

TAX

A. Clarification on levy of service tax on repair/ renovation/ widening of roads:

Taxable under which head-

Statutory provision-

- In respect of the construction or maintenance of roads, the Finance Act, 1994 provides for two separate relevant heads of taxable services, namely-
 - (a) Construction or industrial service (Section 65(105) (zzq), and
 - (b) Management, repair or maintenance services (Section 65(105) (zzg)).

- Whereas the head “Construction or industrial service” specifically excludes the construction or repair of roads; the services under the head “Management, repair or maintenance services”, provided under a contract/ an agreement in relation to an immovable property or not, does not provide for any such exemption.

Clarification sought-

The above mentioned two taxable services attracted divergent views from the field formations of the Revenue authorities in respect of levy of service tax on maintenance/ repair of roads. To settle the conflicting legal positions, CBEC issued a circular¹ dated 23rd February, 2009 clarifying the taxability on repair/ renovation/widening of roads.

¹ Circular No. 110/4/2009- ST

The CBEC has prescribed the reading together of the definitions under the above mentioned respective heads of taxable services and has concluded that while construction of road is not a taxable service; management, maintenance and repair of roads fall within the scope of taxable services and thereby attract service tax.

Types of activities which are taxable-

The circular also categorizes different types of activities under "Maintenance or Repairs" and "Construction" heads, as follows-

(a) Maintenance or repair activities:

- Ø Resurfacing
- Ø Renovation
- Ø Strengthening
- Ø Relaying
- Ø Filling of potholes

(b) Construction Activities:

- Ø Laying of a new road
- Ø Widening of narrow road to broader road (for instance, conversion of a two lane road to a four lane road)

- Ø Changing road surface (for instance, graveled road to metalled road/ metalled road to blacktopped/ blacktopped to concrete etc.

B. Bharti Airtel Ltd.

Vs.

State of Karnataka²

Union of India;

Deputy Commissioner of Commercial Tax, Bangalore;

Commissioner of Service Tax; Bangalore;

Commissioner of Commercial Taxes, Bangalore.

Karnataka High Court held that providing of broadband connectivity to subscribers amounted to 'sale of light energy' thus taxable under Karnataka VAT Act on entire sale proceeds despite being assessed to Service Tax.

Facts-

The Bharti Airtel Ltd. ("Appellant") has established telecom infrastructure for providing broadband connectivity to various subscribers through a complex network of optical fibre cables. These optical fibre cables have enormous data carrying capacity

² 2009-TIOL-99-HC-Kar-VAT

at a very high speed at the speed at which the light travels without any interference. The Appellant provides service of telecom connectivity to its subscribers from one 'point of presence' to one or more 'points of presence.' This service in commercial parlance is called as "leased lines" whereby the Appellant allots to a particular subscriber a particular bandwidth under a 'Service Level Agreement.' The Appellant is registered under the Finance Act, 1994 and has been regularly paying 'service tax' in respect of the said services.

Observations of High Court of Karnataka-

- (a) The 'artificially created electrical light energy' through a network of optical fibres laid 5 feet deep into the ground across the country is "goods" within Article 366(12) of the Constitution of India, Sale of Goods Act, 1930 and Karnataka VAT Act, 2003.
- (b) The 'artificially created light energy' is capable of being possessed, transmitted, delivered and used and, to some extent, stored. Thus, it involves an element of 'sale' of 'artificially created light energy.'

- (c) In the instant case, the two elements of service and sale cannot be separated from each other. Therefore, the entire proceeds received by the Appellant as 'service rentals' will be brought under tax under the provisions of Karnataka VAT ("KVAT") Act treating the entire transaction as sale.
- (d) The Government of Karnataka is competent to levy tax on the said sale under KVAT Act, 2003 on the entire proceeds collected from the subscribers as "lease rentals" despite the Appellant being assessed to service tax on the said activity by the Union Government under Finance Act, 1994 treating it as 'service.'

Note-

Bharti Airtel Ltd. has appealed to the Supreme Court in respect of the issue.

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