CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH, COURT NO. 2

Service Tax Appeal No. 409 of 2011

(Arising out of Order-in-Original No. 29/2010/ST dated 15.11.2010 passed by the Commissioner of Central Excise & Customs, Cochin Commissionerate, Cochin.)

Vodafone Essar Cellular Ltd.,
(Presently known as Vodafone Idea Ltd.)
Mather Square, Opposite North Railway Station,
Kochi, Kerala ....**Appellant**

VERSUS

Commissioner of Central Excise and Customs,
Cochin Commissionerate,
C.R. Building, I.S. Press Road,
Cochin – 682 018. ....**Respondent**

Appearance:

Mr. Syed Peeran and Ms. Sneha Philip, Advocates for the Appellant.
Mr. M.A. Jithendra, Authorized Representative (AR) for the Respondent.

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21370 /2025

Date of Hearing: 27.11.2024
Date of Decision:26.05.2025

Per: Pullela Nageswara Rao

This appeal is filed against Order-in-Original No.29/2010/ST dated 15.11.2010 passed by the Commissioner of Central Excise and Customs, Cochin. The Show cause notice (SCN) No. 138/2009/ST was issued on 07.10.2009, period involved is April 2006 to March 2009 and the demand of service tax is Rs. 2,36,58,071/-.

2. The brief facts are M/s. Vodafone Essar Cellular Ltd., (Presently known as Vodafone Idea Ltd.), the Appellant is providing cellular phone services and registered under the category of 'tele communication services', 'maintenance or repair' service, 'transport of goods by road', and 'sponsorship' services.

3. The department alleging that; the impugned goods are used in building transmission towers which cannot be considered as goods since they are attached to the earth; CBEC vide F. No. 137/315/2007 CX-4 dated 26.02.2008 has clarified that angles, channels, beams which are used for building, transmission towers and prefabricated building, shelters, PUF panels etc. used for housing/storage of generating sets and other equipment are neither input nor capital goods; as per the decision of Mundra Port & SEZ Ltd. Vs. Commissioner of Central Excise-2009 (13) S.T.R 178 (Ahm-Tri) which categorically held that a service provider cannot claim credit of excise duty paid on steel and cement utilized for construction of an immoveable structure which in turn is used for providing an output service; the items such as angles, channels, beams etc., are inputs for civil structures, and are not part of BTS, BSC, GSM, and MS and as such are not used to providing taxable telecom services.; explanation 2 to Rule 2(k) of Cenvat Credit Rules, 2004 confirm that Cenvat credit is not available on goods like angles, channels, beams and prefabricated building, shelter and PUF panels; the Appellants have deliberately suppressed material facts from the department with intent to evade payment of service tax; the availment of Cenvat credit would have gone unnoticed but for the departmental initiative to call for such details, therefore, extended period is invocable; even if the Appellant had enough credit balance each month, it does not mean that they have not taken wrong credit and utilized the same for payment of service tax, maintaining the balance will not alter the position. Hence credit of duty paid on such items is not available to telecom service provider under capital goods or inputs, thus, the Appellant availed ineligible CENVAT credit and proceedings were initiated and as per the impugned order, the Adjudicating authority confirmed the demand along with interest and imposed penalty under

Rule 15(4) of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994. Aggrieved by said order, present appeal is filed before this Tribunal.

4. Learned Counsel for the Appellant during the hearing submits that; Angles, channels and other parts used to construct towers or shelters for affixation of towers are obtained in Completely Knocked Down (CKD) condition and at the site, they are bolted and placed on a platform either on the ground or on top of a building to ensure that there is no vibration to the tower, which can be dismantled again and moved to a different place and erected again; the towers, shelters and parts thereof, at the time of their receipt were movable goods and therefore the Appellants are eligible to avail CENVAT credit; 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; this position has been upheld by the recent decision of the Hon'ble Supreme Court in Appellants own case reported at M/s. Bharti Airtel Ltd Vs. The Commissioner of Central Excise, Pune-2024-VIL-49-SC-CE wherein the Court upheld the decision rendered by the Delhi High Court in Vodafone Mobile Services Limited Vs. CST, Delhi - 2019 [(27) G.S.T.L. 481 (Del.) while overruling the decision of the Bombay High Court in Bharti Airtel Limited Vs. Commissioner of Central Excise, Pune, 2014-VIL-242-BOM-CE.; the Hon'ble Apex Court applied the test of permanency to observe that mobile towers and prefabricated structures was bought and brought in a completely knocked-down (CKD) or semi-knocked-down (SKD) condition and it was erected and installed at the site after assembling the parts, it was held that the items are "goods" and can be considered as "capital goods" under Rule 2(a)(A)(iii) of the CENVAT Credit Rules, 2004, as they are accessories of the "capital goods" like antenna and BTS; the Hon'ble Court also allowed the alternative plea that the mobile towers and prefabricated structures, being "goods" used for providing the output service of mobile telecommunication, can be considered as

"inputs" under Rule 2(k) of the CENVAT Credit Rules, 2004. The definition of "input" under Rule 2(k) is wide enough to cover all goods used for providing any output service, except those specifically excluded. It was further held that invoking Explanation-2 to Rule 2(k) of the CENVAT Credit Rules, 2004 is neither appropriate nor necessary; the decision in the case of Mundra Port & SEZ Ltd - 2008-TIOL-1691-CESTAT-AHM as relied by the department in the impugned stands reversed by Hon'ble Gujarat High Court as reported in **Mundra Ports & SEZ Ltd. v. CCE & Cus., 2015 (39) STR 726 (Guj.);** in the said case, the Gujarat High Court has also held that the Amendment to Explanation 2 of Rule 2(k) w.e.f. 07.07.2009 was not clarificatory in nature, wherever Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision, even, if the new provision is added then it will be a new amendment and cannot be treated to be clarification of particular thing or goods and/or input and as such, the amendment could operate only prospectively; Similar views were rendered in Vandana Global Ltd. Vs. CCE, Raipur-2018 (16) GSTL (Chhattisgarh), hence their case is squarely covered by the decision of Hon'ble Gujarat High Court.

5. Learned Counsel further submits that the extended period cannot be invoked in the present case; without prejudice to the above, demand of Rs. 1,72,46,178/- for the period 2006-2008 in Appeal No. ST/409/2011 is barred by limitation in terms of proviso to Section 73 of the Finance Act, 1994 as the issue involved is interpretational and the issue involved has been decided by the Supreme Court in Appellant's own case **in M/S Bharti Airtel Ltd. Vs. The Commissioner of Central Excise, Pune-2024-VII-49-SC-CE.**; the allegation of suppression is not sustainable on account of the fact that both suppression and intention to evade payment of taxes should be present in order to invoke extended period of limitation; in this regard, reliance is placed on **Pushpam Pharmaceuticals Company Vs. Collector of C. Ex., Bombay 1995 (78) E.L.T. 401 (S.C.),** wherein the Hon'ble Supreme Court has held that mere omission to disclose the correct information is not a suppression of facts unless it was deliberate to

escape from payment of duty; in the instant case, there is neither suppression nor any intention to evade payment of taxes as the Appellants have duly filed returns or made necessary disclosures; the Show Cause Notice was issued based on information provided by the Appellant (previous proceeding, ST-3 return) and therefore, the fact that Appellants were availing credit on Tower/Tower materials was known to the department and no suppression could be alleged against the Appellants for invoking the extended period of limitation; the towers and shelters that are purchased in CKD condition and not angles, beams or bars. Therefore, there was no suppression of facts on the part of the Appellant.

6. The Learned Authorised Representative (AR) for the Revenue reiterated the finding in the impugned order and also relied on large number of decisions including the decision of this Tribunal in the matter of **M/s Vodafone SR South, M/s Bharati Airtel, M/s Tower Vision.** The Learned AR also draws our attention to the explanation to Rule 2(k) of Cenvat Credit Rules, 2004 and CBEC clarification issued vide F.No. 137/315/2007/CX dated 26.02.2008. As regards invoking the extended period of limitation and imposing penalty, the Learned AR relied on the judgment of the Hon'ble Supreme Court in the matter of **CCE Vishakapatnam Vs. M/s Mehta Company – 2011 (264) ELT 481 (SC) and M/s. Bajaj Hindustan Ltd Vs. UOI - 2013 (295) ELT 20 (Tri.- All.).**

7. Heard both sides and perused the records.

8. The issue in the present appeal is whether the appellant availed irregular CENVAT credit on angles, channels, beams etc., used for erecting towers for transmission falling under Chapter headings 72 and 73 of the Central Excise Tariff Act, 1985 and prefabricated buildings shelters, PUF panels etc., which are used for housing/ storing generator sets etc., falling under chapter 94 of the Central Excise Act, 1944 as 'capital goods' as per the definition of Rule 2(a)of the Cenvat Credit Rules, 2004.

9. We find that the issue is no more *res integra* and squarely covered by the judgment of the Hon'ble Supreme Court in the matter of **M/s. Bharati Airtel (supra)** wherein it is held that;-

> *"11.12.6. Having* held that the *tower and pre-fabricated buildings (PFBs) are "goods" and not immovable property and since these goods are used for providing mobile telecommunication services, the inescapable conclusion is that they would also qualify as "inputs" under Rule 2(k) for the purpose of credit benefits under the CENVAT Rules."*
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> *11.13 For the foregoing reasons, we agree with the conclusions arrived at by the Delhi High Court and uphold the judgment rendered by it in Vodafone (supra) and dismiss the connected appeals ....*
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> *11.14 For the same reasons, we are unable to agree with the view of the Bombay High Court and accordingly, set aside the judgment in Bharti Airtel (supra) rendered by it and allow the connected appeals......."*

10. Accordingly, following the judgement of the Hon'ble Apex Court in **M/s. Bharati Airtel (supra)** the impugned order is set aside, and the appeal is allowed with consequential relief, if any, in accordance with law.

(Order pronounced in Open Court on 26.05.2025)

(P.A.Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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