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

REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 75111 of 2015

(Arising out of Order-in-Appeal No. 20/SH/CE(A)/GHY/2014 dated 25.09.2014 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Custom House, Nilamoni, Phukan Path, Christian Basti, Guwahati – 781 005)

M/s. Bharti Hexacom Limited **: Appellant**
Modrina Mansion, Laitumkhrah, Shillong

VERSUS

Commissioner of Central Excise and Service Tax **: Respondent**
Morellow Compound, M.G. Road, Shillong – 793 001

APPEARANCE:

Smt. Payal Bharwani, Advocate
Shri Rahul Tangri, Advocate
For the Appellant

Shri S.K. Mukim, Authorized Representative
For the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 77058 / 2024

DATE OF HEARING / DECISION: 10.09.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the Order-in-Appeal No. 20/SH/CE(A)/GHY/2014 dated 25.09.2014 (hereinafter referred to as 'impugned order', passed by Ld. Commissioner (Appeals), Guwahati.

2. The facts of the case are that the appellant is engaged in the business of rendering taxable services under the category of telecommunication services. During the underlying period, the Appellant availed CENVAT Credit of inputs, capital goods and input services used in the course of furtherance of their business.

2.1. During the course of Departmental audit of the records of the Appellant for the period from July 2009 to January 2011, the audit team made certain observations regarding availment of CENVAT Credit by the Appellant. On the basis of those observations, a Show Cause Notice dated 21.05.2013 was issued to the appellant, alleging that the Appellant had wrongly availed CENVAT Credit on the following inward supplies:

a. Services used for transportation of household goods of its employees from July 2009 to November 2010

b. Travel/ journeys performed by the employees from May 2009 to September 2011

c. Services used for transportation, procurement and filling of diesel for the period from April 2011 to December 2011

d. Prefabricated buildings used as shelters for the period from October 2008 to June 2012, treating them as capital goods.

2.2. The said Notice was adjudicated by the Ld. Additional Commissioner vide Order-in-Original dated 21.10.2013, wherein he has confirmed the demands raised in the Notice. On appeal, the Ld. Commissioner (Appeals) upheld the demands confirmed in the Order-in-Original, vide the impugned order dated 25.09.2014.

2.3. Aggrieved against the confirmation of the demands in the impugned order, the appellant has filed this appeal.

The issue regarding eligibility of CENVAT Credit on the inward supplies during the underlying period is no longer res integra, as the same issue has already been decided in favour of the appellant in various judicial pronouncements:

3. The appellant submits that during the underlying period, till 31.03.2011, the definition of the term 'input services' was very wide and it was inclusive in nature and therefore, CENVAT Credit on all the input services used in or in relation to the business were eligible to the Appellant. They contend that this is evident from the decision of the Hon'ble Bombay High Court in the case of *Coca Cola India Ltd. v. Commissioner of C.Ex. [2009 (242) ELT 168 (Bom.)].*

3.1. In the present case, the appellant submits, the transportation services were used for shifting and transportation of household items of the employees who are transferred to a new office location of the Appellant, for professional/ business commitments; the underlying services are expedient and used in the course of business of the Appellant and hence the appellant is eligible for the CENVAT Credit of service tax paid on such services. In support of this claim, the appellant placed their reliance on the following decisions:

> a. *Robert Bosch Engg. & Business Solutions Ltd. & CCE & ST, Bangalore-LTU [2017 (51) S.T.R. 329 (Tri.-Bang.)].*
>
> *b. Microsoft Global Services Center (I) Pvt. Ltd. v. CCE, Cus. & ST, Hyderabad-IV [2021 (44) G.S.T.L. 264 (Tri. -Hyd.)]*

3.2. Therefore, the appellant submits that instant demand confirmed in the impugned order is liable to be set aside.

CENVAT Credit Availed on Transportation Services of Employees for Business Purposes:

4. In this regard, the submission of the appellant is that travel of employees for official purposes like business meets, sales & advertisement campaigns, etc., are meant for furtherance of business and hence, the CENVAT Credit availed on such services is eligible as 'input service'. In this regard, the appellant placed their reliance on the following decisions:

a. *Zuari Cement Ltd. v. Commr. of CT, Tirupati - GST, [2019 (11) TMI 47 - CESTAT Hyderabad]*
b. *Robert Bosch Engg. & Business Solutions Ltd. & CCE & ST, Bangalore-LTU [2017 (51) S.T.R. 329 (Tri.-Bang.)]*
c. *Ivy Comptech Pvt. Ltd. v. CCE, Cus. & ST, Hyderabad-II [2016 (42) S.T.R. 66 (Tri. - Bang.)]*

4.1. Therefore, the Appellant contends that they are entitled to avail CENVAT Credit on the underlying services.

CENVAT Credit on diesel transportation, procurement and filling services used in respect of DG sets at cell sites:

5. Regarding the CENVAT Credit on diesel transportation, procurement and filling services used in respect of DG sets at cell sites, the appellant submits that at the cell site, uninterrupted power supply is required to effectively provide telecommunication services to the subscribers; that accordingly, DG sets are installed at the cell site as a part of passive infrastructure of the cell sites, which run on diesel. During the underlying period, it is submitted that the appellant outsourced the said

activity of performing Operations & Maintenance to service providers who were responsible to ensure upkeep of cell site including the DG; Diesel is always required for the running the DG sets and thus, as a part of providing operations & maintenance services, the service providers procured, transported and filled diesel in the DG sets to ensure their continuous operation and sustenance of the cell site. It is also submitted that on such activity of procurement, transportation and filling, the service providers charged service tax to the Appellant under the head Business Support Services.

5.1. They also contend that on perusal of the agreement as a whole, it is clear that these services qualify as 'business support services' and the Appellant used such services in the course and furtherance of business. Thus, the Appellant submits that they are eligible to avail CENVAT Credit of service tax charged on such business support services.

5.2. The appellant submits that the 'means' clause of the definition of 'input service' includes those services which are used by the service provider for providing output services; given the wide ambit of the said definition, the CENVAT Credit on the business support services ought not be denied. The appellant submits that the impugned order has mis-construed the nature of services to deny the credit thereon; the services are for operation of sites, which is utmost necessary for rendering of telecommunication services by them. It is stated that the impugned order has incorrectly understood the scope of services and tried to reclassify the same as GTA at the end of the Appellant, to deny the eligible credit. Therefore, it is their contention that CENVAT Credit on such business support services ought not be denied to the Appellant. Reliance in this regard is placed on the following decisions, wherein the credit on identical services has been allowed to assessees:

a. *Idea Cellular Ltd. v. Commr. of ST, Mumbai [2016 (9) TMI 1136]*
b. *B4S Solutions Pvt. Ltd. v. CCE, Ghaziabad [2018 (4) TMI 964 - CESTAT Allahabad]*
c. *Vodafone Essar South Ltd., v. CCE, Meerut-I, [2017 (51) S.T.R. 77 (Tri. - All.)]*

5.3. Therefore, the appellant submits that the Cenvat Credit on such services ought not be denied to the Appellant specifically where there is no dispute regarding payment of service tax thereon.

<u>CENVAT credit availed on shelters qualifies as passive infrastructure in telecommunication business:</u>

6. Regarding CENVAT credit availed on shelters, the Appellant submits that the same qualifies as passive infrastructure in telecommunication business. The Appellant submits that in order to develop a cell site i.e. telecom infrastructure to provide telecommunication services, the Appellant is required to arrange active and passive infrastructure to fix their antenna and set up the BTS, etc; 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 Chapter 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. 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. The appellant also submits that 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, the appellant contends that CENVAT Credit on such towers and shelters are admissible to the Appellant under Rule 2(a)(A)(iii) of the CENVAT Credit Rules as an accessory to the BTS.

6.1. Reliance in this regard is placed on the following decisions:

a. Bharat Sanchar Nigam Ltd. v. CCE, Cus. & ST, Bhubaneswar-I [2024 (7) TMI 1403 - CESTAT Kolkata]

b. ATC Telecom Infrastructure Private Ltd. v. Commissioner, Service Tax, Delhi-II [2023 (2) TMI 895 - CESTAT New Delhi].

c. Tower Vision India Pvt. Ltd. v. Commr. of ST-Delhi [2023 (9) TMI 358-CESTAT Chandigarh]

d. Indus Towers Ltd. v. CCE & ST, Delhi-IV [2020 (6) TMI 493-CESTAT Chandigarh]

e. CCE & ST, Gurgaon v. Bharti Infratel Ltd. [2019 (2) TMI 1736 - CESTAT Chandigarh]

f. Bharati Infratel Ltd. v. Commr. of ST, Delhi-IV [2019 (5) TMI 1698 - CESTAT Chandigarh]

6.2. The appellant also submits 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

Appellant since the Appellant would be unable to provide final telecommunication services to the subscribers. Thus, they contend that these goods are used for provision of output services and hence are eligible to claim credit in respect of towers, shelters and parts thereof.

6.3. In view of the above judicial pronouncements, the Appellant submits that they have rightly availed credit on towers, shelters and parts thereof and hence, denial of such credit by Ld. Commissioner vide the impugned order is liable to be set aside.

6.4. Further reliance is placed on the decision of the Hon'ble High Court of Delhi in the case of ***Vodafone Mobile Services Ltd. v. Commissioner of ST., Delhi reported in 2019 (27) G.S.T.L. 481 (Del.)*** wherein it was held that towers and shelters are not immovable but are fixed to earth using nuts and bolts to achieve stability; such fact would not render the towers and shelters non-excisable.

7. It is further submitted that in the absence of any suppression of facts or *mala fide* intent on the part of the Appellant, extended period of limitation is not invokable. The appellant therefore submits that where the principal demand itself is not sustainable, the ancillary demands for interest and penalty are liable to be set aside.

8. In view of the above, the appellant prayed for setting aside the demands confirmed in the impugned order and allow the appeal filed by them.

9. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

10. Heard both sides and perused the appeal documents.

11. We observe that regarding the services used for transportation of household goods of employees, it was alleged in the Notice that the said services were used primarily for personal use and were not used by the Appellant for furtherance of their business. It is seen that during the period under dispute, the definition of the term 'input services' was very wide and it covered all the' input services' used in or in relation to the business. Thus, we observe that CENVAT Credit availed on services used for transportation of household goods of employees, are 'input services' for the appellant and they are eligible for the credit of service tax paid on such transportation services. Similarly, service tax credit availed on transportation services for travel of employees for official purposes like business meets, sales & advertisement campaigns, etc., are also meant for furtherance of business. Hence, we hold that the CENVAT Credit availed on such services is also eligible as 'input service'.

11.1. We observe that the above said issues are no more *res integra* as the Tribunal, Bangalore in the case ***Robert Bosch Engg. & Business Solutions Ltd. & Commissioner of Central Excise and Service Tax, Bangalore-LTU [2017 (51) S.T.R. 329 (Tri.-Bang.)]*** has allowed the credit on such services as 'input services'. The relevant part of the said decision is reproduced below:

> *"5.1. Firstly the Cenvat credit has been denied on the Movement of personal baggage. Learned counsel for the appellant submitted that the company has a large employee base without whom, the rendition of output service would not be possible. During the employment, employees move from one location of*

> *the company to another or to customer site, where movement of their baggage become necessary to render services and therefore all the services are an activity relating to business and is covered under the definition of input service. He further submitted that in appellant's own case for the subsequent period, the Department has allowed the Cenvat Credit on these services holding the same as input service and he has annexed the copies of the order which is mentioned in the table above. Therefore, in my view, the appellant is entitled to avail Cenvat credit on movement of personal baggage."*

11.2. In view of the discussions above and by relying on the decision cited above, we hold that the appellant is eligible for the CENVAT Credit availed on these input services.

12. Regarding Services used for transportation, procurement and filling of diesel for the period from April 2011 to December 2011, we observe that during the underlying period, the Appellant have outsourced the said activity of performing Operations & Maintenance to service providers who were responsible to ensure upkeep of cell site including the DG sets . Diesel is always required for the running the DG sets. Thus, as a part of providing operations & maintenance services, the service providers procured, transported and filled diesel in the DG sets to ensure their continuous operation and sustenance of the cell site. On such activity of procurement, transportation and filling, the service providers charged service tax to the Appellant under the head Business Support Services. We observe that at the cell site, uninterrupted power supply is required to effectively provide telecommunication services to the subscribers. Thus, we hold that the said services are 'input services' for the Appellant for rendering their output services. In view thereof, we hold that the appellant are eligible for the CENVAT Credit availed on these 'input services'.

12.1. Regarding the denial of CENVAT Credit on the Prefabricated buildings used as shelters for the period from October 2008 to June 2012, we observe 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 Chapter 85 of Central Excise Tariff Act, 1985 (CETA). It is seen 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. 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, we hold that CENVAT Credit on such towers and shelters are admissible to the Appellant under Rule 2(a)(A)(iii) of the CENVAT Credit Rules as an accessory to BTS.

12.2. We find that this view has been taken by this Tribunal in the case of ***Bharat Sanchar Nigam Ltd. v. Commissioner of C.Ex., Cus. & S.T., Bhubaneswar-I [2024 (7) TMI 1403 - CESTAT Kolkata]***. The relevant part of the said decision is reproduced below:

> *"3. We find that the issue has 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 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 sheiters 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."*

The said order has been relied by this Tribunal in the case of Indus Towers Ltd. v. Commissioner of Central Excise & Service Tax, Delhi-V [2020 (6) TMI 493 – CESTAT, Chandigarh] (Final Order No. 61221/2019 dated 19.12.2019 in Service Tax Appeal No. 51211 of 2015)"

12.3. Therefore, we hold that the said goods qualify as capital goods eligible for credit to the Appellant, in terms of Rule 2 (a)(A)(i) of the CENVAT Credit Rules.

13. Regarding invocation of extended period of limitation to demand the service tax, we find that suppression of facts or *mala fide* intent is required to invoke the extended period of limitation. In this case, there is no evidence brought on record to substantiate the allegation of suppression with intention to evade the payment of tax. Accordingly, we find that extended period of limitation is not invokable in this case. Since, the principal demand itself is not sustainable, the demands of interest and imposition of penalty do not arise and hence we set aside the same.

14. In view of the above discussion, we pass the following order:

(i) The appellant is eligible for the CENVAT Credit of service tax paid on transportation services used for transportation of household goods of its employees, during the period from July 2009 to November 2010.

(ii) The appellant is eligible for the CENVAT Credit of service tax paid on the travel/ journeys performed by the employees from May 2009 to September 2011, for furtherance of business.

(iii) The appellant is eligible for the CENVAT Credit of service tax paid on the services used for transportation, procurement and filling of diesel for the period from April 2011 to December 2011.

(iv) The appellant is eligible for the CENVAT Credit on Prefabricated buildings used as shelters for the period from October 2008 to June 2012, treating them as capital goods.

(v) The demands confirmed in the impugned order are not sustainable on the ground of limitation also.

(vi) Thus, the demands confirmed in the impugned order are set aside on merit as well as on limitation.

15. The appeal filed by the appellant is disposed on the above terms.

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

Sd/-
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd