IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF JULY, 2026

PRESENT

THE HON'BLE MR. JUSTICE S.G.PANDIT

AND

THE HON'BLE DR. JUSTICE K.MANMADHA RAO

SALES TAX REVISION PETITION NO.215 OF 2018

BETWEEN:

AXIS BANK LIMITED
A COMPANY INCORPORATED UNDER
THE COMPANIES ACT, 1956
HAVING ITS REGISTERED
ADDRESS AT NO.9,
ESQUIRE CENTRE
M.G.ROAD, BENGALURU
KARNATAKA - 560 001
REPRESENTED BY ITS AUTHORISED
SIGNATORY, MR. D.V.SASTRY.

...PETITIONER

(BY SRI. PRAKASH SHAH, SENIOR COUNSEL A/W
SRI.MOHAN MAIYA G.L.,ADVOCATE)

AND:

1. THE STATE OF KARNATAKA
   REPRESENTEDF BY THE
   COMMISSIONER OF COMMERCIAL TAXES,
   VANIJYA, THERIGE KARYALAYA,
   GANDHINAGAR,
   BENGALURU - 560 009.

2. THE DEPUTY COMMISSIONER OF
   COMMERCIAL TAXES(AUDIT)-4.5, DVO-4,
   KORAMANGALA,
   BENGALURU - 560 047.

...RESPONDENTS

(BY SRI.ADITYA VIKRAM BHAT,AGA)

THIS STRP IS FILED UNDER SECTION 65(1) OF THE KARNATAKA VALUE ADDED TAX ACT, 2003, R/W RULE 153(1) (a) OF THE KARNATAKA VALUE ADDED TAX RULES 2005, AGAINST THE JUDGMENT AND ORDER DATED 12.12.2017 PASSED IN STA NOS.386 TO 388 AND 93/2016 ON THE FILE OF THE KARNATAKA APPELLATE TRIBUNAL AT BENGALURU, DISMISSING THE APPEALS AND FILED AGAINST ORDER DATED 30.11.2015 PASSED IN VAT.AP.NOS.205/14-15, VAT.AP.NOS.206/14-15, VAT.AP.NOS.1149/14-15, VAT.AP.NOS.1150/14-15 ON THE FILE OF THE JOINT COMMISSIONER OF COMMERCIAL TAXES (APPEALS)-I SHANTHINAGAR, BANGALORE, DISMISSING THE APPEALS BY UPHOLDING THE PENALTY AND REASSESSMENT ORDERS DATED 22.04.2014 FOR THE TAX PERIODS OF 2006-2007, 2007-2008, AND 31.01.2015 FOR THE TAX PERIODS OF 2008-2009 AND 2009-2010 PASSED UNDER SECTION 39(1) AND 72(2) OF THE KVAT ACT 2003 , BY THE ASSISTANT COMMISSIONER OF COMMERCIAL TAXES (AUDIT)-1.4 DVO-01 BANGALORE.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 09.07.2026 AND COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE S.G.PANDIT
and
HON'BLE DR. JUSTICE K.MANMADHA RAO

CAV ORDER

(PER: HON'BLE DR. JUSTICE K.MANMADHA RAO)

The present Revision Petition is filed under Section 65 of the Karnataka Value Added Tax Act, 2003 (for short, "the KVAT Act") calling in question the common order dated 12.12.2017 passed by the Karnataka Appellate Tribunal, Bengaluru (‘the

Tribunal' for short), passed in STA Nos.386 to 388/2016 and STA No.93/2016. Wherein, the Tribunal dismissed the appeals preferred by the petitioner-Bank and affirmed the orders passed by the Assessing Authority and the First Appellate Authority for the assessment years 2006-07, 2007-08, 2008-09 and 2009-10.

2. The petitioner/Bank is the Assessee and the respondents are the Revenue.

3. For sake of convenience the petitioner herein is referred to as Bank and the respondents herein are referred to as Revenue.

4. The brief facts of the case are that:-

The petitioner, M/s. Axis Bank Limited, is a scheduled commercial bank carrying on banking and financial activities under the provisions of the Banking Regulation Act, 1949. Apart from its banking activities, the petitioner is also a registered dealer under the provisions of the KVAT Act and the Central Sales Tax Act, 1956 (for short, "the CST Act"). The petitioner obtained registration under the KVAT Act and CST Act on 20.06.2006.

5. As part of its banking operations, the petitioner provides payment processing services to various Merchant Establishments (for short, "MEs"), enabling acceptance of payments through credit cards, debit cards and other electronic payment instruments. For such purpose, the petitioner enters into Merchant Establishment Agreements with the concerned establishments.

6. Under the said arrangements, Electronic Data Capture Terminals (for short, "EDCTs"), commonly known as swiping machines, along with connected accessories and printers, are installed at the premises of the respective merchant establishments. Whenever a customer makes payment through a credit card or debit card, the card is swiped or inserted into the EDCT machine, which transmits the transaction details through the banking network for authorization and settlement.

7. For providing the aforesaid services, the petitioner collects transaction-based charges commonly known as Merchant Discount Rate or swiping commission. Apart from such transaction-based charges, the petitioner also collects fixed charges under various heads including monthly terminal

rental charges, installation charges, maintenance charges and allied charges in respect of the EDCT machines.

8. The petitioner treated the entire consideration received from the merchant establishments as consideration towards banking and financial services and discharged service tax under the provisions of the Finance Act, 1994.

9. For the assessment years 2006-07, 2007-08, 2008-09 and 2009-10, the petitioner filed returns under Section 35 of the KVAT Act and the returns were initially accepted.

10. Subsequently, on 02.08.2010, during the course of proceedings initiated by the Enforcement Wing of the Commercial Taxes Department, it was noticed that the petitioner had not disclosed the rental receipts collected in respect of EDCT machines as taxable turnover under the KVAT Act. Accordingly, reassessment proceedings were initiated under Section 39 of the KVAT Act.

11. The Assessing Authority, by reassessment orders dated 22.04.2014 relating to the assessment years 2006-07 and 2007-08 and further reassessment orders dated 31.01.2015 relating to the assessment years 2008-09 and 2009-10, held that the rentals collected by the petitioner in

respect of EDCT machines constituted consideration for transfer of the right to use goods and consequently amounted to deemed sale liable to tax under the KVAT Act. Accordingly, tax, interest and penalty under Section 72(2) of the Act were levied. The reassessment proceedings resulted in levy of VAT amounting to Rs.7,00,198/-, interest amounting to Rs.5,77,808/- and penalty amounting to Rs.70,700/-.

12. Aggrieved by the reassessment orders, the petitioner preferred VAT Appeal Nos.205, 206, 1149 and 1150 of 2014-15 before the Joint Commissioner of Commercial Taxes (Appeals)-1, Bengaluru. The First Appellate Authority, by common order dated 30.11.2015, dismissed the appeals and affirmed the reassessment orders.

13. The petitioner thereafter preferred STA Nos.386 to 388 of 2016 and STA No.93 of 2016 before the Karnataka Appellate Tribunal ('the Tribunal' for short). The Tribunal, by common order dated 12.12.2017, dismissed the appeals and affirmed the findings recorded by the authorities below.

14. Being aggrieved by the said order, the present revision petition is filed before this Court under Section 65 of the KVAT Act.

15. This Court, while admitting the revision petitions, framed the following substantial questions of law:

> *(i) Whether on the facts, in the circumstances and on the contentions raised, the Tribunal was right in upholding the orders passed by the Assessing Officer and the First Appellate Authority to the extent questioned herein?*
>
> *(ii) Whether, in the facts and circumstances of the case, the Tribunal was right in rejecting the claim of the petitioner that the charges received from the Merchant Establishments in respect of use of EDCTs or swiping machines are only service charges and are not liable to tax as transfer of right to use goods under the KVAT Act, 2003?*

Submissions on behalf of the petitioner

16. Learned Senior Counsel appearing for the petitioner-Bank would contend that the transaction between the petitioner and the merchant establishments is essentially a composite contract for rendering payment processing services. It is submitted that the EDCT machines are only instruments facilitating access to the banking network maintained by the petitioner and have no independent commercial significance.

17. Learned Senior Counsel would further submit that the petitioner continues to retain ownership, dominion and effective

control over the EDCT machines. The petitioner also retains the right to suspend, disconnect or deactivate the terminals. Therefore, according to the petitioner, there is no transfer of the right to use goods so as to attract tax under Article 366(29A)(d) of the Constitution of India.

18. It is further contended that the clauses contained in the Merchant Establishment Agreement prohibit alteration, transfer, relocation or unauthorized use of the machines and require the merchant establishment to return the equipment upon termination of the agreement. According to the petitioner, such restrictions demonstrate that no legal right to use the equipment was transferred.

19. It is also contended that service tax has admittedly been paid on the entire consideration received from the merchant establishments and therefore levy of VAT on the same consideration is impermissible. The petitioner has also challenged levy of interest and penalty under Section 72(2) of the KVAT Act.

20. In support of his contentions learned Senior Counsel placed reliance on the following decisions:-

- ***Bharat Sanchar Nigam Ltd., and another v. Union of India and others*** *reported in* ***(2006) 3 SCC 1;***
- ***Imagic Creative (P) Ltd., v. Commissioner of Commercial Taxes and others*** *reported in* ***(2008) 2 SCC 614;***
- ***Commissioner of Central Excise v. Idea Mobile Communication Ltd.,*** *reported in* ***2008 SCC OnLine Ker 426;***
- ***Idea Mobile Communication Limited v. Commissioner of Central Excise and Customs, Cochin*** *reported in* ***(2011) 12 SCC 608;***
- ***Indus Towers Ltd., v. Deputy Commr. Of Commercial Taxes, Bangalore*** *reported in* ***2011 SCC OnLine Kar 4364;***
- ***Ishikawajma-Harima Heavy Industries Ltd., v. Director of Income Tax, Mumbai*** *reported in* ***(2007) 3 SCC 481;***
- ***Lakshmi Audio Visual Inc., and another v. Assistant Commissioner of Commercial Taxes and another*** *reported in* ***2001 SCC OnLine Kar 789;***
- ***M/s Rashtriya Ispat Nigam Ltd., owing Visakhapatnam steel project, Visakhapatnam v. The Commercial Tax Officer, Company Circle, Visakhapatnam and another*** *reported in* ***1989 SCC OnLine AP 413;***
- ***Nayana Premji Savala v. Union of India*** *reported in* ***2022 (66) G.S.T.L 417 (Bom.);***
- ***K.P.Mozika v. Oil and Natural Gas Corporation Ltd.*** *reported in* ***(2024) 14 Centax 154 (S.C.)***

21. By relying on the above decisions, learned Senior counsel contended that the transaction remains one of service and not deemed sale.

Submissions on behalf of the Revenue

22. *Per contra*, learned Additional Government Advocate appearing for the Revenue supported the orders passed by the authorities below and submitted that the EDCT machines are identifiable goods installed at the premises of the merchant establishments and separate rental charges are collected for the use of such machines.

23. It is contended that the merchant establishments have physical custody and operational use of the machines during the subsistence of the agreement and, therefore, the transaction squarely falls within the ambit of Article 366(29A)(d) of the Constitution of India and constitutes transfer of the right to use goods.

24. Learned Additional Government Advocate would further submit that payment of service tax does not preclude levy of VAT on the sale element of the transaction. It is submitted that the issue stands covered by the judgment of the Division Bench of this Court in ***M/s. Atria Convergence***

Technologies Ltd. v. Deputy Commissioner of Commercial Taxes and connected matters, decided on ***18.02.2025.***

25. In support of his contentions, learned AGA has placed reliance on the following judgments:-

- ***Commissioner of Service Tax, Delhi v. Quick Heal Technologies Limited*** *reported in* ***(2023) 5 SCC 469;***

  53.5. In the case of Article 366(29-A)(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 goods. In such a case taxable event occurs 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.

  53.6. The levy of tax under Article 366(29-A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

  53.7. xxx

  53.8. xxx

  53.9. The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.

- ***M/s Atria Convergence Technologies Ltd., v. Deputy Commissioner of Commissioner of***

Commercial Tax and another *by order dated* ***18.02.2025*** *passed in* ***STRP No.19/2024 c/w. STRP Nos.37/2023, 10/2024, 15/2023 & 31/2019.***

The above observations apply to the case of Assessees. The authorities having accumulated expertise in the matter have formed a considered opinion that a sum of Rs.2,000/- is the consideration for transferring the right to use the STBs. A Court exercising a limited revisional jurisdiction cannot run a race of opinions with the authorities and Tribunals which have recorded concurrent findings.

H. AS TO THE CONTENTION THAT SERVICE TAX & VAT ARE MUTUALLY EXCLUSIVE:

(1) The vehement submission of the Assessees that they have paid service tax as Cable Operator Services u/s.65(105)(zs) of the Finance Act, 1994 and therefore the same charges cannot be subjected to VAT under 2003 Act, appears attractive at the first blush. However, a deeper examination shows its fallacy: A transaction may involve a composite arrangement comprising of service & sale. In such an instance, there may be transfer of a right to use goods as in the case of a telephone connection, which would also include service. It is competent for the State to tax the sale element provided there is a discernable sale and only to the extent relatable to such a sale. True it is, that in ***IMAGIC CREATIVE PRIVATE LIMITED vs. COMMISSIONER OF COMMERCIAL TAXES*** *has said that the payment*

> *of service tax and remittance of VAT are mutually exclusive, the nature of levies being different. However, different aspects of a single transaction can be taxed under different statutes.*

26. Heard learned Senior Counsel appearing for the petitioner and learned AGA for the respondents.

27. We have given our anxious consideration to the rival submissions made by the learned counsel appearing for the parties and have perused the material available on record.

28. Before considering the rival contentions on merits, it is necessary to notice the scope of jurisdiction exercised by this Court under Section 65 of the KVAT Act. The jurisdiction under Section 65 of the KVAT Act is confined to examination of substantial questions of law arising from the order passed by the Karnataka Appellate Tribunal. This Court, while exercising revisional jurisdiction, does not sit as a regular appellate authority to re-appreciate the evidence or substitute its own view merely because another view is possible. Interference with concurrent findings recorded by the authorities below would arise only when such findings are demonstrated to be perverse, arbitrary or contrary to the statutory provisions or settled principles of law.

Section 65 of the KVAT Act reads as under:-

> ***65. Revision by High Court in certain cases**.- (1) Within 1 [one hundred and Eighty days] from the date on which an order under sub-section (5) or (8) or (9) of Section 63 was communicated to him, the appellant or the respondent may prefer a petition to the High Court against the order on the ground that the Appellate Tribunal has either failed to decide or decided erroneously any question of law:*
>
> *1. Substituted Inserted by Act 11 of 2005 w.e.f. 1.4.2005.*
>
> *(2) The High Court may admit a petition preferred after the period of 1 [one hundred and Eighty days] aforesaid if it is satisfied that the petitioner has sufficient cause for not preferring the petition within that period.*
>
> *1. Substituted Inserted by Act 11 of 2005 w.e.f. 1.4.2005.*
>
> *(3) The petition shall be in the prescribed form, shall be verified in the prescribed manner, and shall, when it is preferred by any person other than an officer empowered by the Government under sub-section (1) of Section 63, be accompanied by a fee of one hundred rupees.*
>
> *(4) If the High Court, on perusing the petition, considers that there is no sufficient ground for interfering, it may dismiss the petition summarily:*
>
> *(5) The High Court shall not dismiss any petition unless the petitioner has had a reasonable opportunity of being heard in support thereof.*

(6) (a) If the High Court does not dismiss the petition summarily, it shall, after giving both the parties to the petition a reasonable opportunity of being heard, determine the question or questions of law raised and either reverse, affirm or amend the order against which the petition was preferred or remit the matter to the Appellate Tribunal with the opinion of the High Court on the question or questions of law raised or pass such other order in relation to the matter as the High Court thinks fit. (b) Where the High Court remits the matter to the Appellate Tribunal under clause (a) with its opinion on questions of law raised, the latter shall amend the order passed by it in conformity with such opinion.

(7) Before passing an order under sub-section (6) the High Court may, if it considers necessary so to do remit the petition to the Appellate Tribunal and direct it to return the petition with its finding on any specific question or issue.

(8) Notwithstanding that a petition has been preferred under sub-section (1), the tax shall be paid in accordance with the assessment made in the case.

(9) If as a result of the petition, any change becomes necessary in such assessment, the High Court may authorize the prescribed authority to amend the assessment and the prescribed authority shall amend the assessment accordingly and thereupon the amount overpaid by the person concerned shall be refunded to him without interest or the additional amount of tax due from

> *him shall be collected in accordance with provisions of this Act, as the case may be.*
>
> *(10) (a) The High Court may, on the application of either party to the petition, review any order passed by it under sub-section (6) on the basis of facts which were not before it when it passed the order. (b) The application for review shall be preferred within such time and in such manner as may be prescribed, and shall where it is preferred by any person other than an officer empowered by the Government under sub-section (1) of Section 63 be accompanied by a fee of one hundred rupees.*
>
> *(11) (a) With a view to rectifying any mistake apparent from the record, the High Court may, at any time within five years from the date of the order passed by it under subsection (6), amend such order. (b) The High Court shall not pass an order under this sub-section without giving both parties affected by the order a reasonable opportunity of being heard.*
>
> *(12) In respect of every petition preferred under sub-section (1) or (10), the costs shall be in the discretion of the High Court.*

29. Section 65 of the KVAT Act provides for revision by this Court where the Tribunal has either failed to decide or has erroneously decided any question of law. The power available to this Court under the said provision is, therefore, required to

be exercised within the limited parameters prescribed by the statute.

30. The principal issue which arises for consideration in the present revision petitions is whether the rental charges collected by the petitioner in respect of EDCT machines installed at the premises of merchant establishments constitute consideration for transfer of the right to use goods and consequently amount to deemed sale liable to tax under the KVAT Act.

31. It is observed that Article 366(29A) of the Constitution of India was inserted by the Constitution (Forty-sixth Amendment) Act, 1982. The said amendment expanded the concept of sale by including within the ambit of taxation certain transactions which, though not amounting to sale in the conventional sense under the Sale of Goods Act, 1930, involve transfer of certain rights in goods. Clause (d) of Article 366(29A) includes within the expression "tax on the sale or purchase of goods" a tax on the transfer of the right to use any goods for any purpose, whether for a specified period or otherwise, for cash, deferred payment or other valuable consideration. Thus, the said provision creates a legal fiction by

treating transfer of the right to use goods as a sale, notwithstanding that ownership in the goods continues to remain with the owner.

32. The Constitution Bench of the Apex Court in ***BSNL's*** *case supra* has explained the principles governing transfer of the right to use goods. The nature of the transaction, the contractual terms, the rights conferred upon the user and the manner in which the goods are placed at the disposal of the user are relevant factors for determining whether there has been a transfer of the right to use goods.

33. The Apex Court in ***BSNL's*** *case supra*, further explained the principles governing transfer of the right to use goods under Article 366(29A)(d) of the Constitution of India. The determination of whether a transaction amounts to transfer of the right to use goods depends upon the nature of the goods involved, the contractual arrangement between the parties and the rights conferred upon the user. The essential enquiry is whether the user has been conferred a right to use identified goods for the agreed purpose during the period of the agreement. Retention of ownership by the supplier, by itself,

would not determine the nature of the transaction, as ownership and the right to use goods are distinct concepts.

34. The test is not whether ownership has been transferred, but whether the customer has been conferred a right to use identified goods for the purpose for which such goods are supplied. Retention of ownership, supervision, maintenance obligations or rights of repossession by the owner does not, by themselves, negate transfer of the right to use goods.

35. In the present case, it is not in dispute that the petitioner installed EDCT machines at the premises of the respective merchant establishments. It is also not in dispute that separate charges were collected by the petitioner towards terminal rentals apart from the transaction-based charges collected for processing payments.

36. The material on record indicates that the EDCT machines are identifiable and tangible equipment deployed at the premises of the merchant establishments. The merchant establishments use such machines for accepting payments from their customers through credit cards, debit cards and other

electronic payment instruments, generating transaction slips and facilitating completion of commercial transactions.

37. The contention of the petitioner is that the EDCT machines are merely part of the larger payment processing system maintained by the petitioner and that the transaction is essentially a service transaction. The said contention, in our considered view, cannot be accepted. The fact that the equipment operates through the petitioner's banking network does not take away the independent identity of the equipment. The EDCT machine remains a tangible item of equipment installed at the merchant premises and is made available for use by the merchant establishment during the period of the agreement.

38. Much emphasis has been placed by the learned Senior Counsel appearing for the petitioner on the clauses contained in the Merchant Establishment Agreement which restrict the merchant specifically Clauses 2, 4, 12.1, 12.2, 12.3, and 21, which strictly prohibit the merchant from altering, modifying, reverse-engineering, or tampering with the software programming, moving or relocating the hardware from its registered commercial counter without prior written consent, or

assigning, subleasing, or permitting any third-party interaction with the hardware, while dictating that all equipment remains the property of the bank and must be immediately surrendered on demand.

39. We are unable to accept the submission that such clauses negate transfer of the right to use goods. Clauses of such nature are normally incorporated in commercial arrangements to safeguard the ownership interest of the supplier and ensure proper maintenance and functioning of the equipment. The existence of such restrictions does not mean that the user has not been conferred the right to use the equipment during the subsistence of the agreement.

40. The relevant factor is whether the merchant establishment was enabled to use the identified equipment for its business purposes. In the present case, the answer is clearly in the affirmative. The machines remained installed at the merchant premises and were available for use by the merchant establishment for processing customer transactions during the period of the agreement.

41. The petitioner has contended that since it retained the ability to suspend or deactivate the terminals through its

network infrastructure, effective control continued to remain with the petitioner. The said submission also cannot be accepted. Retention of supervisory or regulatory control by the owner does not necessarily mean that the right to use the goods has not been transferred. A person who transfers the right to use goods may continue to retain ownership, maintenance obligations and certain supervisory powers. The question is whether the customer is placed in a position to use the goods for the agreed purpose. In the present case, the merchant establishments were so enabled.

42. It is relevant to note that Section 2(29)(d) of the KVAT Act, which is enacted in the backdrop of Article 366(29A)(d) of the Constitution of India, expands the scope of the expression 'sale' to include a transfer of the right to use any goods for consideration. Therefore, for a transaction to fall within the said provision, the essential requirements are that there must be identifiable goods, a transfer of the right to use such goods, and such transfer must be for consideration. The determination of whether there is such a transfer would depend upon the nature of the transaction, the terms of the agreement and the rights conferred upon the user.

43. Learned Additional Government Advocate has placed reliance on the judgment of the Co-ordinate Bench of this Court in ***M/s. Atria Convergence Technologies Ltd's*** *case supra.* Though the said decision arose in the context of Set Top Boxes supplied by service providers to subscribers, the legal issue considered therein with regard to the scope of Section 2(29)(d) of the KVAT Act namely, whether retention of ownership and contractual obligations relating to maintenance or service would by themselves negate a transfer of the right to use goods, is relevant for consideration in the present case. The Co-ordinate Bench of this Court held that the determination of such issue depends upon the nature of the transaction, the terms of the agreement and the rights conferred upon the user. Mere retention of ownership by the supplier, by itself, would not be conclusive in determining whether there is a transfer of the right to use goods.

44. Applying the aforesaid principle to the case on hand, it is not in dispute that the petitioner has retained ownership of the EDCT machines. However, the material on record indicates that the said machines were installed at the premises of the merchant establishments and were made available to them for use during the subsistence of the agreement. The relevant

consideration is not merely as to who continued to hold the title over the equipment, but whether the merchant establishments were conferred a right to use the said machines for the purpose for which they were provided.

45. Therefore, the mere fact that the petitioner retained ownership over the EDCT machines or continued to have certain obligations relating to maintenance and service of the equipment cannot, by itself, lead to the conclusion that there was no transfer of the right to use goods. The nature of the rights granted to the merchant establishments under the agreement and the extent of control exercised by them over the use of the machines have to be considered for determining whether the transaction falls within the ambit of Section 2(29)(d) of the KVAT Act.

46. The petitioner/Bank has also urged contention that the Bank has discharged service tax on the entire consideration received from the merchant establishments and, therefore, the same consideration cannot be subjected to VAT. The said contention also does not merit acceptance. Article 366(29A)(d) of the Constitution of India enables the State Legislature to levy tax on transfer of the right to use goods. The taxable event

under the said provision is the transfer of the right to use goods for consideration.

Clause 29-A of Article 366 of the Constitution of India reads as follows:-

> *"366. (29-A) tax on the sale or purchase of goods" includes-*
>
> *(a) a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration;*
>
> *(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;*
>
> *(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;*
>
> *(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;*
>
> *(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;*
>
> *(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human*

> *consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"*

Thus, the above clause specifies the cases which the tax in relation to sale and purchase of goods will include and also outlines its applicability even in the case of deemed sale.

47. It is observed that a transaction may contain different elements and may attract different levies under different statutes, provided the respective taxing fields are distinct and the statutory requirements are satisfied. Payment of service tax on the service component does not, by itself, exclude the power of the State to levy VAT on the sale element, if a transfer of the right to use goods is established.

48. The Apex Court in ***Imagic Creative (P) Ltd's*** *case supra* has recognised that service tax and VAT operate in different fields. The said principle does not support the proposition that once service tax is paid, VAT can never be levied, irrespective of the nature of the transaction.

49. In the present case, the authorities below have not treated the entire banking service as taxable under the KVAT Act. The finding recorded is that the rental charges collected in respect of the EDCT machines represent consideration for transfer of the right to use goods. Therefore, the contention based on payment of service tax does not assist the petitioner.

50. Learned Senior Counsel appearing for the petitioner has relied upon the judgment of the Apex Court in ***Idea Mobile Communication Ltd's*** *case supra* to contend that the EDCT machines are only incidental to the service rendered and cannot be treated as a separate subject matter liable to tax as deemed sale.

51. In the said case, the Apex Court was considering the nature of transaction relating to SIM cards supplied by cellular operators to their subscribers. The question before the Court was whether the value of SIM cards constituted sale of goods or formed part of the taxable service provided by the cellular operator. The Apex Court noticed that a SIM card by itself had no independent value or utility and merely enabled identification of the subscriber and access to the mobile network. It was in that factual context that the Court held that

where the SIM card is merely incidental to the service rendered and does not constitute an independent object of sale, the dominant nature of the transaction is rendering of service.

52. The said principle, however, cannot be applied to the facts of the present case. In ***Idea Mobile Communication Ltd's*** *case supra*, the Apex Court was concerned with a SIM card which, by itself, did not confer any independent right or utility upon the subscriber and merely facilitated identification of the subscriber and access to the telecom network. The SIM card was, therefore, held to be incidental to the rendering of telecommunication service and not an independent subject matter of sale.

53. In the present case, the Electronic Data Capture Terminals (EDCTs) stand on a different footing. The EDCT machines are separately identifiable and tangible equipment installed at the premises of the merchant establishments. The Merchant Establishment Agreement specifically contemplates provision of such equipment, collection of separate rental charges in respect thereof, use of the equipment by the merchant establishments for accepting payment transactions, and return of the equipment upon termination of the

arrangement. Unlike a SIM card, the EDCT machine is not merely an identification device or a passive instrument facilitating access to the Bank's service. The merchant establishment is provided possession and operational access to the identified equipment for accepting customer transactions. The equipment performs a distinct function independent of the mere provision of banking service. Further, separate rental consideration is collected for such equipment.

54. Learned Senior Counsel appearing for the petitioner has also placed reliance upon the judgment of the Apex Court in ***Rashtriya Ispat Nigam Ltd’s*** *case supra* to contend that the transaction in question does not amount to transfer of the right to use goods. The said decision, having regard to the facts and circumstances involved therein, does not advance the case of the petitioner. The determination as to whether there is a transfer of the right to use goods depends upon the nature of the goods involved, the contractual arrangement between the parties and the rights conferred upon the user. In the present case, the EDCT machines are identifiable and tangible goods installed at the premises of merchant establishments and are made available to them for use during the subsistence of the

agreement. Therefore, the said decision does not assist the petitioner.

55. Reliance has also been placed upon by the learned Senior counsel for the petitioner in ***Indus Towers Ltd's*** *case supra*. The said decision was rendered in the context of telecom infrastructure where the question was whether providing access to passive infrastructure amounted to transfer of the right to use goods. This Court, on the facts therein, found that the infrastructure continued to remain under the control of the service provider and the customer was only provided access to the facility.

56. The said decision is also distinguishable on facts. In the present case, the subject matter is not mere access to an infrastructure facility. The petitioner/Bank has provided identified EDCT machines to the merchant establishments, which are installed at their premises and operated by them for accepting payments from customers. The merchant establishments are thus enabled to use the identified equipment during the subsistence of the agreement. Hence, the ratio in ***Indus Towers Ltd's*** *case supra*. cannot be applied to the present case.

57. The petitioner has also challenged the levy of interest and penalty under Section 72(2) of the KVAT Act. The said contention cannot be accepted. The material on record discloses that the petitioner had collected separate charges towards rental of EDCT machines from the merchant establishments but had not disclosed the same as taxable turnover under the KVAT Act. The Assessing Authority, the First Appellate Authority and the Tribunal have concurrently recorded a finding that such rental charges represented consideration for transfer of the right to use goods.

58. The petitioner has also challenged the levy of penalty under Section 72(2) of the KVAT Act. The said contention cannot be accepted. The Tribunal has noticed the applicability of Section 72(2) of the KVAT Act. In the absence of any perversity in the findings recorded by the authorities below, the levy of penalty does not call for interference in exercise of revisional jurisdiction.

59. The levy of interest is consequential to the determination of tax liability and being statutory in nature, the same also does not call for interference.

60. It is relevant to note that the Assessing Authority, the First Appellate Authority and the Karnataka Appellate Tribunal have examined the nature of the agreement entered into between the petitioner and the merchant establishments, the nature of the EDCT machines supplied and the charges collected towards such equipment. All the authorities have concurrently recorded a finding that the EDCT machines constitute identifiable goods and that the rental charges collected in respect of such machines represent consideration for transfer of the right to use goods.

61. In exercise of revisional jurisdiction under Section 65 of the KVAT Act, this Court is not required to re-appreciate the evidence or substitute its own view merely because another view may be possible. Interference with concurrent findings of fact would arise only when such findings are shown to be perverse, contrary to the statutory provisions or based on no evidence.

62. On examination of the material available on record, we are of the considered view that the findings recorded by the authorities below are based upon the contractual terms, the nature of the equipment supplied and the manner in which the

EDCT machines were made available to the merchant establishments. No error of law warranting interference under Section 65 of the KVAT Act is made out.

63. Upon consideration of the statutory provisions, the material available on record and the submissions advanced by the learned counsel appearing for the parties, we are of the considered opinion that the Tribunal has correctly appreciated the nature of the transaction and applied the principles governing transfer of the right to use goods.

64. The EDCT machines are identifiable goods installed at the premises of merchant establishments. The merchant establishments were enabled to use such equipment for their business purposes during the subsistence of the agreement. The retention of ownership and supervisory rights by the petitioner does not negate the transfer of the right to use such goods.

65. Consequently, the rental charges collected by the petitioner in respect of EDCT machines constitute consideration for transfer of the right to use goods and are liable to tax under the KVAT Act.

66. The findings recorded by the Tribunal do not suffer from any error of law warranting interference under Section 65 of the KVAT Act.

67. In view of the discussion made hereinabove, substantial question of law No.(i) is answered in the affirmative and against the petitioner-Bank."

68. Substantial question of law No.(ii) is answered in the affirmative and against the petitioner-Bank by holding that the charges received towards use of EDCT machines constitute consideration for transfer of the right to use goods and are liable to tax under the KVAT Act.

69. In view of the foregoing discussions, this Court proceed to pass the following:-

ORDER

*(i) STRP No.215/2018 is **dismissed.***

(ii) The common order dated 12.12.2017 passed by the Karnataka Appellate Tribunal, Bengaluru, in STA Nos.386 to 388/2016 and STA No.93/2016 is hereby affirmed.

(iii) The substantial questions of law are answered in favour of the Revenue and against the petitioner.

No order as to costs.

Pending interlocutory applications, if any, shall stand disposed of.

SD/-
(S.G.PANDIT)
JUDGE

SD/-
(DR.K.MANMADHA RAO)
JUDGE

MH/-