

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
**CHANDIGARH**

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REGIONAL BENCH – COURT NO. 1

**Service Tax Appeal No. 55227 Of 2013**

[Arising out of OIO No. 161 & 162/ST/PKJ/CCE/Adj/2012 both dated 09.10.2012 passed by the Commissioner of Central Excise, New Delhi]

**Tower Vision India Private Limited** : **Appellant (s)**

Corporate Office Plot No. 356, Udyog  
Vihar, Phase-iv, Gurgaon-122015

Vs

**Commissioner of Service Tax-Delhi** : **Respondent (s)**

MG Marg, IP ESTATE, 17-B...IAEA House...IP ESTATE  
DELHI-110002

APPEARANCE:

Shri Gajendra Maheshwari, Advocate for the Appellant  
Shri Rajeev Gupta, Shri Nikhil Kumar Singh and Shri Narinder Singh,  
Departmental Representatives for the Respondent

**CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**  
**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**ORDER No. A/60335/2023**

Date of Hearing:06.07.2023

Date of Decision:06.09.2023

**Per : S. S. GARG**

The present appeal is directed against the impugned order dated 09.10.2012 passed by the Commissioner of Central Excise, New Delhi whereby the Ld. Commissioner has confirmed the demand of cenvat credit of Rs. 30,07,90,763/- for the period 2006-07 to 2009-10 and for Rs. 17,77,72,576/- for the period 2010-11 raised in two show cause notices dated 26.10.2010 and dated 20.09.2011. The Ld. Commissioner has also imposed equal penalty under Rule 15 (1) of CCR, 2004 and also demanded interest under Rule 14 of CCR, 2004

readwith Section 75 of the Act and also imposed penalty of Rs. 5,000/- under Section 77 of the Finance Act, 1944.

2. Briefly the facts of the case are that the appellant is engaged in providing telecom network infrastructure support services to various telecommunication companies providing mobile services. In this regard, the Appellant has been issued IP1 licence by Department of Telecommunication, Ministry of Communication and Information Technology. The telecommunication infrastructure support services so provided by the Appellant at telecom sites is on non exclusive basis.

- During the course of Audit of the appellant's records, some discrepancies were noticed by the audit party. The major objections of the audit team were:

(i) Wrong availment of CENVAT Credit on Pre-fabricated Building (telecom shelter) and Towers/Tower materials/Tower structures falling under CETH 94060091 & 730820190 by declaring these items as capital goods and

(ii) Wrong availment of Cenvat credit of services utilized in relation to Pre-fabricated shelters and Towers as input service providing output service.

- On these allegations, two show cause notices were issued to the appellant.

- The appellant filed detailed reply to the show cause notices and after following due process, the Ld. Commissioner has confirmed the demand as proposed in these two show cause notices.

- Aggrieved by the said order, the appellant filed appeal before this Tribunal.

3. Heard both the parties and perused the records.

4. Ld. Counsel for the appellant submitted that the only issue involved in this appeal is about the eligibility of the appellant to claim cenvat credit on tower, tower material, shelters etc. He submits that this issue has been decided in favour of the appellant by the Hon'ble Delhi High Court vide order dated 31 October 2018 and the copy of Delhi High Court Order has also been tendered with his submissions. He further submitted that based on the Delhi High Court Order dated 31 October 2018, CESTAT Chandigarh bench of the Tribunal on the identical issue has passed the order allowing the CENVAT credit on input, input services and capital goods in the following cases:

- Bharti Infratel Ltdcases (Appeal no. ST/ 52951,52377-52378/2015) - Order dated 21 February 2019
- Bharti Infratel Ltd. v Commissioner of Service Tax, Delhi-IV (Appeal NoST/52382/ 2015-Cus-(DB) - Order dated 22 May 2019
- Indus Towers Limited v CCE& ST, Delhi-IV (Appeal NoST/51115/2015) along with other tagged matters - Order dated 23 May 2019
- Indus Towers Limited v CCE& ST, Delhi-IV (Appeal No ST/51211/2015) - Order dated 19 December 2019

Copies of all the orders are also annexed with the written submissions filed by the Ld. Counsel for the appellant.

5. He further submitted that the Revenue has filed appeals against the orders passed by this bench before the Hon'ble High Court of Punjab and Haryana and the same are pending before the Hon'ble High Court, but the Hon'ble High Court has not granted any stay in any of the cases filed by the Revenue.

6. He further submitted that the items in question, namely, tower, tower material and telecom shelters are movable goods received in CKD condition by the appellant and its eligibility to avail Cenvat credit is determined at the time of such receipt of these items. It is for the reason of movability of these items only that Excise Duty is paid thereon by the suppliers, whose credit is availed by the appellant.

7. On the other hand, the Ld. DR supported the impugned order and submitted that treating the prefabricated building (telecom shelter) and tower/tower materials/tower structure as movable goods and allowing Cenvat credit of the duty paid on these items on the output service namely, the cellular service, is not correct because in the CKD or SKD condition the tower and parts thereof would fall under Chapter Heading 7308 of the Central Excise Tariff Act, 1985, which is not specified in clause (i) or clause (ii) of Rule 2(a)(A) of the Cenvat Rules so as to be capital goods. In support of his submission, he relied upon the decision of the Bombay High Court in *Bharti Airtel Ltd vs. Commissioner Central Excise, Pune-III* [2014 (35) S.T.R. 865 (Bom.)].

8. Ld. DR also submitted that the decision of the Hon'ble Delhi High Court in the appellant's own case has been challenged before the Hon'ble Supreme Court and the notice has already been issued, therefore, he has prayed that this case may be kept in abeyance till the decision of the Hon'ble Apex Court in the case of *Vodafone Mobile Services Ltd vs. Commissioner of Service Tax, Delhi* [2018-TIOL-2409-HC-DEL-ST 2019 (27) G.S.T.L481 (Del)].

9. After considering the submissions of both the parties and perusal of the records and the various decisions relied upon by both the parties, we find that this issue of Cenvat Credit on input/input

services on the impugned items and capital goods has been decided in favour of the appellant by the Hon'ble High Court of Delhi vide its order dated 31.10.2018 in a bunch of appeals in the case of Vodafone Mobile Services Ltd. cited (supra).

10. Further, we find that by relying upon the decision of Hon'ble Delhi High Court in appellant's own case, this Tribunal in the case of Bharti Infratel Ltd. and Indus Towers Limited cited (supra) have allowed the cenvat credit on tower, tower material and telecom shelter etc.

11. Further, we find that the revenue's appeal against the decisions in the case of Bharti Infratel Ltd. and Indus Towers Limited filed before the Hon'ble High Court of Punjab and Haryana is pending, but the Hon'ble High Court has not granted any stay in favour of the revenue.

12. We note that the division bench of CESTAT Principle Bench at New Delhi in identical facts has examined the issues in the case of Bharti Hexacom Ltd. vs. CCE & Customs, Jaipur-I reported in 2021 (52) GSTL 62 (Tri.-Del.) wherein the division bench has noted all the five questions framed by the Hon'ble Delhi High Court and answered each questions with a detailed reasons and after following the decision of the Hon'ble Delhi High Court has allowed the appeal of the assessee by holding that the appellant is eligible to claim cenvat credit on tower, tower material and telecom shelter etc. It is pertinent to reproduce the said findings provided in Para 10 to 22 and are being reproduced herein below:-

**“10.** The Delhi High Court in *Vodafone Mobile Services* framed five questions of law to be answered. It would be pertinent to refer to the said five questions and the view expressed by the Delhi High Court.

**11.** Question No. 1 is whether the finding of the Tribunal that the towers, shelters and accessories used by the appellant for providing ‘business support services’ are immovable property is correct or not?

**12.** The finding recorded by the Delhi High Court is as follows :

“38. A machine or apparatus annexed to the earth without its assimilation by fixing with nuts and bolts on a foundation to providing for stability and wobble free operation cannot be said to be one permanently attached to the earth and therefore, would not constitute an immovable property. Thus, the tribunal erred in relying on the Bombay High Court and the judgment was delivered, the whole case proceeded on the presumption that these are immovable properties. The tribunal failed to appreciate the “permanency test” as laid down by the Supreme Court in *Solid and Correct Engineering* (supra).”

(Emphasis supplied)

**13.** It is seen that the decision of the Bombay High Court in *Bharti Airtel* was considered by the Delhi High Court.

**14.** Question No. 2 framed by the Delhi High Court is whether the assesseees are entitled to claim Cenvat credit on the towers and shelters either as capital goods or inputs in terms of Rule 2(a) and (k) of the Cenvat Rules and whether towers and shelters would qualify as “accessories”?

**15.** The finding recorded by the Delhi High Court on this issue is as follows :

“53. On examination of the definition and the decisions, the court is of the considered opinion that the term “all goods” mentioned in Rule 2(k) of the Credit Rules would cover all the goods used for providing Output Services, except those which are specifically excluded in the said Rule. Therefore, the definition is wide enough to bring all goods which are used for providing any output service. Further, from the decisions of the Supreme Court and other judgments referred to previously, the test applicable for determining whether inputs are used in the manufacture of goods is the “functional utility” test. If an item is required for providing out the output services of the service provider on a commercial scale, it satisfies the functional utility test. In the facts of the present case, what emerges is that, BTS is an integrated system and each of its components have to work in tandem with each other in order to provide the required connectivity for cellular phone users and for efficient telecommunication services. *The towers and pre-fabricated shelters form an essential in the provision of telecommunication service. The CESTAT in the opinion of this court failed to appreciate that it is*

*well settled that the word "used" should be understood in a wide sense, so as to include passive as well as active use. The towers in CKD condition are used for the purpose of supplying the service and therefore, would qualify as "inputs". There is actual use of tower and shelters in conjunction with the Antenna and the BTS equipment in providing the output service, which also includes provision of the Business Support Service. The CESTAT has failed to appreciate that the towers and the parts thereof and the pre-fabricated shelters are inputs, in accordance with the provisions of Rule 2(k) of the Credit Rules. The CESTAT has erred in holding that there is no nexus between the inputs and the output service. The CESTAT also failed to consider the decision of the Andhra Pradesh High Court in the case of the M/s. Indus Towers Ltd. v. CTO, Hyderabad [(2012) 5 VSR 447], which clearly ruled that the towers and shelters are indeed used and are integrally connected to the rendition of the telecommunication service."*

(Emphasis supplied)

**16.**The third question framed by the Delhi High Court is whether the Tribunal erred in applying the nexus test with reference to MS angles and channels as according to the appellant what was bought to the site were towers, shelters and accessories in CKD/SKD conditions for providing services?

**17.** The finding on this issue is contained in paragraph 56 of the judgment of the Delhi High Court and it is as follows :

*"The inputs such as MS angles and channels "56. are used for the providing infra-support service/telecom service. To apply the term "used for" the definition of inputs, there should be a nexus between the input goods and the output service. In the opinion of this court, clearly goods in question have gone into the making of such towers which in turns are used for providing infra-support service/telecom service. It is therefore, held that the CESTAT erred in applying the nexus test and therefore, credit has to be extended to the duty paid MS angles and channels."*

(Emphasis supplied)

**18.**Question No. 4 framed by the Delhi High Court is whether the appellant was justified, in terms of Rule 4(1) of the Cenvat Rules, in claiming Cenvat credit of excise duty paid by the manufacturer of towers and shelters after receipt of such towers and shelters at the premises?

**19.**The finding on this issue is contained in paragraph 68 of the judgment and it is as follows :

*"68.On the basis of the above reasoning, the Tribunal had denied CENVAT credit to the assessee on the premise that the towers erected result into an immovable property, which is erroneous and contrary to the judgment of the Supreme Court in the case of Solid and Correct Engineering (supra). The*

*towers which are received in CKD condition, are assembled/erected at the site subsequently giving rise to a structure that remains immovable till its use because of safety, stability and commercial reasons of use. The entitlement of CENVAT credit is to be determined at the time of receipt of goods. The fact that such goods are later on fixed/fastened to the earth for use would not make them a non-excisable commodity when received. Therefore, this question is answered in favour of the assessee and against the Revenue."*

(Emphasis supplied)

**20.** Question No. 5 as framed by the Delhi High Court is whether emergence of immovable structure at intermediate stage (assuming without admitting) is a criterion for denial of Cenvat credit?

**21.** The finding is contained in paragraph 73 of the judgment of the Delhi High Court and it is as follows :

*"73. The conclusion of CESTAT, denying the assessee CENVAT credit on the premise that the towers erected result in immovable property, is erroneous and plainly contrary to Solid and Correct Engineering (supra). The towers that are received in CKD condition, are erected at site, subsequently, giving rise to a structure that remains, safe and stable (commercial reasons of use). The fact that in the intermediate stage, an immovable structure emerged, is of no consequence, in the facts of the present case. It is a settled principle of law that entitlement of CENVAT credit is to be determined at the time of receipt of the goods. If the goods that are received qualify as inputs or capital goods, the fact that they are later fixed/fastened to the earth for use would not make them a non-excisable commodity when received. The CESTAT failed to consider the fact in the event antennae and BTS are to be relocated, the assessee also has to relocate the tower and the pre-fabricated shelters, thereby, implying that the towers and the pre-fabricated shelters, are not immovable property. Therefore, the CESTAT erred in relying upon the decision of the Bharti Airtel (supra)."*

(Emphasis supplied)

**22.** It is seen from the aforesaid judgment of the Delhi High Court in *Vodafone Mobile Services* that towers and pre-fabricated shelters form an essential ingredient in the provision of telecommunication service as they are used for the purpose of supplying the service and would qualify as 'inputs' and, therefore, Cenvat credit can be availed."

13. Further, we find that the decisions of the Hon'ble Delhi High Court in *Vodafone Mobile Services Ltd.* has been challenged by the



Revenue before the Hon'ble Apex Court and only notice has been issued without stay.

14. in view of our discussion above, by following the ratio of the decision in appellant's own case decided by the Hon'ble High Court of Delhi cited (supra) and the various decisions of the coordinated bench of the Tribunal cited (supra), we are of the considered opinion that the impugned order denying the cenvat credit on input and input services, capital goods on tower, tower material and shelter etc. are not sustainable in law and therefore, we set-aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

*(Pronounced on 06.09.2023)*

**(S. S. GARG)**  
MEMBER (JUDICIAL)

**(P. ANJANI KUMAR)**  
MEMBER (TECHNICAL)

G.Y.