CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

Service Tax Appeal No. 50433 of 2018

(Arising out of Order-in-Appeal No. 406(SM)ST/JPR/2017 dated 15.11.2017 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur)

M/s Bharti Hexacom Limited **Appellant**
K-21, Sunny House,
Malviya Marg, C-Scheme,
Jaipur, Rajasthan.

VERSUS

Principal Commissioner, Goods & Service Tax, Central Excise And Central Goods And Service Tax, Jaipur **Respondent**
NCRB, Statue Circle, Jaipur-302005.

Appearance

Ms. Shagun Arora & Shri Kunal Agarwal, Advocates – for the Appellant.

Shri Rajeev Kapoor, Authorized Representative – for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing/Decision : 08/01/2024

Final Order No. 50087/2024

Dr. Rachna Gupta

The appellant herein is engaged in providing tele-communication services along with few other taxable services. During the course of audit of records of appellant, the department observed that the appellant has availed the utilized Cenvat credit of service tax paid for 'pre-fabricated building green house shelter' amounting to Rs. 1,50,48,089/-. Department formed an opinion that for anything to be called as input it should either be contained in or be consumed in while providing output service. Since "pre-fabricated building green house shelter" does not appear either to be contained in or consumed for providing the output service that the appellant were alleged to have wrongly availed the utilised Cenvat credit of said service tax. The structure was otherwise fixed to earth. Resultantly, vide show cause notice No. 2171 dated 18.10.2012 Cenvat credit amounting to Rs. 1,50,48,089/- was proposed to be recovered from the appellant along with the interest with imposition of appropriate penalty. The said proposal was initially confirmed vide Order-in-Original No. 156/2016-17 dated 06.02.2017. The appeal against the said order has been rejected vide Order-in-Appeal No. 406/2017 dated 15.11.2017. Still being aggrieved, the appellant is before this Tribunal.

2. Learned counsel for the appellant has mentioned that the appellant is eligible to avail Cenvat credit on "pre-fabricated building green house shelter". The item being immovable goods received in CKD condition by the appellant. Excise duty has also been paid by the supplier on these items just for the reason of mobility of these items. Hence the item in question is wrongly alleged to be a product attached to the earth and is wrongly denied availment of Cenvat credit. Learned counsel has further mentioned that the issue is no more res integra and stands decided in favour of the appellant by Hon'ble Delhi High Court in the case of **Vodafone Mobile Services Limited Vs. Commissioner of Service Tax - 2018-TIOL-2409-HC-DEL-ST**. The said decision has been affirmed by Hon'ble Supreme Court in the case of **Commissioner of Service Tax, Delhi Vs. Vodafone Mobile Services** reported as **2019-TIOL-309-SC-ST.** Finally, it is submitted that the service provided is through the transmission

equipment it cannot work without pre-fabricates structure in question. Resultantly, the product/item rightly been considered as input by the appellant. The Cenvat credit of service tax paid thereupon is rightly been claimed. With these submissions, the order under challenge is prayed to be set aside and appeal is prayed to be allowed.

3. Per contra, the learned Departmental Representative has impressed upon no infirmity in the order under challenge. It is mentioned that the order has been passed in compliance of the Circular No. 137/315/2007 dated 26.02.2008 and has been passed after relying upon several decisions of this Tribunal as well as of Hon'ble High Court of Bombay wherein it was held that pre-fabricated building/towers since are fastened to earth, after their erection, these structures become immovable property and hence cannot be called as capital goods. Cenvat credit cannot be availed on such goods. However, learned Departmental Representative while conceding to decision of Hon'ble Supreme Court in **Vodafone Mobile Services** (supra) case, it is mentioned that another party on the similar issue has gone in appeal before Supreme Court another party other than Vodafone appeal is pending consideration. Learned counsel for the appellant has rebutted the same that no stay has been granted in this case. Learned Departmental Representative has however, prayed for dismissal of the appeal.

4. Having heard the rival contentions, we observe that the adjudicating authority below has denied the eligibility of the appellant to avail Cenvat credit on "pre-fabricated building green house shelter" which got bolted to be fastened to the earth. To

adjudicate the issue raised in the appeal, foremost the meaning of what becomes "attached to the earth" need to be looked into. Section 3 of Transfer of Property Act, 1882 defines of the same as anything which is.

(i) Rooted in the earth, as in the case of trees and shrubs:

(ii) Embedded in the earth, as in the case of walls or buildings; or

(iii) Attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

In the present case, it is not at all in dispute that the appellant is engaged in setting up of positive infrastructure and provision of such structure to various telephone companies. The said positive infrastructure that is the tower, shelter etc. is created out of MS angles, and channels which used to be brought to the site in CKD condition and with the help of nuts and bolts were got assembled and erected as towers and shelters on the site after being fabricated and erected these structures were got fastened to the earth. There is no denial to the fact that the products brought in CKD condition were the excisable commodity when these admitted facts are glanced in light of above definition of Section 3 of Transfer of Property Act, to our opinion, it is clear that the tower or shelter erected with the help of nut and bolts to a foundation on earth to provide stability and functionality does not qualify to mean "attached to the earth". Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Ahmedabad, Vs. Solid & Correct Engineering Works - 2010 (4) TMI 15 (SC)** has held that :

> "14. While determining whether an article is permanently fastened to anything attached to the earth, both the intention as well as the factum of fastening have to be ascertained from the facts and circumstances of each case and the relevant portion of the judgment is reproduced below:
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> > 'There can be no doubt that if an article is an immovable property, it cannot be termed as 'excisable goods' for purposes of the Act. From a combined reading of the definition of "immovable property" in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the excise law. Whether an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of the case."

In the case of **Sirpur Paper Mills Ltd. Vs. Collector of Central Excise, Hyderabad - 1997 (12) TMI 109 (SC),** Hon'ble Supreme Court observed that merely because a machine is attached to earth for more efficient working and operations it would not per se become the immovable property. Above all, if any article is an immovable property, it cannot be termed as excisable goods for the purpose of the Act. Admittedly, the goods erected out of the pre-fabricated structure in question is the outcome of MS angles and channels which are excisable goods in its CKD condition. Mere assembly of the said excisable CKD structure with the help of nuts and bolts will not take the item/good out of the scope of excisablity and thus such good cannot be called as something which is attached to the earth which is not eligible to be called as capital good. Resultantly, the goods in question are held to be the capital goods. The definition under Rule 9 of Cenvat Credit Rules, 2004 in terms of Rule 3 thereof the appellant is held eligible to avail the Cenvat credit.

5. We observe that in the case of **Vodafone** (supra) similar issue of availment of Cenvat credit in respect of towers and shelters and part thereof and services in question. The gist of the decision of Hon'ble Delhi High Court in the said case is as under:

"(i) 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 they can be moved without any damage. Fastening to earth is only to provide the stability.

(iii) Setting up of passive infrastructure does not therefore constitute annexation and cannot be termed as immovable property.

(iv) The Hon'ble Tribunal failed to appreciate the permanency test as established in the case of **CCE, Ahmedabad V. Solid & Correct Engineering Works – 2010 (252) ELT 481 (SC).**

(v) Towers are erected to form the active infrastructure for placement of BTS equipment, antennae and other items. Therefore, towers form part of the active infrastructure and shelters are the accessories for placement of BTS and other items.

(vi) Towers and shelters are therefore covered under the definition of 'capital goods' as per Rule 2(a) of the Cenvat Credit Rules, 2004 ("Credit Rules").

(vii) Alternatively, towers and 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 towers and shelters are therefore "inputs" in terms of Rule 2(k) of the 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 in CKD condition, are assembled/erected 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, in any case, immovability cannot determine eligibility to avail credit. Emergence of immovable property in the intermediate stage also cannot disentitle the assessee from availing credit.

(xi) Several High Courts in different contexts have taken a view that credit of Excise Duty and Service Tax paid would be available irrespective of the fact that inputs and input services were used for creation of an immovable property at the intermediate stage, if it was ultimately used in relation to provision of output service or manufacturing of final products."

6. The relevant portion of the said decision is reproduced as under:-

> "65. The above analysis shows that the definition of "input" does not contain any condition relating to emergence of immovable property to be ineligible for taking credit. The eligibility of credit must be determined at the time of receipt of the goods in terms of Rule 4(1) of the Credit Rules. Credit cannot be denied so as long as the goods are used for the provision of the output service. The issue for availment of CENVAT credit came up before the Gujarat High Court in Mundra Ports and Special Economic Zone Ltd.- 2015-TIOL-1288 HC & ST – 2015-VIL-215-GUJ-CE. The High Court held that Assessee-Appellant would be entitled to input credit for the cement and steel used in the construction of new jetties and other commercial buildings.
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> 68. ...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-Appellant and against the Revenue.

> 72. In the present case, it is not in dispute that the appellant is a taxable service provider providing passive telecommunication service. Therefore, the Assessee-Appellant is entitled for input credit on the weight of judicial authority discussed above. It is also clear that several High Courts in different contexts have taken a view that credit of excise duty and service tax paid would be available irrespective of the fact that inputs and input services were used for creation of an immovable property at the intermediate stage, if it was ultimately used in relation to provision of output service or manufacturing of final products."

7. In view thereof and in view of entire above discussion, we have no reason to accept the findings of the order under challenge with the irrespective that some other party is before Hon'ble Supreme Court on the same issue, especially when there is no stay of order in that case by the Supreme Court. We hold that goods in question, the 'pre-fabricated shelter' is not immovable property but is the Capital Good for which the appellant is entitled to take credit of duty paid. Resultantly, the order under challenge is hereby set aside. Consequent thereto, the appeal stands allowed.

(Pronounced in Court)

(Dr. Rachna Gupta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

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