**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH**
**BANGALORE**

Application(s) Involved:

**ST/Misc./498/2015; ST/Stay/468, 813/2011**
**in**
**ST/733, 1333/2011-DB**

Appeal(s) Involved:

**ST/733, 1333/2011-DB**

[Arising out of Order-in-Original No. 33/2010/ST dt. 30/11/2010 & No.11/2011 dt. 31/01/2011 passed by CST, Bangalore]

**M/s. Vodafone Essar South Ltd.,**
**Bangalore**
**M/s. Vodafone Essar Cellular Ltd.** Appellant(s)
**Kochi**

**Versus**

**Commissioner Service Tax**
**Bangalore** Respondent(s)

**Appearance:**

**Shri G. Shivadass, Advocate** For the Appellant
For the Appellant
Dr. J. Harish, Dy. Commissioner(AR) For the Respondent

Date of Hearing: 15/12/2017
Date of Decision: …………………

**CORAM:**

**HON'BLE SHRI S.S. GARG, JUDICIAL MEMBER**
**HON'BLE SHRI V. PADMANABHAN, TECHNICAL MEMBER**

**Final Order No. / 2018**

**Per : S.S. GARG**

These two appeals have been filed by the appellant against the impugned orders dt. 30/11/2010 and dt. 31/01/2011. The appellant has also filed stay petitions along with appeals. On the other hand, Department has also filed miscellaneous petition seeking early hearing of the case. Since the appeals pertain to the year 2011, we have decided to dispose of the appeals with the consent of the parties, on merits, after allowing the early hearing application of the Department. Since the issue involved in both the appeals is identical, both the appeals are being disposed of by this common order.

2. The details of the two appeals are given herein below:-

| **Appeal No.** | **ST/733/2011** | **ST/1333/2011** | | | |
|---|---|---|---|---|---|
| **Period** | 04/ 2008 to 03 2009 | 09/2004 to 09/2006 | 09/2006 to 09/2007 | 10/2007 to 06/2008 | 07/2008 to 03/2009 |
| **Demand** | Rs.65,50,943/- | Rs.4,50,19,908 | Rs.5,33,84,386 | Rs.3,62,30,007 | Rs.1,10,21,926 |
| **Period within limitation** | 10/2008 to 03/2009 | 10/2006 to 03/2009 | | | |
| **Amount within limitation** | Rs.8,83,377/- | Rs.10,06,36,319/- | | | |
| **Amount barred by limitation** | Rs.56,67,566/- | Rs.4,50,19,908/- | | | |
| **Interest** | u/s 75 | u/s 75 | | | |
| **Penalty** | u/s 76, 77 and 78 | u/s 76,77 and 78 | | | |

For the sake of convenience, the facts of appeal No.St/733/2011 are taken.

3. The appellants are providing telecommunication services and paying the service tax on the value of the services. They are also providing maintenance or repair service, transportation of goods by road service and sponsorship service. On scrutiny of ST3 returns for the year 2008-09 and

the records maintained by the assessee, it was noticed that they had taken CENVAT credit in respect of the goods like angles, channels and beams etc. falling under Chapter 72 and 73 of the CETA, 1985 which were used for erecting towers for transmission and goods like prefabricated buildings / shelters / PUF panels falling under Chapter heading 94.06 which were used for housing, storage of generating sets and other equipments and utilized such credit for payment of service tax on 'telecommunication service'. The Department vide its letter dt.10/09/2009 sought the details of CENVAT credit taken / utilized for the year 2008-09 and the details were submitted by the assessee vide its letter dt. 30/10/2009. As per the Department, the assessee has taken CENVAT credit of an amount of Rs.65,50,943/- irregularly during the period 2008-09 and they have wilfully suppressed the same in the ST3 returns for the period 2008-09. On these allegations, show-cause notice was issued to the appellant proposing to recover irregularly availed CENVAT credit along with interest and penalties under various provisions of CENVAT Credit Rules as well as Finance Act, 1994. After complying with the principles of natural justice, the learned Commissioner confirmed the demand as stated in the table. Aggrieved by the impugned orders, appellant has filed these appeals along with stay petitions.

4. Heard both the parties and perused records.

5. Learned counsel for the appellant submitted that impugned orders are not sustainable in law as the same are contrary to the facts and

the law. He further submitted that the towers / tower material and prefabricated building / shelter on which CENVAT credit has been availed by the appellant as capital goods and the said availment is valid in law. He further submitted that the appellants are entitled to avail CENVAT credit of tower / tower material and prefabricated shelters as inputs. The towers and tower materials are essential for the provision of taxable output service. The antennas which are essential for the provision of telephone service have to be installed at the top of the tower for transmitting mobile signal into atmosphere. Therefore as per the learned counsel without tower it is not possible to render telephone service effectively. It is his further submission that unless the angles, channels, beams are used to fabricate the tower, the same cannot be used for providing telephone service. Similarly prefabricated shelters and panels are used for installation of transmission devices, DG sets and other electrical and electronics instruments. It serves as a junction box. No output service can be provided without prefabricated shelters. He also submitted that the words "all goods …. used for providing output service" is broader in its context than the words 'input means all goods ……. …. used in or in relation to the manufacture of final products' because the words "used for" are preceded by ' for providing output service'. Whereas in the case of 'manufacture of final products' the words "used in" have been used. He further submitted that the words "used for" are of wider impact than the words "used in". Towers are erected using steel structures and come in a complete knock down condition before sent to the site for assembling. 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. The same can be dismantled again and moved to a different place and erected again. The learned counsel further submitted that the Department has wrongly invoked extended period of limitation. He also submitted that the show-cause notice was issued based on the information provided by the appellant and the fact that the appellants are availing credit on tower/tower material was very well known to the Department and therefore no suppression could be alleged against the appellant for invoking extended period of limitation. He also submitted that the subject matter of the dispute since the very beginning is a contentious issue and there were decisions on both sides. He also submitted that there are plethora of decisions in favour of the assessee demonstrating that the goods in question were admissible as capital goods. He also submitted that the Mumbai Bench of the Tribunal in Bharti Airtel Limited Vs. CST Pune [2013(29) STR 401 (Tri. Mum.)] ruled that CENVAT credit could not be availed. This decision of the Tribunal was upheld by the Hon'ble High Court of Bombay in Bharti Airtel Limited Vs. CCE, Pune-III [2014(35) STR 865 (Bom.)]. The Hon'ble Bombay High Court followed the decision of the Bharti Airtel in Vodafone India Ltd. Vs. CCE, Mumbai-II [2015(324) ELT 434 (Bom.)]. The conflict of opinion was specifically addressed in the case of Tower Vision India Pvt. Ltd. & Bharti Infratel ltd. Vs. CST, Delhi [2015-TIOL-1895-CESTAT-DEL ] and in the Interim Order No.142-154/2015 dt. 28/07/2015 passed by the Delhi Bench of CESTAT. Thereafter the matters were clubbed together and placed before the Larger Bench for answering the reference and the Larger Bench decision in the case of Tower vision India pvt. Ltd. [2016(42) STR 249 (Tri.

LB)] discussed the scope of the aforesaid decision in detail and finally answered the reference in favour of the Revenue. Learned counsel further submitted that once the issue is subject matter of interpretation and there are conflicting decisions leading to its referral to the Larger Bench, then in such circumstances extended period of limitation cannot be invoked. On this submission, he relied upon the following decisions:-

i. General Manager, Consumer Mobility, BSNL Vs. CCE&ST, Chandigarh [2014-VIL-325-CESTAT-DEL-ST]
ii. Tata Teleservices Ltd. and others Vs. CST, Pune [2015-TIOL-628-CESTAT-MUM]
iii. Vodafone Essar Digilink India Ltd. Vs. CCE, Panchkula [2016-TIOL-873-CESTAT-CHD]
iv. Vodafone Essar Mobil Services Ltd. Vs. CST, New Delhi [2016-TIOL-2648-CESTAT-DEL]
v. Spice Communication Ltd. Vs. CCE,ST&C, Bangalore [2017-TIOL-3872-CESTAT-CHD]

6. On the other hand, learned AR defended the impugned orders and submitted that the CENVAT credit of duty on various capital goods i.e. tower / tower materials and prefabricated shelters are not allowed on the ground that the said items do not fall under inputs and also on the ground that they do not qualify as accessories or components. He also submitted that the angles / channels / beams etc. are used to fabricate the towers and the activity of erection of tower does not amount to manufacture and therefore the tower in itself cannot be treated as excisable goods. He further submitted that the appellants are liable to pay interest as well as the penalties under various provisions of the Finance Act.

7. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by the appellant, we find that various Benches of the Tribunal have held that the appellants are not entitled to take CENVAT credit on tower / tower materials and prefabricated buildings/shelters as capital goods as well as inputs. We also find that this issue has been subject matter of litigation before various Benches of the Tribunal and the matter was also referred to the Larger Bench and finally the Larger Bench in the case of Tower Vision (India) Pvt. Ltd. cited supra answered the reference in favour of the Revenue vide its order dt. 16/03/2015 disposing of various appeals including the appeal of the appellant. The Tribunal in the said decision has also followed the decision of the Karnataka High Court in the case of CCE, Bangalore Vs. MTR Food Ltd. [20129282) ELT 196 ] wherein it has been held that if the returns were filed properly and audit has also taken place, then there are no allegation of bona fide on the part of the assessee and in such a situation extended period cannot be invoked. The learned counsel for the appellant fairly conceded that in view of the various decisions, the issue has been held against the assessee and in favour of the Revenue but he only prayed that in all the decisions decided by the Tribunal and the High Court, it has been categorically held that the demand can only be confirmed for normal period and extended period of limitation has been dropped. Consequently all the penalties have also been dropped. In view of the various decisions settling the issue, we are of the considered view that the issue in the present appeals was of an interpretation nature i.e. as to the eligibility of CENVAT credit or otherwise on the towers and building

and had to be settled in the hands of the High Court. Therefore, the appellant could have entertained a bona fide belief. Hence all the penalties imposed on all the appellants herein are set aside by invoking the provisions of Section 80 of the Finance Act, 1994.

8. To sum, we dispose of the these two appeal by holding as follows:-

i. We confirm the demand of ineligible CENVAT credit and interest thereon on towers and prefabricated buildings within the limitation period.

ii. Demand of ineligible CENVAT credit which confirmed along with interest by invoking extended period is set aside.

iii. All the penalties are also set aside.

9. Accordingly both the appeals are disposed of in above terms. Stay petitions are also accordingly disposed of.

(Pronounced on .................................)

**V. PADMANABHAN**
**TECHNICAL MEMBER**

**S.S. GARG**
**JUDICIAL MEMBER**

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