IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75870 of 2014

(Arising out of Order-in-Original No. 04/ST/Commissioner/2014 dated 06.03.2014 passed by the Commissioner of Central Excise & Service Tax, 3RD Floor, Central Revenue Building, Bir Chand Patel Path, Patna-800 001)

M/s. Idea Cellular Infrastructure Service Ltd. **: Appellant**
1st Floor, Sumitra Sadan, (Above ICICI Bank),
Boring Road Crossing, Patna-800001

VERSUS

Commissioner of Central Excise & Service Tax, Patna **: Respondent**
3RD Floor, Central Revenue Building,
Bir Chand Patel Path, Patna-800 001

APPEARANCE:

Ms. Payal Bharwani, Advocate
Ms. Taniya Roy, Advocate for the Appellant

Shri P. Das, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.76698/2024

DATE OF HEARING / DECISION: 30.07.2024

Order: [PER SHRI ASHOK JINDAL]

The Appellant is *inter alia* engaged in providing infrastructure support services to various telecommunication/cellular service providers. They undertake site development by erecting towers on which antennas of the respective telecommunication service providers are mounted, and shares such developed site with telecom service providers. On such services, the Appellant discharges service tax under the head 'Business Support Services'. In this regard, the Appellant availed CENVAT Credit on tower materials (e.g., angles, shelter of steel structure, nuts & bolts and other tower materials etc.) procured for setting up of cell sites, telecom shelter and erecting towers used for the attainment of a certain height for housing the machines and equipment for receipt and transmission of telephonic/cellular wavelengths and frequencies. Such towers and cell sites are required for installing antennas and various other equipment to provide cellular telephone service so as to provide the telecommunication services.

2. On the basis of the audit proceeding conducted from 23.06.2010 to 25.06.2010, the underlying Show Cause Notice dated 09.07.2012 was issued upon the Appellant, proposing to deny the CENVAT Credit availed on the inputs for towers, pre-fabricated shelters and input services used in installation of towers and shelters for providing output services, based on the following allegations:

(i) CENVAT Credit availed by the Appellant on tower materials which are angles, shelter of steel structure, nuts & bolts and other tower materials do not qualify as capital goods under Rule 2(a) of CENVAT Credit Rules 2004 (‘**CCR, 2004**’).

(ii) CENVAT Credit availed by the Appellant on input services in respect of civil construction of immovable property for the erection of support structure namely tower cannot be availed and utilized against the output service tax liability on “renting of immovable property” service on the ground that the immovable civil structure or property is neither service nor goods.

(iii) Input services do not have any nexus with output services provided by the Appellant.

2.1. The Appellant filed a detailed reply vide letter dated 31.10.2012 wherein it was explained that the Appellant had correctly availed the entire CENVAT Credit on capital goods and input services.

3. However, the Ld. Commissioner vide the impugned dated 06.03.2014, confirmed the demand of CENVAT Credit based on following observations:

a. Tower material and prefabricated shelters fall under Chapters 72, 73 and 94 and therefore are not covered with the definition of 'capital goods' as per Rule 2(a) of the CCR, 2004.
b. Since towers and shelters are immovable, they are non-exercisable in nature. Thus, CENVAT Credit of duty paid on parts of tower and shelter cannot be availed.
c. The input service used for establishing the immovable structures, do not have any direct nexus with the output services rendered by the Appellant. Accordingly, they are not eligible for CENVAT Credit.

4. Aggrieved from the said order, the appellant is before us.

5. The submissions made by the appellant can be summarized as given below: -

A. **<u>The present issue is no longer *res-integra* and stands decided in favour of the Appellant.</u>**

A.1 The present issue with respect to eligibility of CENVAT Credit of prefabricated building/ shelter and tower materials (structural items) used for fabrication and erection of towers, shelters and cell sites stands decided by this Tribunal in the various cases. It is submitted that in order to build a Cell site i.e. telecom infrastructure for telecom operator, Appellant is required to provide the passive infrastructure to other cellular mobile operators for them to set up the BTS, antenna, etc.

Cenvat credit on components of towers and shelter are admissible as it qualifies as accessories to active infrastructure which falls under chapter 85 of CETA

A.2 It is submitted that in order to develop a cell site i.e. telecom infrastructure for telecom operators, who are customers of the Appellant, the Appellant is required to provide them passive infrastructure to enable the service recipients to fix their antenna and set up the BTS etc.

A.3 It is submitted that the subject goods i.e., tower materials, shelters of steel structure, etc. received by the Appellant are accessories to Base Transceiver Station (BTS), which falls under heading 85 of Central Excise Tariff Act, 1985 (CETA) and therefore, qualify as eligible capital goods in terms of Rule 2 (a)(A)(i) of the Credit Rules.

A.4 It is submitted that BTS is one of the core parts of the cell site i.e. telecom infrastructure. The main function of BTS is to transmit and receive the global system of mobile communication for transmitting and receiving frequency.

A.5 It is submitted that towers and shelters and other components together makes the telecom infrastructure in a workable condition, thus this equipment used for setting up of telecom infrastructure along with BTS becomes accessories to the BTS thus, Cenvat credit on such towers and shelters are admissible to the Appellant under Rule 2(a)(A)(iii) of CCR as an accessory to BTS.

A.6 Reliance in this regard is placed on the case of *ATC Telecom Infrastructure Private Ltd. vs. Commissioner, Service Tax, Delhi-II 2023 (2) TMI 895 - CESTAT NEW DELHI* wherein the Hon'ble Tribunal held that the issue involved in the present appeal stood decided in favour of the appellant by the Delhi High Court in **Vodafone Mobile Services Limited & Ors. V. Commissioner of Service Tax, Delhi, 2018 (11) TMI 713 (Bombay High Court)** which was further affirmed by the Supreme Court in **2019 (7) TMI 1419-SC Order.** Thus, the Hon'ble Tribunal held that the towers and shelters would not be immovable property and accordingly, the Cenvat Credit thereon would be eligible as 'capital goods'. Similar ratio has been held in the following decisions also:

a. ***Indus Towers Ltd. v. CCE & ST, Delhi-IV 2020 (6) TMI 493-CESTAT CHANDIGARH***
b. ***CCE & ST -Gurgaon vs. Bharti Infratel Limited 2019 (2) TMI 1736 - CESTAT Chandigarh***
c. ***Bharati Infratel Limited vs. Commissioner of Service Tax, Delhi-IV 2019 (5) TMI 1698 - CESTAT CHANDIGARH***
d. ***Tower Vision India Pvt. Ltd. v. Commissioner of Service Tax- Delhi 2023 (9) TMI 358-CESTAT Chandigarh***

A.7 It is submitted that the transmission equipment cannot work without subject goods. If an antenna and other active infrastructure is not placed on the height, without the support of passive infrastructure, it would not receive microwaves because of the hindrances present in the form of trees, buildings, thickness of air etc. and if it does not receive microwaves, it would become futile for the service recipients (telecom service providers) since the service recipients would be unable to provide final telecommunication services to the final subscribers. In the absence of these items, the Appellant cannot provide its output service. Thus, these goods are undoubtedly used for provision of output services and hence Appellant is eligible to claim credit in respect of towers, shelters and parts thereof.

A.8 In view of the above judicial pronouncements, it is submitted that the Appellant has rightly availed credit on towers, shelters and parts thereof and hence denial of such credit by Ld. Commissioner vide impugned order is liable to be set aside.

B. <u>The finding that towers and shelters are immovable in nature, is factually incorrect.</u>

B.1 The towers and shelters are not immovable structures but can be moved around from one place to another as per the needs of the Appellant, since the mode of their installation is completely different from that of construction of a civil structure. The only activity of civil construction nature, if at all, is laying of the foundation for the tower.

B.2 Reference is made to definition of `movable property' under Section 3(36) of the General Clauses Act, 1897, which reads as under: "property of every description, except immovable property"

B.3 Section 3(26) of the General Clauses Act, 1897, defines `immovable property' as inclusive of: "*land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth*".

B.4 Section 3 of Transfer of Property Act, 1882, defines `attached to the earth' as: a) rooted to the earth, as in the case of trees and shrubs; b) embedded in the earth, as in the case of walls or buildings; or c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

B.5 Therefore, the attachment of tower/shelter with the help of nuts and bolts to a foundation to provide stability and functionality does not qualify as "attached to the earth" under any of the above.

B.6 In this regard, reliance is placed on the decision of **Hon'ble Supreme Court in Solid & Correct Engineering (supra),** wherein it was held that where a machine was fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to earth but because a foundation was necessary to provide a wobble free operation to a machine, it cannot constitute as permanent fixing, embedding or attachment to make the machine part and parcel of the earth and hence, cannot be treated as immovable property. In this background, an asphalt drum mix plant was held to be movable in nature.

B.7 Further, this issue also stands settled in favour of the assessee in case of **Vodafone Mobile Services Ltd. v. Commissioner of ST., Delhi 2019 (27) GSTL 481 (Del.)**. The relevant portion thereof is reproduced below:

> *"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."*

B.8 In view of above, it is submitted that the subject towers, shelters and cell sites are not immovable in nature and hence, confirmation of demand in the Impugned Order is liable to be set aside.

C. CENVAT Credit in respect of input services is admissible to the Appellant

C.1 The impugned order while confirming the demand of CENVAT credit on input services used by the Appellant has grossly erred in law.

C.2 The input services in question are used for erection and commissioning of towers, by constructing a structure which provides a base to the tower by erecting such towers with the help of tower foundation bolts. These services include activities such as excavation, steel binding, concreting, earth filling, etc.

C.3 It is submitted that such input services are finally used by the Appellant for providing wobble free erect towers and shelters to the service recipients, which form the required cell sites to enable the service recipients to provide telecommunication services to the final subscribers, without which it would be commercially inexpedient.

C.4 Given such direct nexus of the input services with the output services provided by the Appellant, the CENVAt Credit on the input services ought not be denied. Reliance in this regard is placed on the following decisions:

- ***Tower Vision India Pvt. Ltd. v. Commr. of Service Tax-Delhi, 2023 (9) TMI 358 - CESTAT Chandigarh (supra)***
- ***Indus Towers Limited vs. Commissioner of C.E. & S.T., Delhi-IV 2020 (6) TMI 493 - CESTAT Chandigarh (supra)***

D. **<u>The judgment of the Hon’ble Bombay High Court in the case of Bharti Airtel Ltd. is incorrect in law and facts and anyway not applicable to the instant case.</u>**

D.1 It is respectfully submitted that the impugned order relies on the judgment of the Hon'ble Tribunal in **Bharti Airtel Limited v. CCE, Pune, 2013 (29) S.T.R. 401 (Tri.-Mumbai)**, affirmed by the Hon’ble Bombay High Court in **Bharti Airtel Limited v. CCE, Pune-III, 2014 (35) S.T.R 865 (Bom.)**. Hence, the Appellant shall make submissions on the decision of the Hon’ble Bombay High Court. At the outset the Appellant submits that the Hon’ble Bombay High Court does not decide the issue correctly on several counts including, inter-alia, the following:

a. The commercial expediency test laid down by the Hon'ble Supreme Court in JK Cotton Spinning & Weaving Mills Co Ltd v. Sales Tax Officer, Kanpur, 1997 (91) ELT 34 (SC) and Member, Board of Revenue, West Bengal v. Phelps & Co. (P) Ltd, (1972) 4 SCC 121 was not followed. It incorrectly holds that credit of parts of towers and shelters would not be available, because the antenna does not become non-functional in the absence of a tower.

b. Immovability is not a relevant criterion for determining eligibility of Credit, stands settled by various decisions, which were incorrect considered in this case.

c. On the issue of immovability, the test laid down by the Hon'ble Supreme Court in Solid &

Correct Engineering (supra) was not considered.

D.2 Hence, the decision rendered by the Hon'ble Bombay High Court, denying credit on towers and shelter, cannot be construed as good law.

D.3 Reliance herein is placed on the decision of **Vodafone Mobile Services Ltd. v. Commissioner of ST., Delhi 2019 (27) GSTL 481 (Del.)** ***(supra)***, which distinguished the decision of the Hon'ble Bombay High Court in case of Bharti Airtel (supra) and held that the assessee is eligible to claim credit on towers and shelters.

D.4 Thus, in view of the above, the appellant submitted that impugned order denying credit of capital goods and inputs on towers and shelters, on the basis of the decision in the case of **Bharti Airtel (supra)** is liable to be set aside.

E. <u>Extended period of limitation is not invokable in the present case</u>.

E.1 It is submitted that in the absence of any suppression of facts or mala fide intent of the Appellant, extended period of limitation is not invokable.

E.2 Furthermore, the Appellant availed CENVAT Credit on the underlying goods based on the bona fide interpretation adopted based on the aforementioned settled precedents. Hence, extended period cannot be invoked when the issue involves interpretation of statute. Reliance is placed on the judgment of the Tribunal in case of ***Amit Metaliks Limited v. Commr. of Central Excise, Bolpur – 2023 (11) TMI 721 – CESTAT Kolkata.***

F. <u>No interest is payable, and no penalty is imposable on the Appellant.</u>

It is submitted that since the demand itself is not sustainable consequent interest and penalty is not imposable.

6. On the other hand, the Ld. Authorized Representative appearing for the Revenue supported the impugned order.

7. Heard the parties and considered their submissions.

8. We find that the issue to be decided in this appeal is whether the Appellant is eligible for CENVAT Credit on the following inward supplies used for providing infrastructure support services to telecom operators?

(i) Tower materials and prefabricated shelters used for setting cell sites; and

(ii) Input services of erection and commissioning of towers

9. We find that the issue has already been settled by this Tribunal in the case of **M/s Bharati Infratel Limited vide Final Order No. A/60267-60269/2019 dt. 21.02.2019**, 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 marely bolted or fastened The foundation is necessary only to make a wobble free operation (stability) of the equpment 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) Ailematively, towers are shelters quality as "inputs the last used for

determining whether the capital goods are 'used in the manufacture of goods" is the functional utility less- 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 prefabricated 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 avall 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.

9.1. The said decision was followed by this Tribunal in the case of *Indus Tower Ltd. v. Commissioner of Central Excise and Service Tax, Delhi-IV [2020 (6) T.M.I. 493 – CESTAT, Chandigarh].* Therefore, the issue is no more *res integra*. Accordingly, we hold that the appellant is entitled to avail CENVAT Credit on inputs viz. angles, shelter of steel structure, nuts & bolts and other tower materials used for setting up and installation of pre-fabricated shelters and input services namely, erection and commissioning of towers, in terms of Rule 2(k) and Rule 2(l) respectively of the CENVAT Credit Rules, 2004. Therefore, we do not find any merit in the impugned order and hence, the same is set aside.

10. The appeal is allowed with consequential relief, if any.

(Operative part of the order was pronounced in open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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