
(2021) 04 CESTAT CK 0012

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 1032 Of 2010

M/s. Bharti Airtel Ltd

APPELLANT

Vs

C.C.E.-Bangalore-I

RESPONDENT

Date of Decision : 06-04-2021

Acts Referred:

Finance Act, 1994 — Section 75, 78, 80

Central Excise Act, 1944 — Section 37

Cenvat Credit Rules 2004 — Rule 2(a), 2(a)(A), 2(a)(A)(i), 2(a)(A)(iii), 2(k), 2(k)(ii), 4(1), 15(1)

Citation : (2021) 04 CESTAT CK 0012

Hon'ble Judges : S.S. Garg, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : Ravi Raghavan, P.Gopakumar

Final Decision : Allowed

Judgement

1. The appellants, M/s Bharti Airtel Ltd., are providers of taxable service under the category of Telephone/Telecommunications Services; an audit conducted by the Department for the period 10.09.2004 to 30.09.2006, it appeared that the appellants have availed CENVAT credit on (ii) Pre-fabricated buildings/shelters/ PUF panels used for housing/storage of generating sets and other components/ equipments/spares etc. and the same was not available in terms of CENVAT Credit Rules; CBEC vide Circular F.No. 137/315/2007-CX4 dated 07.12.2007 held that the activity of erection of towers does amount to manufacture and hence credit is not available. A SCN dated 6.07.2009 seeking to deny the erroneous credit amounting to Rs.7,89,56,288/- and to impose penalty under Section 78 of the Finance Act and Rule 15(1) of the CCR, 2004. The same was confirmed by Order-in-Original No. 03/2010 (ST) dated 17.02.2010 which is subject of discussion in the appeal.

2. The Learned Counsel for the appellants submits that the towers and prefabricated buildings on which CENVAT credit has been availed are capital

goods and therefore, CENVAT credit is correctly availed as:

- The towers/ tower materials and pre-fabricated shelters which are integral to the erection of the cell sites for providing cellular coverage in public areas are capital goods used in providing the output service for the Appellants.
- A cell site of a cellular operator consists of antennae which receive and transmit signals so as to facilitate the Telecommunication service of the Appellants.
- These antennae are mounted on the tower and a typical tower would have more than four or five antennae to receive the signal and transmit the signal.
- Therefore, tower/tower materials and pre-fabricated shelters would fall under 'Components, Spares and Accessories' of capital goods since they act as components and accessories to the antennae at the cell site.

2.1. The appellants are entitled to avail CENVAT credit of towers/tower materials and pre-fabricated shelters as inputs as:

- The term "all goods" mentioned in Rule 2(k)(ii) of Cenvat Credit Rules, 2004 would cover all the goods used for providing any output service except those which are specifically excluded in the said Rule. Thus, even the capital assets which are used for providing any output service will be covered under the term "all goods" mentioned in 2(k) (ii).
- The antennas which are essential for the provision of telecommunication service have to be installed at the top of the towers for transmitting mobile signals into atmosphere.
- The pre-fabricated shelters and panels are used for installation of transmission devices, DG sets and other electrical and electronic instruments. It serves as a junction box. No output service could be provided without the pre-fabricated shelters.

2.2. Learned Counsel for the appellants submits that towers are in the nature of movable property as:

- It is submitted that angles, channels and other parts used to construct towers or shelters or affixation of towers are obtained in Completely Knocked Down (CKD) condition.
- At the site, they are bolted and placed on a platform either on the ground or on top of a building to ensure that there is no vibration to the tower. The same can be dismantled again and moved to a different place and erected again.
- The towers, shelters and parts thereof, at the time of their receipt were movable goods and therefore the Appellants are eligible to take CENVAT credit on the same.
- It is a settled principle of law that entitlement of CENVAT credit is to be

determined at the time of receipt of the goods. If the goods that are received qualify as inputs or capital goods, the fact that they are later fixed/fastened to the earth for use would not make them a non-excisable commodity when received.

- This position has been upheld by the decision of the Hon'ble High Court of Delhi in the case of Vodafone Mobile Services Ltd and Others v. Commissioner of Service Tax, Delhi 2019 (27) G.S.T.L. 481 (Del.)

- The Hon'ble Delhi High Court has considered the decision in Bharti Airtel Limited v. CCE, Pune-III - 2014 (35) S.T.R. 865 (Bom.) and distinguished the same on the ground that the said decision proceeded on the wrong presumption that the goods in question are immovable properties and accordingly the "permanency test" as laid down by the Supreme Court in Solid and Correct Engineering (2010-TIOL-25-SC-CX) was not applied by the Hon'ble Bombay High Court

- Relying on the ratio of the decision of the Hon'ble Delhi High Court in Vodafone Mobile Services Ltd and Others 2019 (27) G.S.T.L. 481 (Del.), the Hon'ble Chandigarh Tribunal in the case of CCE Gurgaon v. Bharti Infratel Ltd Final Order No. 60267-60269/2019 dated 21.02.2019 passed by Hon'ble CESTAT Chandigarh and Bharati Infratel Ltd v. Commissioner of Service Tax, Delhi Final Order No. 60592-60594/2019 dated 22.05.2019 passed by Hon'ble CESTAT Chandigarh has allowed the credit on angles, beams, channels and prefabricated structures/shelters.

- Accordingly, the decision of the Hon'ble Delhi High Court followed by the Hon'ble Chandigarh Tribunal will be squarely applicable in the present appeal and therefore the appeal is to be allowed on merit.

2.3. Learned Counsel further submits that the demand is anyway time barred as:

The availability of credit on towers, angles, channels, beams and shelters have always been a subject matter of dispute/litigation and accordingly extended period of limitation is not applicable in cases of such interpretational nature.

It is submitted that there was a conflict of opinion on the said issue which was ultimately addressed by Hon'ble Larger Bench in Tower Vision India Pvt. Ltd v. Commissioner of Central Excise, Delhi 2016 (42) STR 249 (Tri-LB). It is a settled position that when a matter is referred to Larger Bench, to resolve conflict of opinion, extended period of limitation is not invocable.

The instant proceeding is completely barred by limitation and various decisions based on same set of facts, have categorically held that extended period could not have been invoked in such cases.

Reliance is placed in Appellant's own case, Bharti Airtel Ltd v. Commissioner of Central Excise, Guwahati, Shillong & Kolkata 2018-TIOL-4061-CESTAT-KOL, wherein the Hon'ble CESTAT Tribunal, Kolkata held that extended period of

limitation is not invocable since the availability of credit on tower and tower materials, is contingent upon a question of law involving interpretation of complex legal provisions. Similar view has been taken in the Appellant's own case by the Hon'ble CESTAT Tribunal, Chennai (Bharti Airtel Ltd. & Ors v. Commissioner GST 2018-VIL-193-CESTAT-CHE-ST) as well as Hon'ble CESTAT Tribunal, Chandigarh (Bharti Airtel Ltd. & Ors Vs. CST, Chandigarh-1 - 2017-TIOL-4081-CESTAT-CHD).

Hon'ble High Courts/Tribunals have consistently set aside such demands barred by limitation:

- i. M/s Vodafone Cellular Ltd v. CCE, Cochin 2019-TIOL-841-CESTAT-BANG
- ii. Vodafone Essar South Ltd. v. Commissioner of S.T., Bangalore 2020 (43) G.S.T.L. 249 (Tri. - Bang.) Appeal on merits admitted by Hon'ble High Court and Stay granted reported at 2020 (43) G.S.T.L. 152 (Kar.)
- iii. M/s. Spice Communications Ltd - Final Order No. 20047/2017 dated 16.01.2017 passed by Hon'ble CESTAT, Bangalore

3. Learned AR for the Department reiterates the findings of the OIO and submits that the High Court of Bombay in the case of Bharti Airtel Ltd. 2014 (35) STR 865 (Bom.) and Vodafone India Ltd. 2015 (40) STR 422 (Bom.) has decided that the credit in question is not available to the appellants.

4. We have gone through the records of the case and the submissions of the appellants as well as the Department. The main case of the Department is that the angles, channels, beams, pre-fabricated buildings/shelters etc used for erecting transmission towers are not directly used for providing the output service though the same are used indirectly; the definition of input cannot be given an enlarged connotation in absence of the words 'directly or indirectly' and 'in or in relation to'; the transmission towers are admittedly attached to earth. Erection of towers attaching to earth does not amount to manufacture of goods and therefore the erected towers cannot be called as capital goods; merely for the sake of availing Cenvat credit of duty paid on the material used in erecting towers, the Appellant cannot classify the towers under Chapter 85 of the Central Excise Tariff and claim that the angles, channels and beams are component and accessories of capital goods; extended period of limitation can be invoked as the Appellant has not declared the details of items on which credit has been taken in the ST-3 returns filed by them; the Appellant is liable to pay Interest under Section 75 of Finance Act, 1994 and penalty is imposable under Rule 15(1) of the Cenvat Credit Rules, 2004.

5. We find that Hon'ble Bombay High Court has upheld the stand of the Department in the cases cited above while Hon'ble High Court of Delhi held that credit is admissible in the case of Vodafone Mobile Services & Others 2019 (27) GSTL 481 (Delhi). We find that the jurisdictional High Court has not pronounced any judgment on this issue. Therefore, we find that this Bench is free to consider

the issue independently in the light of the facts of the case. We find that Hon'ble High Court of Bombay in the appellant's case themselves has held that credit is not admissible on the above. Hon'ble High Court has dealt the matter in an elaborate manner going through the definitions of "Capital Goods" "Inputs" etc. and the CENVAT Credit Rules. We find that Hon'ble High Court has held as follows:

31. In the light of the aforesaid discussion we examine whether on the rules as they stand the appellants would be entitled to the credit of the duty paid on the item in question on the output service namely the cellular service. We may observe that a plain reading of the definition of 'capital goods' as defined under Rule 2(a)(A) of the Credit Rules show that all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, Heading No. 6805, grinding wheels and the like, and parts thereof falling under Heading 6804 of the First Schedule to the Central Excise Tariff Act; pollution control equipment; components, spares and accessories of the goods specified at sub-clauses (i) and (ii) which are used either in the factory for manufacture of final products but does not include any equipment or appliance used in the office and those used for providing output service. Further in the CKD or SKD condition the tower and parts thereof would fall under the Chapter Heading 7308 of the Central Excise Tariff Act. Heading 7308 is not specified in clause (i) or clause (ii) of Rule 2(a)(A) of the Credit Rules so as to be capital goods. Further the appellants contention that they were entitled for credit of the duty paid as the Base Trans receiver Station (BTS) is a single integrated system consisting of tower, GSM or Microwave Antennas, Prefabricated building, isolation transformers, electrical equipment, generator sets, feeder cables etc. and that these systems are to be treated as "composite system" classified under Chapter 85.25 of the Tariff Act and be treated as 'capital goods' and credit be allowed, also is not acceptable. It is clear that each of the component had independent functions and hence, they cannot be treated and classified as single unit. It is clear that all capital goods are not eligible for credit and only those relatable to the output services would be eligible for credit. The goods in question in any case cannot be held to be capital goods for the purpose of Cenvat credit as they are neither components, spares and accessories of goods falling under any of the chapters or headings of the Central Excise Tariff Schedule as specified in sub-clause (i) of the definition of capital goods. Hence a combined reading of sub-clauses (a)(A) (i) and (iii) and sub-rule (2) indicates that only the category of goods in Rule 2(a)(A) falling under clause (i) and (iii) used for providing output services can only qualify as capital goods and none other. Admittedly the goods in question namely the tower and part thereof, the PFB and the printers do not fall within the definition of capital goods and hence the appellants cannot claim the credit of duty paid on these items. Even applying the ratio of the judgments as relied upon by the appellants as observed above the said goods in the present context cannot be classified as capital goods.

32. As regards second contention of the appellants that the tower and part thereof, the PFB and the printers would also falls under the definition of 'input' as

defined under Rule 2(k) also cannot be sustained. The definition of inputs as defined under Rule 2(k) includes all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production, and as provided in subclause (ii) all goods except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service. Explanation (2) of sub-rule (k) is also which provides that input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. A plain reading of the definition of input indicates that in the present context, clause (i) of Rule 2(k) may not be of relevance as same pertains to manufacturing activity and pertains to goods used in relation to manufacture of final product or any other purpose within the factory of production. Sub-clause (ii) has been referred to as relevant by the appellant as the same pertains to goods except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service. Tower and parts thereof are fastened and are fixed to the earth and after their erection become immovable and therefore cannot be goods.

33. The alternative contention of the appellant is that tower is an accessory of antenna and that without towers antennas cannot be installed and as such the antennas cannot function and hence the tower should be treated as parts and components of the antenna. It is urged that antennas fall under Chapter 85 of the Schedule to the Central Excise Tariff Act and hence being capital goods used for providing cellular service falling under Rule 2(a)(A)(iii) as part of capital goods falling under Rule 2(a)(A)(i) towers become accessories of antenna and should be held as capital goods for availing of credit of duty paid. The argument at the first blush appeared to be attractive however a deeper scrutiny shows that the same is without substance. It would be misconceived and absurd to accept that tower is a part of antenna. An accessory or a part of any goods would necessarily mean such accessory or part which would be utilized to make the goods a finished product or such articles which would go into the composition of another article. The towers are structures fastened to the earth on which the antennas are installed and hence cannot be considered to be an accessory or part of the antenna. The position in this regard stands fortified from the decision of the Supreme Court in the case of "Saraswati Sugar Mills v. CCE, Delhi [2011 (270) E.L.T. 465]". From the definition of the term 'input' as defined in 2(k) of the Credit Rules it is clear that the appellant is a service provider and not a manufacturer of capital goods. A close scrutiny of the definition of the term capital goods and input indicates that only those goods as used by a

manufacturer would qualify for credit of the duty paid. As observed hereinabove a service provider like the appellant can avail of the credit of the duty paid only if the goods fall within the ambit of the definition of capital goods as defined under Rule 2(a)(A) of the Credit Rules. The contention of the appellant that they are entitled for the credit of the duty paid towers and PFB and printers is defeated by the very wording of the definition of input. In any case towers and PFB are in the nature of immovable goods and are non-marketable and non-excisable . If this be the position then towers and parts thereof cannot be classified as inputs so as to fall within the definition of Rule 2(k) of the Credit Rules. We clarify that we are not deciding any wider question but restricting our conclusion to the facts and circumstances which have fell for our consideration in these appeals.

34. We therefore find no infirmity or illegality in the findings as recorded by the tribunal in holding that the subject items are neither capital goods under Rule 2(a) nor inputs under Rule 2(k) of the Credit Rules and hence Cenvat credit of the duty paid thereon was not admissible to the appellants. The appeals are devoid of merit and accordingly stand rejected. No orders as to costs.

The above decision has been appealed against and is pending before the Apex Court for decision, 2015 (40) STR J229 (SC).

6. On the contrary, Hon'ble High Court of Delhi in the case of Vodafone Mobile Services & Others, 2019 (27) GSTL 481 (Del.) has taken a contra decision and have held that credit on capital goods and inputs on towers, pre-fabricated shelters and accessories is admissible to the appellants therein. Hon'ble Court has held that:

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.

49. The allied question is alternatively, whether towers and shelters would qualify as "inputs" under Rule 2(k) of the Credit Rules. The assessees had urged that the tower (and parts thereof) and the pre-fabricated shelters would also qualify as

'inputs' used for providing output service. This contention is based on sub-clause (ii) of clause (k) of Rule 2 (definition of "input") of the Credit Rules. They rely on Godfrey Phillips India Ltd. v. Union of India - 1990 (48) E.L.T. 508, where the term 'input' was interpreted and the Court held as follows :

"All that the company then seeks is relief or credit qua duty already once and earlier paid on Tariff Item No. 68 goods going into the manufactured product which is finally rendered marketable to the consumer. In all such circumstances, the word 'Inputs' (with which word the authorities seem to have been overwhelmed) in the - 1979 notification cannot have the effect of superseding and setting at naught the entire relevant earlier recital preceding thereto. The word 'Inputs' is only a cryptic abbreviated form not meant to change and alter the meaning and intention of the substantive and the really relevant part of the notification but only indicative thereof. The interpretation put by the authorities on the said word is too narrow and technical defeating the very object of the notification and running counter thereto. Reading the said notification as a whole, it is obvious and clear that a much wider meaning to the word 'inputs' is intended. It is not used as the grammatical equivalent of or otherwise synonymous with the word 'ingredients'. The effort to equate the two would render the notification to a great extent infructuous and nugatory. Indeed, the notification itself clarifies the word (Inputs) to mean : "...any goods falling under Item No. 68."

The sum and substance is to enable manufacturers to claim credit for all Tariff Item 68 goods that go into the manufactured product and on which product full duty is being paid."

64. C.B.E. & C. Circular No. 58/1/2002-CX, dated 15-1-2002, was relied on, to say that when the final product is considered as immovable and hence, non-excisable, the same product in CKD condition or unassembled form will also not be dutiable as a whole by applying Rule 2(I) of the Credit Rules of Interpretation of the Central Excise Tariff. The relevant portion of the circular is extracted hereunder for reference :

"4. (v) if items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as movable and will, therefore, not be excisable goods.

(vi) if any goods installed at site (example paper making machine) are capable of being sold or shifted as such after removal from the base and without dismantling into its components/parts, the goods would be considered to be movable and thus excisable. The mere fact that the goods, though being capable of being sold or shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported in dismantled condition. Rule 2(a)

of the Rules for the Interpretation of Central Excise Tariff will be attracted as guiding factor is capability of being marketed in the original form and not whether it is actually dismantled or not, into its components. Each case will therefore have to be decided keeping in view the facts and circumstances, particularly whether it is practically possible (considering the size and nature of the goods, capability of goods to move on self-propulsion - ships etc.) to remove and sell the goods as they are, without dismantling into their components. If the goods are incapable of being sold, shifted and marketed without first being dismantled into component/parts, the goods would be considered as immovable and therefore, not excisable to duty.

(vii) When the final product is considered as immovable and hence not excisable goods, the same product in CKD or unassembled form will also not be dutiable as a whole by applying Rule 2(a) of the Rules of Interpretation of Central Excise Tariff. However, components, inputs and parts which are specified excisable products will remain dutiable as such identifiable goods at the time of their clearance from the factory or warehouse."

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 (39) S.T.R. 726 (Guj.)*. The High Court held that assessee would be entitled to input credit for the cement and steel used in the construction of new jetties and other commercial buildings. In the said case, the High Court has observed in paras 7, 8 and 9 as under :

"7. It is not disputed that jetty was constructed and input credit was claimed on cement and steel. The aforesaid definition of Rule 2(k) was applicable and Explanation 2 did not provide that cement and steel would not be eligible for input credit. According to learned counsel for the appellant, the appellant is not manufacturer and, therefore, the provisions Explanation 2 of Rule 2(k) would be applicable only to the factory and manufacturer. The appellant is neither having any factory nor he is manufacturer. The appellant is a service provider of port. We need not go into this question as to whether the appellant is a factory or manufacturer or service provider in view of the fact that it is not disputed by Mr. Y.N. Ravani, learned counsel appearing for the Revenue in this Tax Appeal that the appellant provides service on port for which he is getting jetty constructed through the contractor and the appellant has claimed input credit on cement and steel. The cement and steel were not included in Explanation 2 from 2004 upto March, 2006. The Cenvat Credit Rules, 2004 were amended in exercise of the powers conferred by section 37 of the Central Excise Act, 1944 with effect from 7-7-2009, the date on which it was notified by the Central Government from the

date of the notification. According to learned counsel for the appellant, this amended definition would apply only to the factory or manufacturer and would not apply to the service provider. According to him, either before the amendment made in the year 2009 or thereafter, the appellant was neither factory nor manufacturer and he has only constructed jetty by use of cement and steel for which he was entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is a service provider. According to the appellant, his case is squarely covered by the judgment of the Division Bench of the Andhra Pradesh High Court in Commissioner of Central Excise, Visakhapatnam-II v. Sai Sahmita Storages (P) Limited, 2011 (270) E.L.T. 33 (A.P.) wherein in paragraph 7, it has been clearly held that a plain reading of the definition of Rule 2(k) would demonstrate that all the goods used in relation to manufacturer of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for CENVAT credit. It is not in dispute that the appellant is a taxable service provider on port under the category of port services. Therefore, the appellant was entitled for input credit and the decision of the Division Bench of the Andhra Pradesh High Court squarely applies to the facts of the case and answered the question on which the appeal has been admitted.

8. Mr. Y.N. Ravani, learned counsel for the Revenue has placed reliance on the decision of the Larger Bench of the Tribunal in Vandana Global Limited v. Commissioner of Central Excise, Raipur, 2010 (253) E.L.T. 440. We have carefully gone through the decision of the Larger Bench of the Tribunal. We do not find that amendment made in Cenvet Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification of particular thing or goods and or input and as such, the amendment could operate only prospectively. In our opinion, the view taken by the Tribunal is based on conjectures and surmises as the Larger Bench of the Tribunal used the expression that intention behind amendment was to clarify. The coverage under the input from where this intention has been gathered by the Tribunal has not been mentioned in the judgment. There is no material to support that there was any legislative intent to clarify any existing provision. For the same reason, as mentioned above, the decision of the Apex Court in Sangam Spinners Limited v. Union of India and others, reported in (2011) 11 SCC 408 would not be applicable to the facts of the instant case.

9. Mr. Ravani has also vehemently urged that since jetty was constructed by the appellant through the contractor and construction of jetty is exempted and, therefore, input credit would not be available to the appellant as construction of jetty is exempted service. The argument though attractive cannot be accepted. The jetty is constructed by the appellant by purchasing iron, cement, grid etc.

which are used in construction of jetty. The contractor has constructed jetty. There are two methods, one is that the appellant would have given entire contract to the contractor for making jetty by giving material on his end and then make the payment, the other method was that the appellant would have provided material to the contractor and labour contract would have been given. The appellant claims that he has provided cement, steel etc. for which he was entitled for input credit and, therefore, in our opinion, the appellant was entitled for input credit and it cannot be treated that since construction of jetty was exempted, the appellant would not be entitled for input credit. The view taken contrary by the Tribunal deserves to be set aside."

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 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.

73. The conclusion of CESTAT, denying the assessee Cenvat credit on the premise that the towers erected result in immovable property, is erroneous and plainly contrary to *Solid and Correct Engineering (supra)*. The towers that are received in CKD condition, are erected at site, subsequently, giving rise to a structure that remains, safe and stable (commercial reasons of use). The fact that in the intermediate stage, an immovable structure emerged, is of no consequence, in the facts of the present case. It is a settled principle of law that entitlement of Cenvat credit is to be determined at the time of receipt of the goods. If the goods that are received qualify as inputs or capital goods, the fact that they are later fixed/fastened to the earth for use would not make them a non-excisable commodity when received. The CESTAT failed to consider the fact in the event antennae and BTS are to be relocated, the assessee also has to relocate the tower and the pre-fabricated shelters, thereby, implying that the towers and the prefabricated shelters, are not immovable property. Therefore, the CESTAT erred in relying upon the decision of the *Bharti Airtel (supra)*.

On an appeal, this case is pending before Hon'ble Supreme Court for decision 2020 (32) GSTL J150.

7. Chandigarh Bench of this tribunal in the case of *M/s Bharati Airtel*, vide final order A/60267-60269/2019 dated 24-02-2019, held that such items are admissible for credit.

8. In view of the above, it is clear that two High Courts have taken a completely contrary opinion in the matter having identical facts as the instant case. Both the decisions are appealed against and admitted and are for consideration before the

Hon'ble Apex Court. We find that there is no judgement passed by the jurisdictional High Court on this issue. However, we find that Larger Bench of the Tribunal in the case of Tower Vision India Pvt Ltd Vs CCE (ADJ.), DELHI2016 (42) STR 249 (Tri. - LB) has deliberated the issue at length and decided that credit is not admissible. We are of the considered opinion that we are bound by the judgement of the larger Bench. This very Bench relying on the larger Bench decision in the above case, decided in favour of Revenue, in the case of Vodafone Essar South Ltd. 2020 (43) G.S.T.L. 249 (Tri. - Bang.), decided the issue in favour of Revenue. This Bench observed that

After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by the appellant, we find that various Benches of the Tribunal have held that the appellants are not entitled to take Cenvat credit on tower/tower materials and prefabricated buildings/shelters as capital goods as well as inputs. We also find that this issue has been subject matter of litigation before various Benches of the Tribunal and the matter was also referred to the Larger Bench and finally the Larger Bench in the case of Tower Vision (India) Pvt. Ltd. cited supra answered the reference in favour of the Revenue vide its order dated 16-3-2015 disposing of various appeals including the appeal of the appellant. The Tribunal in the said decision has also followed the decision of the Karnataka High Court in the case of CCE, Bangalore v. MTR Food Ltd. [2012 (282) E.L.T. 196] wherein it has been held that if the returns were filed properly and audit has also taken place, then there are no allegation of bona fide on the part of the assessee and in such a situation extended period cannot be invoked. The Learned Counsel for the appellant fairly conceded that in view of the various decisions, the issue has been held against the assessee and in favour of the Revenue but he only prayed that in all the decisions decided by the Tribunal and the High Court, it has been categorically held that the demand can only be confirmed for normal period and extended period of limitation has been dropped. Consequently all the penalties have also been dropped. In view of the various decisions settling the issue, we are of the considered view that the issue in the present appeals was of an interpretation nature i.e. as to the eligibility of Cenvat credit or otherwise on the towers and building and had to be settled in the hands of the High Court. Therefore, the appellant could have entertained a bona fide belief. Hence all the penalties imposed on all the appellants herein are set aside by invoking the provisions of Section 80 of the Finance Act, 1994.

In view of the above, following judicial discipline, we find that the appellants have no case on merits.

9. The appellants have also submitted their arguments on the issue of limitation and submitted various case laws in their defense. The appellants have argued that

the availability of credit on towers, angles, channels, beams and shelters have always been a subject matter of dispute/litigation and accordingly extended

period of limitation is not applicable in cases of such interpretational nature.

there was a conflict of opinion on the said issue which was ultimately addressed by Hon'ble Larger Bench in Tower Vision India Pvt. Ltd v. Commissioner of Central Excise, Delhi 2016 (42) STR 249 (Tri-LB). It is a settled position that when a matter is referred to Larger Bench, to resolve conflict of opinion, extended period of limitation is not invocable.

in Appellant's own cases, 2018-TIOL-4061-KOL, 2018-VIL-193-CHE and 2017-TIOL-4081- CESTAT-CHD CESTAT, held that extended period of limitation is not invocable since the availability of credit on tower and tower materials, is contingent upon a question of law involving interpretation of complex legal provisions.

Learned Commissioner finds that the appellants have not declared the details of items on which the credit has been availed; have only declared the amount of credit taken; therefore it cannot be said that the Department was in the knowledge of availment of credit on such materials; the assessee not only continued to avail the CENVAT credit but continue to utilize the same with an intent to evade payment of service tax.

10. We find that in the instant case, demand pertains to period 10.9.2004 to 30.09.2006. Show cause Notice has been issued on 06.07.2009, which is clearly beyond the period of limitation. We find that Hon'ble Apex Court in the case of Pushpam Pharmaceuticals Vs CCE 1995(78) ELT 401(SC) has held that mere suppression of facts is not sufficient to invoke extended period; there should be some positive Act on the part of the noticee to evade payment of duty. We find that other than just mentioning that the assessee continued to avail and utilise credit, no evidence of any positive act by the appellant has been brought out. Also in the case of Continental foundation Joint Venture Vs CCE, Chandigarh 2007(216) ELT 177(SC), Apex Court held that when the issue is referred to larger Bench, extended period cannot be invoked, as the issue is clearly debatable. As discussed above, in the instant issue different High Courts have given different judgements. There was difference of opinion between members of CESTAT. The issue was referred to Larger Bench. It clearly indicates that the issue involved is of interpretation of a question of Law and therefore, mala fides cannot be attributed. The appellants submitted that they have been regularly filing returns. Hon'ble High Court of Karnataka MTR Foods Ltd 2012(282) ELT 196 held that under such circumstances, extended period cannot be invoked. We find that Hon'ble High Courts/Tribunals have consistently held that extended period cannot be invoked under such circumstances and demands are barred by limitation. The appellants cited the following cases.

(i). M/s Vodafone Cellular Ltd v. CCE, Cochin 2019-TIOL841-CESTAT-BANG

(ii). Vodafone Essar South Ltd. v. Commissioner of S.T., Bangalore 2020 (43) G.S.T.L. 249 (Tri. - Bang.) Appeal on merits admitted by Hon'ble High Court and Stay granted reported at 2020 (43) G.S.T.L. J52 (Kar.)

(iii). M/s. Spice Communications Ltd - Final Order No. 20047/2017 dated 16.01.2017 passed by Hon'ble CESTAT, Bangalore.

We find that the ratio of cases cited above, is applicable to the facts of the instant case. We find that the demands are barred by limitation.

11. In view of the above, while upholding the Revenue stand on merits, we allow the appeals on limitation.

(Order pronounced in the open court on 06.04.2021)