CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

**REGINAL BENCH AT CHANDIGARH**

**Court NO.I**

**Appeal No. ST/52382/2015-Cus-(DB)**

(Arising out of OIO No.7-11/SG/ST/DL-IV/2014-15 dt.27.3.2015 passed by the Commissioner, Service Tax, Plot No.36 & 37, Opposite Medanta Medicity Hospital, Sector 32, Gurgaon-122001 )

**M/s. Bharati Infratel Limited** **Appellant**
(BPTP, Park Centra, 2nd Floor, Sector30, Gurgaon, Haryana-122001)

**Vs.**

**Commissioner of Service Tax, Delhi-IV** **Respondent**
(Plot No.36 & 37, Opposite Medanta Medicity Hospital, Sector 32, Gurgaon-122001)

**With**

**Appeal No. ST/42/2016-Cus-(DB)**

(Arising out of OIO No.DLI-SVTAX-0004-COM-006-15-16 dt.30.10.2015 passed by the Commissioner, Service Tax, Gurgaon-IV, Plot No.36 & 37, Opposite Medanta Medicity Hospital, Sector 32, Gurgaon-122001 )

**M/s. Bharati Infratel Limited** **Appellant**
(BPTP, Park Centra, 2nd Floor, Sector30, Gurgaon, Haryana-122001)

**Vs.**

**Commissioner of Service Tax, Delhi-IV** **Respondent**
(Plot No.36 & 37, Opposite Medanta Medicity Hospital, Sector 32, Gurgaon-122001)

**And**

**Appeal No. ST/43/2015-Cus-(DB)**

(Arising out of OIO No.DLI-SVTAX-0004-COM-003-15-16 dt.29.10.2015 passed by the Commissioner, Service Tax, Gurgaon-IV, Plot No.36 & 37, Opposite Medanta Medicity Hospital, Sector 32, Gurgaon-122001 )

**M/s. Bharati Infratel Limited** **Appellant**
(BPTP, Park Centra, 2nd Floor, Sector30, Gurgaon, Haryana-122001)

**Vs.**

**Commissioner of Service Tax, Delhi-IV** **Respondent**
(Plot No.36 & 37, Opposite Medanta Medicity Hospital, Sector 32, Gurgaon-122001)

Present for the Appellant: Shri B.L.Narasimhan, Advocate
Present for the Respondent: Shri Harvinder Singh, AR

**Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)**
**Hon'ble Mr.Bijay Kumar, Member (Technical)**

**FINAL ORDER NO.60592-60594/2019**

**Date of hearing/Decision: 22.05.2019**

**PER: ASHOK JINDAL**

Short issue involved in the matter is whether the appellant is entitled to avail credit on tower, shelter in terms of Rule 2(k) of Cenvat Credit Rules, 2004 and whether the appellant is entitled to avail credit on input service used for providing telecommunication services/passive infrastructure in terms of Rule 2 (l) of Cenvat Credit Rules, 2004 or not?

2. Heard the parties and considered the submissions.

3. Considering the fact that the issue has been settled by this Tribunal in their own case vide Final Order No.A/60267-60269/2019 dt.21.2.2019 wherein this Tribunal has observed as under:-

"5. We have gone through the decision of the Hon'ble Delhi High Court in the case of ***Bharti Infratel Ltd. (supra)*** wherein the Hon'ble High Court allowed the cenvat credit in respect of towers, shelter parts thereof has observed as under:-

(i) The Revenue did not dispute that the towers and shelters are merely bolted or fastened. The foundation is necessary only to make a wobble free operation (stability) of the equipment and there is no assimilation of the machine with the structure permanently.
(ii) The installation or assembly of towers and shelters on a foundation cannot be said to be "attached to earth" and can be moved without any damage.
(iii) Fastening to earth is only to provide stability
(iv) Manufacture of the plant does not therefore constitute annexation and cannot be termed as immovable property.
(v) The Hon'ble Tribunal failed to appreciate the permanency test as established in the case of CCE, Ahmedabad vs. Solid & Correct engineering Works, 2010 (252) ELT 481 (SC).
(vi) Towers are constructed to form the active infrastructure for placement of BTS equipment, antennae and other items. Therefore, toweres form part of the active infrastructure and shelters are the accessories for placement of BTS and other items.
(vii) Alternatively, towers are shelters qualify as "inputs" the test used for determining whether the capital goods are "used in the manufacture of goods" is the functional utility test- BTS is an integrated system and each component in the BTS have to work in tandem to provide cellular connectivity. Thus, there is an actual use of towers and shelters in conjunction with the capital goods, namely BTS and antennae. The pre-fabricated shelters are therefore inputs as per rule 2(K) of the Cenvat credit Rules.

(viii) The eligibility to claim credit on inputs is to be determined at the time of receipt of goods in terms of Rule 4(1) of the Credit Rules. The definition of "inputs" does not contain any condition relating to emergence of immovable property to be ineligible for taking credit.

(ix) Towers which are received CKD condition, are assembled/eracted at the site subsequently giving rise to structure that remains immovable till its use for safety, stability and commercial reasons cannot be disentitled for credit. The fact that goods are later on fastened to earth cannot make them non-excisable.

(x) Further that, in any case, immovability cannot determine eligibility to avail credit. Emergence of immovable property in the intermediate stage also cannot disentitle the Assessee-Appellant's eligibility to avail credit.

Therefore, we hold that the assessee-appellant are entitled to avail cenvat credit on items, towers, shelter parts thereof being input used for providing output service. In these circumstances, we dismiss the appeal filed by the Revenue and allow the appeals filed by the assessee-appellants."

4. Therefore, relying on the above decision of this Tribunal in the appellant's own case, we set aside the impugned order and allow the credit availed by the appellant. Consequently, the appeals are allowed with consequential relief if any.

(dictated and pronounced in the court)

**(ASHOK JINDAL)**
**MEMBER (JUDICIAL)**

**(BIJAY KUMAR)**
**MEMBER (TECHNICAL)**

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