

**IN THE COURT OF COMMISSIONER  
DEPARTMENT OF TRADE & TAXES  
GOVERNMENT OF NCT OF DELHI  
VYAPAR BHAWAN, NEW DELHI**

No: 268/CDVAT/2010/35

Dated: 10.09.2010

**RULING U/S 85 OF DVAT ACT, 2004**

**Subject: Levy of Tax on the transaction of artificially created light energy consequent upon the provision of Broadband connections to subscribers**

Shri B.L. Sharma, The then Joint Commissioner (L&J), Department of Trade & Taxes has filed an application u/s 85 of the DVAT Act, 2004, seeking clarification/ruling u/s 85 of the DVAT Act, 2004 on the following two points:-

a. Whether sale of artificially created light energy in connection with the provision of broadband connectivity to subscribers for a fixed sum is liable to levy of VAT under the DVAT Act, 2004?

b. If yes, then under which entry does the item figure and as to what is the rate of tax in respect of the transaction of sale of artificially created light energy involved in the provision of broadband connection to subscribers?

The said application has been filed for the purpose of notifying the exact legal position in respect of tax ability on the sale of artificially created light energy consequent upon the provision of Broadband connections to subscribers both to the authorities subordinate to Commissioner (VAT), Government of NCT of Delhi and the entities/dealers who are carrying on or who may undertake such transactions.

2. While explaining the nature of transactions of sale of artificially created light energy the applicant in the application dated 16.04.2010 has stated that the telecom companies have a broadband network and the light energy artificially created within the network is made to carry the data to the subscribers by traveling through the core of optic fiber cables as laid by the companies. The creation, supply, possession, use and transmission and delivery of artificially created light energy takes place almost simultaneously as in the case of electricity. The artificial light energy is capable of being abstracted, possessed and consumed and therefore it qualifies as goods under the provision of Article 366(12) of Constitution of India.

3. It is worth while to refer to the Hon'ble High Court of Karnataka in the case of M/s Bharti Airtel Limited Vs. State of Karnataka and Others vide judgement dated 16.01.2009 had, inter-alia, held that:

“Under the Service Legal Agreement entered into by the broadband provider with customers that the appellant had given its subscribers the right to use its optic fibre cable network and also to use and consume the “light energy” created by it artificially for the purpose of carrying their data/information and the appellant the broadband provider collected from them an ascertained sum of money towards it. This activity of the appellant-company involved transfer of property in goods, viz.,

the artificially created light energy” (other than by way of mortgage, hypothecation, charge or pledge) by the appellant-company to its subscribers in the course of business for ascertained sum of money (consideration) payable to it by its subscribers and the giving of the right by the appellant company to its subscribers to use the optic fibre cable network and also to use and consume artificially created light energy. Thus, though this activity of the appellant-company had been held as “service” under the provisions of the Finance Act, 1994, it fully answered the definition of “sale” as given under section 2(29)(d) of the KVAT Act, 2003, and therefore it was sale for the purpose of that statute.”

“That since the appellant and all its customers had their places of business within the State of Karnataka all the transactions reported by the assessee had to be treated as “local sales” and the Government of Karnataka was competent to levy sales tax on the appellant – company on the sale of artificially created light energy used in the course of transmission of data / information of the subscribers of the appellant through its optic fibre cable network.

That the transaction between the appellant and its subscribers under the “Service Level Agreement” was a composite transaction involving service as well as sale elements which could not be split. The dominant object of the transaction/contract, was the “sale of artificially created light energy” by the appellant to its subscribers and the providing of infrastructure of optic fibre cable network to facilitate the carrying of data/information was incidental to the said dominant object thereby attracting the principle of non-separability.

Thus the entire proceeds received by the appellant from its subscribers as “lease rentals” had to be brought under tax under the provisions of the KVAT Act treating the entire transaction of the appellant as sale of artificially created light energy. Since both sales tax and service tax are separate and distinct imposts – tax/compulsory charges the appellant was liable to be assessed to sales tax under the provisions of the KVAT Act on its activity of providing broadband connectivity to subscribers although, it had been assessed to service tax under the provisions of the Finance Act, 1994.”

The Hon’ble Karnataka High Court has thus held that “light energy” generated by the broadband providers is goods and the transaction of providing broadband connections by a telecom company and receipt of payment thereof is liable to levy of VAT, under the Karnataka Value Added Tax Act, 2003. While arriving at the above said conclusions, the Hon’ble Court had examined as to whether creation supply, possession, use, transmission and delivery of artificially created light energy was goods in the light of the provision of Article 366(12) of the Constitution of India, Section 2(15) of the KVAT Act, 2003 and Section 2(7) of Sale of Goods Act, 1930. Consequent upon the above-said examination, the Hon’ble High Court of Karnataka held that, artificially created light energy is goods. The Hon’ble Court had further held that the transaction of providing broadband connection and receipt of consideration in lieu thereof is sale in terms of provision of Section 2(29) of KVAT Act, 2003 and is liable to levy of VAT under the KVAT Act, 2003.

4. It is relevant here to refer to the definition of the term “goods” as contained in Article 366(12) of the Constitution of India which reads as follows:

(12) “goods” includes all materials, commodities and articles;

Here, it is also pertinent to refer to the provision of Section 2(15) and Section 2(29) of KVAT Act, 2003. Under section 2(15) of the KVAT Act, 2003, the term “goods” has been defined as meaning:-

“all kinds of moveable property (other than newspaper, actionable claims, stocks and shares and securities) and includes livestock, all materials, commodities and articles (including goods, as goods or in some other form) involved in the execution of a works contract or those goods to be used in the fitting out, improvement or repair of movable property, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be served before sale or under the contract of sale”.

Similarly, the term “sale” as defined under section 2(29) of the KVAT Act, 2003, reads as under:-

“Sale” with all its grammatical variation and cognate expressions means every transfer of the property in good (other than by way of a mortgage, hypothecation, charge or pledge by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes, -

(a) .....

(b) .....

(c) .....

(d) a 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.

5. It is also worthwhile to refer to the definition of the term “goods” as defined in section 2(1)(m) of the DVAT Act, which reads as under:-

(m) “goods” means every kind of moveable property (other than newspapers, actionable claims, stocks, shares and securities) and includes –

i livestock, all materials, commodities, grass or things attached to or forming part of the earth which are agreed to be severed before sale or under a contract of sale, and

ii property in goods (whether as goods or in some other form) involved in the execution of a works contract, lease or hire-purchase or those to be used in the fitting out, improvement or repair of movable property”

Here, it is equally relevant to refer to the definition of the “sale” as contained in section 2(1)(zc) of DVAT Act, 2004, which reads as follows:

2(1)(zc) “sale” with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and includes –

.....

.....

Comparison of relevant provisions of KVAT Act, 2003 and DVAT Act, 2004 shows that the said provisions are quite identical.

6. It is also pertinent to refer to Entry No. 3 of IIIrd Schedule appended to the DVAT Act, 2004 which reads as follows:-

**Entry No. 3 of IIIrd Schedule**

“01.04.2005

All intangible goods like copyright, patent, rep license, goodwill etc.”

The nature, substance and manner / modalities of sale of artificially created light energy in connection with the provision of broadband connectivity to subscribers for fixed sum is similar to the products mentioned in the said entry, hence, is covered by the aforesaid entry.

It is also relevant to refer to the judgment of the Hon’ble Supreme Court in the case of Tata Consultancy Services Vs. State of Andhra Pradesh wherein, it was, interalia, held that:-

“A “goods” may be tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods”.

The product known as artificially created light energy has got utility/market value, is capable of being bought and sold, is capable of being possessed, transmitted, delivered, used and to some extent, stored. Thus, all the three attributes as laid down by the Hon’ble Supreme Court in the above said case are getting fulfilled in the present case as well.

7. After careful examination of the nature of product known as artificially created light energy in connection with the provision of broadband connectivity to subscribers, the nature of the transactions of sale and purchase as explained in the application filed by the then Shri B.L. Sharma. The then Joint Commissioner (L&J), keeping in view the provisions of DVAT Act, 2004 referred to above, the law laid down by the Hon’ble Supreme Court in the aforesaid judgment and the decision of the Hon’ble High Court of Karnataka on the said product and the sale/purchase transactions related thereto, the ruling on the questions raised by the applicant in his application filed u/s 85 of the DVAT Act, 2004 is given as follows:-

(a) The sale of the item/product known as artificially created light energy in connection with the provision of broadband connectivity to subscribers for fixed sum i.e. “lease rentals” is taxable under the DVAT Act, 2004.

(b) The rate of tax in respect of the above-said item/product is 5% as the said item is covered by Entry No. 3 of IIIrd Schedule appended to DVAT Act, 2004.

This ruling shall come into force from the date of its publication in the official gazette.

**(Jalaj Shrivastava)**  
Commissioner (T&T)

Joint Commissioner (Legal)  
T&T Department, Vyapar Bhawan,  
I.P. Estate, New Delhi.

Copy for information and necessary action to:-

1. The Secretary (GAD) – with the request to get the ruling published in the official gazette urgently.
2. The Addl. Commissioners Department of Trade & Taxes, Vyapar Bhawan, I.P. Estate, New Delhi.
3. The Joint Commissioners/Dy. Commissioners, Department of Trade & Taxes, Vyapar Bhawan, I.P. Estate, New Delhi.
4. The President, Sales Tax Bar Association, Department of Trade & Taxes, Vyapar Bhawan, I.P. Estate, New Delhi.
5. The Value Added Tax Officer, Policy Branch, Department of Trade & Taxes, Vyapar Bhawan, I.P. Estate, New Delhi.
6. Guard File.

**(Jalaj Shrivastava)**  
Commissioner (T&T)