 2010 (hereafter referred to as "Entry Tax Act") as well. The contention of the appellant, that the appellant is not liable for payment of tax in the absence of Rules under the said Entry Tax Act, is contrary to the provisions of section 12 of that Act vide which the relevant provisions of the HP VAT Act, 2005 and the Rules made there under have been expressly made *mutatis mutandis* applicable for the purposes of Entry Tax and accordingly, the said contention deserves rejection in view of explicit statutory provisions. As regards levy of Entry Tax, it is not in doubt nor in dispute that the appellant has, in fact, admittedly effected entry of the concerned goods for consumption and in the above-said infra-structure of power or telecommunication projects. The provision of the charging Section 3 (1) of the Entry Tax Act mandates *that "there shall be levied and paid to the State Government a tax on the entry, in the course of business of a dealer, of the goods specified in Schedule-II into each local area for consumption, use or sale therein .shall be levied and paid to the State Government a tax on the entry, in the course of business of a dealer, of the goods specified in Schedule-II into each local area for consumption, use or sale therein".* Section 2(1) (f) of the Entry Tax Act defines *"entry of goods into a local area" with all its grammatical variations and cognate expressions means entry of goods into a local area from any place outside thereof including a place outside the State for consumption, use or sale therein."* It is an admitted fact that the Appellant has been purchasing goods like towers, shelters, PIU, SMPS, DG, sets etc. for use of the same by telecom operators like Vodafone, BSNL etc. within the state of Himachal Pradesh. Consequently, the appellant by his act of having caused and effected entry of the relevant goods into local areas of the State for consumption or use not

only make the appellant a dealer but also clearly and indisputably attract liability to pay tax on entry of the goods. Section 3, ibid, does not require that in order to attract the levy of Entry Tax "sale" of goods is essential. The argument for the appellant about service etc. does not whittle down the statutory tax liability which arises with the entry of goods into a local area even for consumption or use. It is an admitted fact that these goods have been used and irrespective of their nature of use in the infrastructure, the tax liability remains intact and is exigible under the provisions of the Entry Tax Act. The provisions of section 3(1) of the Entry Tax Act apply to every use of goods and there is no merit to restrict meaning of the word "use" employed in section 3(1) of the Entry Tax Act, as suggested for the appellant. The Supreme Court in Union of India v. Dharmendra Textile Processors (2008) 18 VST 180 has clearly held that ***"It is well-settled principle of law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intention....Legislative casus omissus cannot be supplied by judicial interpretative process."*** Entry 5 of the Schedule II to the Entry Tax Act only determines a rate of the charge of tax created by Section 3(1) of the Entry Tax Act. Further, the contention of the appellant that the agreement intended such use of goods in the works contract to be a passive use is of no assistance to the appellant because it is elementary that an agreement is incapable of taking precedence over and above the enacted statutory provisions of law. It is not the intention of the appellant but the actual use which determines the tax liability under the Entry Tax Act. Supreme Court in *Larsen and Toubro Ltd. V. State of Karnataka (2014) 1 SCC 708 (3JJ)* on 26-09-2013 has held that:

"Whether the contract involved a dominant intention to transfer the property in goods, in our view, it is not at all material. It is not necessary to ascertain what is the dominant intention of the contract", and that "the dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen to have lost their significance where the transactions of the nature contemplated in Article 366(29A)".

On 06.05.2015, the Constitution Bench of the Supreme Court in Kone Elevator (P) Ltd. V. State of Tamil Nadu (2014) 7 SCC1 (5JJ) considered the matter and declared the law that:

"Considered on the touchstone of the aforesaid two Constitutions Bench decisions in Builders' Assn [(1989) 2 SCC 645] and Gannon Dunkerley (2) [(1993) 1 SCC 364], we are of the convinced opinion that the principles stated in Larsen and Toubro...., do correctly enunciate the legal position. Therefore, the "Dominant nature test" or "overwhelming component test" or "the degree of labour and service test " are really not applicable."

Very significant facts available on record are that the Appellant-company has signed agreements/entered into contracts and imported various goods such as towers, shelters, battery sets, power plants, DG sets, site electrical systems etc. from outside the state for use in within the State. The dealer, as per record has submitted before the Assessing Authority that items such as mobile switching centre (MSC), base station control (BSC), base trans receiver station (BTS), microwave radio, computer / software printer, tower and shelters were actually used by telecommunication operators. The

infrastructure services such as telecommunication site provided by the dealer company to telecom operators, consists of towers, pre-fabricated shelters, green shelters, power interface units, DG Sets, cables, power supply units, transformers etc. It is established from other facts on record that the goods have been used in work contract and even the tax has been deducted at source (TDS) from the said contractors. The plea of the appellant, thus being directly contrary to the facts, deserves to be rejected. I agree with the reasons adduced by the Ld. 1st Appellate Authority in his impugned order dated 19-05-2017 which is a detailed and speaking one and the same are concurred to by this Tribunal also.

7. Consequently, the impugned orders of the Ld. Assessing Authority dated 21-01-2016 and of the Ld. Appellate Authority dated 19-05-2017 call for no interference and these are upheld.

8. Copy of this order be sent to the parties concerned. File after due completion be consigned to the record room.

Akshay Sood
Chairman,
HP Tax Tribunal, Dharamshala,
Camp at Shimla

HP Tax Tribunal, Camp at Shimla.
Block No 30, SDA Complex Shimla-9

Endst. No. HPTT/CS/2023 – 25030 **Dated:** 14/02/2023

Copy forwarded for information to:-

1. The Commissioner State Taxes & Excise, Himachal Pradesh, Shimla-09.
2. The Addl. CST&E-cum- Appellate Authority, SZ, Himachal Pradesh, Shimla.
3. Assessing Authority, Dhalli Circle, District Shimla (HP)
4. M/s Bharti Infratel Ltd., Airtel Tower, Mehli Shimla (HP)
5. Sh. Goverdhan Sharma, Advocate.
6. Sh. Sandeep Mandyal, Sr. Law Officer, HQ.

Reader
HP Tax Tribunal
Dharamshala

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