

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 54034 of 2018

(Arising out of the Order-in-Original No. 751 (CRM)ST/JDR/2018 dated 11.07.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur)

**M/s GMTD Bharat Sanchar
Nigam Limited**

Hiran Magri, Sector 4
Udaipur

.....Appellant

Versus

**Commissioner of Central Goods
and Service Tax, and
Central Excise, Jodhpur**

G-105, New Jodhpur Industrial Area,
Jodhpur

.....Respondent

APPEARANCE:

Shri Om P. Agarwal, Chartered Accountant for the Appellant

Shri Anand Narayan, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Decision: August 08, 2024

FINAL ORDER NO. 57997/2024

JUSTICE DILIP GUPTA:

This appeal that has been filed by M/s GMTD Bharat Sanchar Nigam Limited, Udaipur¹ seeks the quashing of the order dated 11.07.2018 passed by the Commissioner (Appeals), Central Excise and CGST, Jodhpur², by which the order dated 18.01.2017 passed by the Joint Commissioner adjudicating two show cause notices dated 02.03.2010 and 06.10.2010 has been upheld and the appeal has been dismissed.

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- 1. the appellant**
 - 2. the Commissioner (Appeals)**

2. The Assistant Commissioner had disallowed CENVAT credit and ordered for its recovery from the appellant with interest in terms of rule 14 of the CENVAT Credit Rules, 2004³ read with section 73 (2) and section 75 of the Finance Act, 1994⁴. The Assistant Commissioner also imposed penalty under rule 15 (4) of the CENVAT Rules read with section 78 of the Finance Act.

3. The appellant is engaged in providing telecommunication services. It availed CENVAT credit on receipt of various tower materials and pre-fabricated shelters (tower materials) falling under Chapter 73 of the First Schedule of the Tariff Act which materials were used in setting up of the 'tower' for transmission. The credit was availed treating the goods as capital goods. The issue that arises for consideration in this appeal is whether CENVAT credit would be admissible to the appellant on tower materials.

4. The show cause notices allege that since the tower materials made up of iron were neither covered under the definition of 'capital goods' nor under 'inputs', in terms of the definition under the CENVAT Rules, the same were to be disallowed and recovered with interest. It was further alleged that the appellant had deliberately suppressed facts relating to availment of such credit by not disclosing the same to the department and so the extended period of limitation was invocable. Penalty was also proposed to be imposed on the appellant.

5. The appellant submitted a reply and denied the allegations made in the show cause notices and stated that the goods in question were parts and components of 'base trans receiver station (BTS)', 'base station

3. the CENVAT Rules

4. the Finance Act

controller (BSC) and mobile switching centre (MSC), which are tower materials. Thus, such tower materials would qualify to be capital goods under CENVAT Rules. The appellant, in the alternative, claimed that since the tower materials are 'inputs' used for providing of telecommunication services, they would be covered under the definition of 'inputs' under the CENVAT Rules.

6. The submission of the appellant was not accepted by the Assistant Commissioner and the Commissioner (Appeals) and the entire CENVAT credit has been disallowed under rule 14 of the CENVAT Rules.

7. This appeal has been filed to assail the aforesaid order dated 11.07.2018 passed by the Commissioner (Appeals).

8. Shri Om P. Agarwal, learned Chartered Accountant appearing for the appellant submitted that the issue involved in this appeal as to whether CENVAT credit would be admissible to the appellant on tower materials has been settled by a Division Bench of the Tribunal in **Vodafone Mobile Services Ltd. vs. CCE, Jodhpur**⁵.

9. Shri Anand Narayan, learned authorized representative appearing for the department has, however, supported the impugned order and has contended that it does not call for any interference in this appeal.

10. The submission advanced by the learned Chartered Accountant for the appellant and the learned authorized representative have been considered.

11. It clearly transpires from a perusal of the order passed by the Tribunal in **Vodafone Mobile Services**, that the appellant would be entitled to CENVAT credit on the tower materials. The Tribunal relied upon

5. **2023 (70) G.S.T.L. 476 (Tri- Del)**

the decision of the Delhi High Court in the case of the appellant in **Vodafone Mobile Services Ltd. vs. CST, Delhi**⁶. The relevant observations of the Tribunal are reproduced below:

"5. The issue involved in the present appeal is about the eligibility of the appellant to claim CENVAT credit on tower, tower material, shelter, input services for the period from October, 2004 to March, 2012 and April, 2014 to March, 2015. *****

23. The alternative argument of learned counsel for the appellant that towers and shelters would also qualify as 'inputs' under rule 2(k) of the 2004 Rules was also examined by the Delhi High Court in **Vodafone Mobile Services** and it was held that :

"53. On examination of the definition and the decisions, the Court is of the considered opinion that the term "all goods" mentioned in Rule 2(k) of the Credit Rules would cover all the goods used for providing output services, except those which are specifically excluded in the said Rule. **Therefore, the definition is wide enough to bring all goods which are used for providing any output service.** Further, from the decisions of the Supreme Court and other judgments referred to previously, the test applicable for determining whether inputs are used in the manufacture of goods is the 'functional utility' test. If an item is required for providing out the output services of the service provider on a commercial scale, it satisfies the functional utility test. In the facts of the present case, what emerges is that, BTS is an integrated system and each of its components have to work in tandem with each other in order to provide the required connectivity for cellular phone users and for efficient telecommunication services. **The towers and pre-fabricated shelters form an essential in the provision of telecommunication service. The CESTAT - in the opinion of this Court - failed to appreciate that it is well settled that the word "used" should be understood in a wide sense, so as to include passive as well as active use.** The towers in CKD condition are used for the purpose of

6. (27) G.S.T.L. 481 (Delhi)

supplying the service and therefore, would qualify as 'inputs'. There is actual use of the tower and shelters in conjunction with the Antenna and the BTS equipment in providing the output service, which also includes provision of the Business Support Service. The CESTAT has failed to appreciate that the towers and the parts thereon and the prefabricated shelters are inputs, in accordance with the provisions of Rule 2(k) of the Credit Rules. The CESTAT has erred in holding that there is no nexus between the inputs and the output service. The CESTAT also failed to consider the decision of the AP High Court in case of M/s. Indus Towers Ltd. v. CTO, Hyderabad - (2012) 52 VSR 447, which clearly ruled that the towers and shelters are indeed used and are integrally connected to the rendition of the telecommunication services".

(emphasis supplied)

24. Another alternative submission advanced by the learned Counsel for the appellant that the items in dispute are 'capital goods' and, therefore, credit was correctly taken as 'capital goods' also deserves to be accepted.

25. The Delhi High Court in **Vodafone Mobile Services** had also examined this issue and the observations are as follows:

"44. From the above definition, clearly for goods to be termed "capital goods", in the present set of facts, should fulfil the following conditions:

1. They must fall, inter alia, under Chapter 85 of the first schedule to the CET or must be component, parts or spares of such goods falling under Chapter 85 of the first schedule to the Central Excise Tariff Act (CET); and
2. Must be used for providing output service.

45. **Accordingly, all components, spares and accessories of such capital goods falling under Chapter 85, would also be treated as capital goods. Now, given that Cenvat credit is available to accessories, it is important to address whether towers and shelters would qualify as "accessories"**. Black's Law dictionary, (fifth edition), defines "accessory" as:

"anything which is joined to another thing as an ornament or to render it more perfect, or which

accompanies it, or is connected with it as an incident, or as subordinate to it, or which belongs to or with it, adjunct or accompaniment. A thing of subordinate importance. Aiding or contributing in secondary way of assisting in or contributing to as a subordinate. "

46. **On the basis of the above analysis, it is apparent that the primary test to qualify as an accessory is whether does the item in question adds to the beauty, convenience or effectiveness of something else.** An accessory is an article or device that adds to the convenience or effectiveness of but is not essential to the main machinery. It was highlighted during the hearing of the appeals that the towers are structures installed to support GSM and microwave antennae. These antennae receive and transmit signals and are used for providing output service. Without them, the antennae cannot be installed high above the ground and cannot receive or transmit signals. **Therefore, the towers too have to be considered as essential component/part of the capital goods, namely BST and antennae. Further, BTS is an integrated system and each component in the BTS, have to work in tandem to provide cellular connectivity to phone users and to provide efficient services. In the facts of the present case, it is evident that the towers form part of the active infrastructure as the antennae cannot be placed at that altitude to generate uninterrupted frequency. Further, these shelters are accessories for the placement of various BTS equipment and other items for it to remain in a dust-free, ambient temperature.**

47. **From the foregoing discussion, clearly towers and shelters support the BTS in effective transmission of the mobile signals and therefore, enhance their efficiency. The towers and shelters plainly act as components/parts and in alternative as accessory to the BTS and would be covered by the definition of "capital goods".**

48. **In the present cases, the Tribunal, in this Court's view erred in interpreting the definition of "capital goods". It merely adopted the ratio laid down by the Bombay High Court in the case of the Bharti Airtel (supra) and Vodafone India (supra). Both those are subject matter of appeals before**

the Supreme Court. This Court is of the opinion, with due respect to the Bombay High Court that those two judgments are contrary to settled judicial precedents, including the later view of the Supreme Court in Solid and Correct Engineering (supra). In this conclusion, it is held that the Tribunal clearly erred in concluding that the towers and parts thereof and the prefabricated shelters are not capital goods with the meaning of Rule 2(a) of the Credit Rules. This question is answered in favour of the assessee and against the Revenue."

(emphasis supplied)

25. Thus, the appellant was also entitled to take CENVAT credit since the items in dispute are 'capital goods'.

31. This decision of the Delhi High Court in **Vodafone Mobile Services** has also been followed by the Tribunal in following decisions:

- i. Bharti Hexacom Limited vs. Commissioner of Central Excise and Customs, Central Goods and Service Tax, Jaipur-I (ST Appeal No. 50835 of 2017 decided on 25.05.2021);
- ii. Bharti Airtel Limited vs. CCE & ST – Gurgaon-II (ST Appeal No. 55383 of 2013 decided on 03.09.2019);
- iii. CCE Gurgaon-II vs. Bharti Infratel Ltd. (ST Appeal No. 52951, 52377-52378 of 2015 decided on 21.02.2019);
- iv. Bharti Infratel Limited vs. Commissioner of Service Tax, Delhi – IV (ST Appeal No. 52382 of 2015 decided on 22.05.2019); and
- v. Reliance Jio Infocomm Ltd."

(emphasis supplied)

12. The aforesaid decision of the Tribunal in **Vodafone Mobile Services** holds that tower materials would qualify as 'inputs' under rule 2(k) of the CENVAT Rules and they would also be capital goods and, therefore, credit could be taken.

13. In view of the aforesaid decision of the Tribunal in **Vodafone Mobile Services**, the impugned order dated 11.07.2018 passed by the Commissioner (Appeals) deserves to be set aside and is set aside. The appeal is, accordingly, allowed with consequential relief, if any, to the appellant.

(Order pronounced and dictated in Open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)