

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 27.07.2018

Pronounced on: 31.10.2018

- + **CEAC 12/2016, C.M. APPL.37207/2016**
VODAFONE MOBILE SERVICES LIMITEDAppellant
versus
COMMISSIONER OF SERVICE TAX, DELHI Respondent
- + **CEAC 13/2016, C.M. APPL.37208/2016**
VODAFONE MOBILE SERVICES LIMITED Appellant
versus
COMMISSIONER OF SERVICE TAX, DELHI Respondent
- + **CEAC 6/2017, C.M. APPL.6902/2017 & 37758/2017**
COMMISSIONER OF SERVICE TAX, AHMEDABAD Appellant
versus
M/S. VODAFONE MOBILE SERVICES LIMITED..... Respondent
- + **CEAC 4/2018, C.M. APPL.3649/2018**
VODAFONE MOBILE SERVICES LIMITED Appellant
versus
COMMISSIONER OF SERVICE TAX, DELHI Respondent
- + **SERTA 14/2016, C.M. APPL.45647/2016**
INDUS TOWERS LIMITED Appellant
versus
THE COMMISSIONER OF SERVICE TAX NEW DELHI Respondent
- + **SERTA 15/2016**
INDUS TOWERS LIMITED Appellant
versus
THE COMMISSIONER OF SERVICE TAX NEW DELHI Respondent
- + **SERTA 16/2016**
INDUS TOWERS LIMITED Appellant

Ghai, Advocates, for respondent in CEAC 12-13/2016, CEAC 6/2017 & CEAC 4/2018.

Sh. Gajendra Maheshwari, Advocate, for petitioner, in SERTA 14-17/2016.

Sh. Tarun Gulati, Sh. Sparsh Bhargava and Sh. Anupam Mishra, Advocates, for intervener, in SERTA 14/2016.

Sh. Deepak Anand, Jr. Standing Counsel with Ms. Hemlata Rawat and Sh. Aayushmaan Vatsyayana, Advocates, for respondents, in SERTA 15-20/2016.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

MR. JUSTICE S. RAVINDRA BHAT

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1. In all these appeals, preferred under Section 35E of the Central Excise Act, 1944 (hereafter referred as the “Excise Act”) and Section 83 of the Finance Act, 1994 (“the Act”) the common question of law is whether parts of base transmission systems (hereafter “BTS”) are classifiable under Tariff Heading 8517 and, consequently, all components, spares and accessories qualify as capital goods in terms of Rule 2(a)(A)(iii), of the CENVAT Credit Rules, 2004 (hereafter “the Credit Rules”) regardless of whether those components, spares and accessories only fall under Chapter 85. The questions of law framed are:

- i) Whether the CESTAT was right in concluding that the towers, shelter and accessories used by the Appellants for providing telecom services are immovable property?

- ii) Whether the Appellants are entitled to claim CENVAT credit on the towers, shelter as 'accessories' either as capital goods or input goods in terms of Rule 2(a) or 2(k) of the Credit Rules?
- iii) Whether the CESTAT erred in applying nexus test with reference to MS Angles and Channels, whereas according to the Appellants what was brought to the site were towers, shelter and accessories for providing services?
- iv) Whether the Appellants were justified, in terms of Rule 4 (1) of the Credit Rules, in claiming CENVAT credit of excise duty paid by the manufacturer of towers and shelters after receipt of such towers and shelters at their premises (i.e. tower sites)?
- v) Whether the emergence of immovable structure at an intermediate stage (assuming without admitting) is a criterion for denial of CENVAT credit?

2. The relevant facts are that the appellant Indus, (in SERTA No. 14-20/2016) and the assessee respondent Vodafone, (in CEAC Nos. 4/2016, 6/2016, CEAC No. 12-14/2016), which are appeals by the Revenue, provide cellular telephone services and accordingly, pay service tax applicable on cellular telephone services. They, availed CENVAT credit on the excise duty paid on towers, parts and shelters/pre-fabricated buildings purchased by it and thereby used to provide output service. Such credit so availed was utilised to pay service tax on output service viz. Cellular Mobile Service, provided by the assessees. Show Cause Notices were issued by the Revenue to the assessees, *inter alia*, alleging that they had wrongly claimed and utilized CENVAT credit in contravention of the provisions of Rule 2(a)(A) of Credit Rules. The assesses were called upon to show cause as to why (i)

the CENVAT credit amount utilized wrongly should not be recovered from them under the provisions of Rule 14 of the Credit Rules, read with Section 73 of the Act; (ii) penalty should not be imposed under provisions of Rule 15(1) of the Credit Rules on account of CENVAT Credit wrongly taken and utilized; (iii) penalty should also not be imposed under provisions of Rule 15(2) of the Credit Rules read with Section 11AC of Excise Act for CENVAT credit wrongly taken and utilized on account of suppression of the facts; (iv) all such goods (detailed in annexures to the notices) should not be confiscated under the provisions of Rule 15(1) of the Credit Rules; and (v) interest should not be recovered from the assesseees from the date on which the CENVAT credit has been wrongly taken till the date of recovery of the said credit, under provisions of Rule 14 of the Credit Rules read with Section 75 of the Act.

3. The Revenue alleged that the assesseees had claimed and used, contrary to the Credit Rules, credit in regard to certain goods which did not qualify as capital goods within the meaning of the Credit Rules. It was stated that after verification of documents and records relating to CENVAT credit on account of capital goods for the periods in question, it was observed that the credit availed was not in accordance with the provisions of Credit Rules and same was in contravention of the Rules. The relevant Rule being Rule 2(a)(A) of the Credit Rules which defined "Capital goods". It was stated that while availing CENVAT credit in respect of any goods as "capital goods" the requirement of Rule 2(a)(A) of the Credit Rules stipulates satisfaction of following two conditions:-

(a) The goods should fall under a particular CSH or description specified for the purpose;

(b) That in case of the service provider, the goods should be used for providing output service.

4. The Revenue alleged that CENVAT Credit availed by the assesseees during the various periods outlined in the show cause notices in respect of the various items, including towers and parts of tower was in contravention of Rule 2(a)(A) of the Credit Rules. Alleging that the assesseees in their return had omitted to give any 'chapter heading' under Central Excise Tariff nor the use of the said goods in providing output service. Information, about use of the goods and Chapter heading under the Central Excise Tariff Act [hereafter "CETA"] was called for from the assesseees, which were furnished. It was alleged that the assesseees had suppressed material facts and knowingly, wilfully and wrongly had taken and utilized CENVAT credit on those items.

5. The assesseees resisted the show cause notices received by them denying the allegations and the Revenue's position. They stated that the towers and parts of tower are capital goods and that credit is admissible on towers and parts of towers also, as inputs. The assesseees relied on the Credit Rules introduced by the Central Government with effect from 10.09.2004 and especially Rule 3(1) (which defines the term "CENVAT Credit", Rule 2(a)(A) which defines "Capital goods" and Rule 2(k) which defines "input"). They argued that Rule 3(1) of the Credit Rules allows the service provider to take credit of the excise duties paid on any "inputs" and "capital goods". They argued that the definition of the term "capital goods" and "input" was clear to include the said goods for availing credit of the duty paid. According to the assesseees, to qualify as "capital goods" under the Credit Rules, firstly,

what was essential was that the articles had to be goods; secondly, the goods must belong to any category as specified under Rule 2(a)(A)(i) to (vii) of the Credit Rules and that goods must be used for providing output service. It was stated that the assesseees were service providers and, therefore, Rule 2 (k) (ii) should be applied to them. Accordingly, all goods except LDO, HSD and motor spirit were inputs provided and they are used for providing output service. The appellant also placed reliance on Rule 4 of the Credit Rules to contend that the credit in respect of "inputs" can be availed of immediately on receipt of the goods in the premises of the service provider. It was stated that credit of "inputs" can be taken on time and in any manner and by not availing of the whole or part of the input credit immediately on receipt of inputs in the factory, does not vitiate the right of the manufacturer or output service provider to take un-availed credit later. The assesseees argued, more crucially that a mobile tower is part of the BTS, which is an integrated system. Therefore, BTS was classifiable under heading 85.25 of CETA which comprises of the tower also as one of its parts, without which the output service cannot be provided. It was, therefore, contended that the towers are part of the eligible capital goods, viz. BTS and are used for providing output services, as also the towers were eligible for capital goods credit.

6. The assesseees stated that they had imported number of BTS for installation at various sites and that the BTS equipment were classified under heading No. 85.25 of the CETA, when imported. Depending on the site condition, additional peripheral equipment such as battery back-up, rectifier, UPS were also purchased by them. All these were brought to the site and they were housed/installed in a pre-fabricated room or a building.

Subsequently, installation of various equipments at the site is undertaken in accordance with the Radio Frequency Design Plan. The assesses argued that the material was ordered from various vendors having regard to the site lay out and report of the structural consultant. All the material was supplied by the vendors on payment of applicable duty on clearance from their factories. Later, erection of the towers for supporting antennas is undertaken. The tower comprises of poles for mounting of GSM and Microwave antenna. The poles are given necessary angular supports to ensure their stable positioning. Antenna mounts comprising of angles are fixed on these poles and the antenna are mounted upon them.

7. It was stated that a pre-fabricated housing/shelter too was purchased for housing electrical equipments viz. isolation transformers, batteries and stabilizers, rectifiers etc. and telecom equipment like BTS and Microwave/Radio Hops etc serve as a junction box. It was stated that the telecom installation vendor installs the BTS telecom equipment and lays cable (including feeder cables) from antenna to BTS. The electrical vendor installs the electrical equipment and does the required wiring inside and outside the room. A separate power supply connection is taken from the concerned State Electricity Board as also the Diesel Generating (DG) set is used as a back-up source for power supply in case of any mains failure. The BTS and Microwave link is then commissioned and the site is integrated with the main network.

8. It was urged that since the BTS as a whole is considered as a single integrated system classifiable under 85.25 of CETA and was eligible capital goods, towers and parts thereof which form part of the integrated system of BTS, are part of specified capital goods eligible for capital goods credit. It

was further stated that in any case credit is admissible on towers and parts of towers as inputs as falling within the ambit of Rule 2(k) of the Credit Rules which defines "input". It was stated that as per the definition of term "input" irrespective of the classification of the said goods under the CETA, they will qualify as "inputs" and will be eligible for input credit if they are used for providing output service. In regard to the pre-fabricated building, the appellant contended that they are eligible for capital goods credit as they were part of the integrated BTS and in any case they were eligible to input credit. As also, the same contention was raised in respect of office chairs and printers. As regards the penalty as proposed to be levied under rule 15(1) and (2) of the Credit Rules, the assessee submitted that the penalty provision is not attracted in view of classification of their goods as capital goods and in any case as "inputs". They denied that they had wrongly availed credit by practicing fraud or by making wilful mis-statement, collusion or suppression of facts. It was stated that there was no wilful suppression. It was, therefore, submitted that the show cause notice as issued against them be dropped.

9. The Commissioner, after granting a hearing to all assesses and after taking into consideration the provisions of the Credit Rules (especially, the definition of 'capital goods' as defined under Rule 2(a)(A) and the definition of the term 'inputs' as defined under rule 2(k) of the Credit Rules), rejected their submissions. It was held that the assessee had wrongly availed of different CENVAT credit amounts under provisions of Rule 14 of the Credit Rules read with Section 73 of the Act. In respect of towers and parts thereof, pre-fabricated building, printers and office chairs, the Commissioner observed that the appellant had availed the benefit of CENVAT Credit on BTS claiming to be a single integrated system consisting of tower, GSM or

Microwave Antennas, Pre-fabricated building, isolation transformers, electrical equipment and various other items. It was observed that these systems have been treated as "composite system" classified under Chapter 85.25 of the CETA and that the appellant's contention that these systems should be treated as 'capital goods' and credit be allowed, could not be accepted. The Commissioner held that each of these goods had independent functions and hence, they could not be treated and classified as a single unit. It was observed that all capital goods are not eligible for credit and only those relatable to the output services would be eligible for credit. It was observed that only telecom equipment like BTS transmitters which were used in providing telecom services alone would be liable to input credit. In regard to the extended period, it was observed that the service tax is based on self-assessment and therefore, it is the assessee who determines the duty and discharges the same.

10. The assessees, and various other tower owners, appealed to the CESTAT. By then, the decision of the Bombay High Court in *Bharti Airtel Ltd. v. Commissioner Central Excise, Pune - III* 2014 (35) S.T.R. 865 (Bom) had been rendered. On 28.07.2015, a two-member Bench of the CESTAT recorded difference of opinion as regards availability of input credit to those providing business auxiliary services; they referred their difference of opinion, but at the same time, noted the ruling in *Bharti Airtel (supra)*.

11. The larger, three-member bench of the CESTAT agreed with the Revenue that the goods in question were not capital goods and that they were also not inputs. CESTAT's view was expressed in two opinions: a majority and a concurring opinion. The majority held:

“On the above analysis, the first point for difference of opinion referred to this Larger Bench relating to non-applicability of the decision of the Hon'ble Bombay High Court in Bharti Airtel to infrastructure companies to provide business support service to telecom operators can be examined. We find in the normal course the nature of output service should not have any bearing to decide credit eligibility on capital goods now under dispute. A distinction was sought to be made that the decision of Hon'ble Bombay High Court was applicable only to active telecom service providers and not to providers of passive infrastructural support to such telecom operators. Reliance was sought to be placed on the decision of the Tribunal in GTL Infrastructure Ltd. v. CST, Mumbai reported in 2015 (37) S.T.R. 577 (Tri. - Mumbai) and Tribunal's final order No. A/382-383/2015 dated 26/11/2014 in Reliance Infratel Ltd. v. CST, Mumbai - II reported in 2015 (38) S.T.R. 984 (Tri. - Mumbai). We have perused the GTL Infrastructure Ltd. decision. In the said decision it was mentioned that towers/BTS Cabins were used for providing business auxiliary service and, hence, CENVAT credit cannot be denied. Further, reliance placed by the Original Authority on Explanation II and Rule 2 (k) (i) was found to be incorrect as the same dealt with a manufacturer and not a service provider. The Tribunal was referring to its earlier order in Bharti Airtel Ltd. v. CCE, Pune reported in 2013 (29) S.T.R. 401 (Tri. - Mumbai) and observed that the said case dealt with facts which are totally different. It was found that since appellants were allowing the operators right to install antenna and BTS equipments and rendering an output service under business auxiliary service they were eligible for credit. We find that this decision of Tribunal is not based on a proper appreciation of the ratio of the Hon'ble Bombay High Court. The Hon'ble Bombay High Court order in Bharti Airtel Ltd. (supra) was not available to the Tribunal while deciding GTL Infrastructure Ltd. The tower and BTS Cabin are used for providing output service, here business auxiliary/support service but the question is, is there any duty claimed as credit paid on tower or BTS Cabins as installed at site. These items cannot be considered as inputs as they were

held to be immovable property. The inputs which suffered duty like MS angles and pre-fabricated shelters, per se, were not used for providing output service. In other words there is a tower and cabin structure erected and embedded before such support service could be provided to the telecom operators.

23. It is necessary to note that before infrastructure companies came into the picture, telecom operators themselves were putting up such infrastructure and using the same to provide telecom service. In other words, in the absence of infrastructure companies as an intermediary, telecom companies themselves created such infrastructure and "provided" such business support service to self. The issue of service tax liability in such situation on business support service is not raised because there are no two persons as a provider or recipient of such service. In a sense such service was to the self. Considering such factual matrix, we find that no distinction could be made between the telecom operators and the infrastructure companies in deciding the eligibility of CENVAT credit on the impugned items now under consideration.

24. Further, it was contended by the appellants that even if towers shelters and other materials are held to be immovable property, credit cannot be denied on them. Reliance was placed on the decision of Hon'ble Andhra Pradesh High Court in CCE, Visakhapatnam - II v. Sai Sahmita Storages (P) Ltd. reported in 2011 (270) E.L.T. 33 (A.P.), Hon'ble Gujarat High Court decision in Mundra Ports and Special Economic Zone Ltd. reported in 2015 - TIOL - 1288 HC AHD ST and Hon'ble Punjab & Haryana High Court decision in Belsonica Auto Components India P. Ltd. reported in 2015 VIL 300 (P&H - ST). In Sai Sahmita Storages (P) Ltd. (supra), the Hon'ble Andhra Pradesh High Court held that there is no dispute that the assessee used cement and TMT bar for providing storage facility without which storage and warehousing services could not have been provided. The question relating to creation of an immovable asset and the implication of CENVAT credit flow in such situation was not examined in detail in the said order.

Similarly, the Hon'ble Gujarat High Court also arrived at similar conclusion. It is seen the Hon'ble Punjab & Haryana High Court in *Belsonica Auto Components India P. Ltd.* (supra) was dealing with credit availability on input service paid on construction of civil structure. In the present case, we are dealing with credit eligibility of goods, either as inputs or as capital goods. Further, with due respect to these decisions, it is to be noted that the very same matters covered in the present appeals are discussed elaborately on a similar set of facts by the Hon'ble Bombay High Court in *Bharti Airtel Ltd.* (supra). When there is a detailed examination and ruling on identical set of facts by the Hon'ble High Court, the same are to be followed. Further, the Hon'ble Bombay High Court reiterated their findings arrived in *Bharti Airtel Ltd.* (supra) in the case of *Vodafone India Ltd.* in their order dated 01/09/2015 in civil appeal No. 126/2015 and others. The Hon'ble Bombay High Court examined various contentions now raised in these appeals and reiterated their findings recorded earlier in *Bharti Airtel Ltd.* (supra).

25. In such a situation and in the absence of any material before us to distinguish the said ratio vis-à-vis the fact of the present case we find the ratio of the Hon'ble Bombay High Court as laid down in *Bharti Airtel Ltd.* (supra) and *Vodafone India Ltd.* (supra) should be followed. Hence, first point of difference is answered against the appellant and in favour of Revenue.

26. The second point of difference of opinion referred to the Larger Bench is regarding the eligibility of the appellant to the credit on shelters and parts as capital goods. We find that our preceding analysis regarding ineligibility of credit on towers and shelters is equally applicable to the said items. The only reason for claiming the credit on shelters and parts is their classification under Chapter 85. We find that a particular classification of duty paid item by itself does not make the item eligible for CENVAT credit. The eligibility of credit is determined by the provisions of CENVAT Credit Rules. By

classifying a product and paying duty under a particular heading, an automatic claim for such credit for that item cannot be made. The eligibility of any item for credit is to be decided as per provisions of CENVAT Credit Rules, 2004. As discussed elaborately hereinabove shelters were found to be not eligible for CENVAT credit either as capital goods or as inputs and as such some supplier classifying the product under Chapter 85 by itself does not make them eligible for credit if they are otherwise not entitled for the same. Learned Counsel contended that the denial of credit as held by Hon'ble Bombay High Court is only on classification of these shelters. We find that the Hon'ble High Court categorically held that towers and PFB are in the nature of immovable goods and are non-marketable and non-excisable. Further, we find that the analogy drawn by learned Counsel with plant and machinery to the present issue is not correct. The plant and machinery classifiable under specific tariff heading are manufactured and cleared on payment of duty as such machinery. Here, the facts are clearly different. Accordingly, the second point of reference is also answered against the appellant and in favour of Revenue.”

12. The President of the Tribunal (CESTAT) agreed with the majority, but wrote a concurring opinion, wherein it was held that the decision cited by the assesseees -*Commissioner of Central Excise v Solid and Correct Engineering Works* 2010 (5) SCC 122 was inapplicable. The separate opinion observed, among others that:

“39. Assesseees contend before us that in the facts before us, as in the case of Solid and Correct Engineering Works there is no permanent affixation of towers and the pre-fabricated shelters to the earth, permanently. These are fixed to foundations by nuts and bolts, not with the intention to permanently attach them to the earth or for the beneficial enjoyment thereof, but only since securing these to a foundation is necessary to provide stability and wobble/vibration free operation and to ensure stability. Since affixation of towers and shelters is without the necessary intent of making these a non-temporal

part and parcel of the earth to which these are temporally fixed, these continue to be movables and goods; and do not normatively, undergo transformation as immovable property, is the core contention.

40. An empirical and normative analyses of M.S. steel angles and other parts used to construct towers or shelters or affixation of towers obtained in CKD condition and pre-fabricated shelters and the process employed for their erection at a site; the degree of permanency that results from their attachment to the site by bolting them on to concrete foundations; whether the intendment in so embedding these to the site, is for permanent and beneficial enjoyment of the earth and other relevant and cognate fact specific aspects, by applying the nuanced tests of immovability expounded in Solid & Correct Engineering Works, may perhaps lead to a different conclusion than the one emerging from the Hon'ble Bombay High Court's rulings in Bharti Airtel Limited and Vodafone India Limited or the Andhra Pradesh High Court's judgment in BSNL.

41. In our respectful view however the challenge to the ratio and conclusions of the High Court's decisions in Bharti Airtel Limited and Vodafone India Limited, on the ground that these are predicated on an incorrect and impermissible interpretation of the rationes in Solid & Concrete Engineering Works, must await an appellate consideration, when and if challenged, by the Hon'ble Supreme Court. It is outside the province and jurisdiction of this Tribunal to analyse and record a ruling on a superior Court's analyses and elucidation of other binding precedents. The A.P. High Court's judgment in BSNL, in the context of levy of VAT, concluded that towers are immovable property, after noticing and advertent to the judgment in Solid & Correct Engineering Works. Though, the Solid & Concrete Engineering Works ruling of the Hon'ble Supreme Court was neither specifically referred to nor analysed in the Bharti Airtel Limited ruling, it was specifically considered in the later decision in Vodafone India Limited. Nevertheless, the Hon'ble High Court was pleased to reiterate and affirm its earlier decision in Bharti Airtel Limited, to conclude in conformity

therewith. If the Hon'ble High Court was not persuaded to reconsider, while adjudicating the lis in Vodafone India Limited, its earlier decision in Bharti Airtel Limited on a premise that its earlier decision might have been incongruous with the ratio of the Apex Court's decision in Solid & Correct Engineering Works, it is clearly beyond the province of this Tribunal to embark upon such an exercise, on any grounds, including the per-incuriam principle.

42. On the above analyses, we conclude that the Hon'ble Bombay High Court judgments in Bharti Airtel Limited and Vodafone India Limited, which are directly on the issue of the character of towers and shelters and parts, and held to be immovable property, constitute the binding law, in so far as we are concerned. Since the provision of towers and shelters as infrastructure used in the rendition of an output service is common to both passive and active infrastructure providers, whether of "BAS" or "BSS" in one case and "telecom service" in the other, consequences of the application of the above Hon'ble High Court's rulings, would not be different."

Assessees contentions in the present set of appeals"

13. This Court proposes to describe the main outline of parties' submission on the first and principal issue and later, in respect of each question, analyse the rival arguments. Mr. V. Lakshmikumaran, learned counsel for the assessee argued that credit on towers and shelters and other materials cannot be denied on the ground of immovability. He cited Rule 3 of the Credit Rules to urge that credit is admissible on all inputs and capital goods which are received in the premises of service provider. In the present case, towers and shelters are received in the premises of service providers. Later, when the towers are embedded in earth, the eligibility of credit will not change. It was argued that credit of input services cannot be denied on the ground of immovability which is an irrelevant factor, because the

character of the goods, and the purpose for which they are procured does not change; they remain goods. It was submitted that besides the duty paid, the documents clearly indicated the classification and, as such, the credit cannot be denied at the recipients' end.

14. It was argued that towers and shelters, *ipso facto*, qualify as 'inputs'. Rule 2 (k) (ii) defines inputs as "all goods used for providing output services". There is no bar to indicate that goods which do not fall under the category of capital goods would not also qualify as inputs. It was submitted that furthermore, towers, shelters MS Angles, etc are to be considered as 'accessories' of capital goods. For an item to fall under the category of 'components', 'spares' and 'accessories', it must be either a component or a spare or an accessory and the classification of such item is immaterial. The towers and shelters would qualify as 'accessories'. Without the tower, the active infrastructure, namely antenna, cannot be placed on that altitude to generate uninterrupted frequency.

15. Counsel submitted that telecommunication services cannot be provided without towers and shelters and that the necessity test or the 'functional utility test' has to be applied. In support of this submission, reliance is placed on the judgment of the Calcutta High Court in the case of *Singh Alloys & Steel Ltd. v. Associated Cement Company Ltd* 1993 (66) ELT 273. It was submitted that these goods are used for providing output services on commercial scale and hence, they satisfied the 'functional utility test'. It is submitted that the functional utility of the towers is apparent from the fact that the antennas are installed on the towers. The antennas continuously receive signals and transmit signals with the subscriber's devices to authenticate subscriber's accounts and enable the

roaming of the mobile subscriber.

16. Learned counsel argued that in the mobile telecommunication service, towers are the "accessory" of the antenna and therefore, qualify as capital goods falling under Chapter Heading 85. It is submitted that shelter is also an accessory of BTS equipment falling under Chapter heading 85. It is submitted that capital goods viz. Antenna and BTS are fitted into the tower and shelter respectively to provide telecommunication service.

17. Mr. Deepak Anand, learned counsel for the Revenue, argued that the findings and order of the CESTAT were justified and based on sound reasons. He urged that the issue relating to eligibility of towers and shelters for CENVAT credit has been clearly settled by the Bombay High Court in *Bharti Airtel Ltd. (supra)*. The clear finding after elaborate analysis by the High Court was not deviated by any other court or over-ruled by the Supreme Court. It was next argued that the Central Excise duty paid on MS Angles, Channels and pre-fabricated buildings are claimed as credit by the assesseees. Such items have no direct nexus to the output service of either telecommunication service or business support service. It cannot be said that iron and steel articles are used for providing telecommunication service. It is the immovable tower which is used for providing telecommunication service or business support service.

18. Counsel argued that the CBEC by its Circular dated 04/1/2008 clarified that input of credit of service tax can be taken only if the output is a service liable to Service Tax or goods liable to excise duty. Since immovable property is neither service nor goods, no credit can be taken. Learned counsel relied on the decision of the Supreme Court in *Triveni Engineering*

& Indus Ltd. v Commissioner of Central Excise 2000 (120) ELT 273 (SC) and submitted that the applicable test to determine if the asset was movable or immovable was marketability. It was submitted that *Triveni (supra)*, highlighted the marketability of the goods: whether they can be taken to the market and sold. Applied properly, to the facts of this case, it was apparent that once the goods were fixed, there was no question of their marketability; they attained the character of immovable property. Consequently, the question of granting input credit did not arise.

19. It was argued that attachment of the towers to the foundation though not comparable to something rooted in the earth it is equivalent to entrenching in the earth of the plant as in the case of walls and buildings. The functionality of the BTS equipment depends on the attachment of the towers to the foundation and is comparable to imbedding of a wall in the earth. Counsel submitted that the tower was not fastened merely to provide a foundation but to provide stability to the plant and that the attachment is permanent.

Analysis and Reasoning

Re Question No. 1: correctness of CESTAT's findings that the towers, shelters and accessories used by the Appellant for providing business support services were immovable property

20. In the present case, the fundamental issue which needs to be decided is whether the towers and shelters are movable or immovable property. In this regard, it would be useful to refer to the relevant statutory provisions to examine, what would constitute as moveable or immovable property. The

expression "moveable property" has been defined in Section 3(36) of the General Clauses Act, 1897 as under:

“Section 3(36): "movable property" shall mean property of every description, except immovable property.”

21. It is obvious that the answer to the question whether the towers and shelters in question are movable property, would depend upon whether they are immovable property. That is because anything that is not immovable property is by its definition "moveable" in nature. Section 3 of the Transfer of Property Act, 1882 does not spell out an exhaustive definition of the expression "immovable property". It simply provides that unless there is something repugnant in the subject or context, 'immovable property' under the Transfer of Property Act, 1882 does not include standing timber, growing crops or grass. Section 3(26) of the General Clauses Act, 1897, similarly does not provide an exhaustive definition of the said expression. It reads:

“Section 3(26): "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.”

22. A plain a reading of Section 3 (26), shows that it defines "immovable property" *as things attached to the earth or permanently fastened to anything attached to the earth*. The term "attached to the earth" has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls and buildings;

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

23. The assessee relied on *Commissioner of Central Excise, Ahmedabad v. Solid and Correct Engineering Works & Ors* 2010 (5) SCC 122. The Supreme Court after taking into consideration a series of judgments like *Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad* (1998) 1 SCC 400; *Narne Tulaman Manufacturers Pvt. Ltd. Hyderabad v. Collector of Central Excise, Hyderabad*; 1989 (1) SCC 172; *Quality Steel Tubes (P) Ltd. v. CCE, U.P.* 1995 (75) ELT 17 (SC) and *Mittal Engineering Works (P) Ltd. v. CCE, Meerut*: 1996 (88) ELT 622 (SC) and after taking into account the earlier view in the *Triveni Engineering & Indus Ltd. v Commissioner of Central Excise* 2000 (120) ELT 273 (SC); finally concluded what is the “permanency test” in the case of *Solid and Correct Engineering (supra)*. In *Solid and Correct Engineering (supra)*, the court, after analyzing its previous judgments, stated the controlling principle as follows:

“33. It is noteworthy that in none of the cases relied upon by the assessee referred to above was there any element of installation of the machine for a given period of time as is the position in the instant case. The machines in question were by their very nature intended to be fixed permanently to the structures which were embedded in the earth. The structures were also custom made for the fixing of such machines without which the same could not become functional. The machines thus becoming a part and parcel of the structures in which they were fitted were no longer moveable goods. It was in those peculiar circumstances that the installation and erection of machines at site were held to be by this Court, to be immovable property that ceased to remain moveable or marketable as they were at the time of their purchase. Once such a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. The same

cannot thereafter be treated as moveable so as to be dutiable under the Excise Act. But cases in which there is no assimilation of the machine with the structure permanently, would stand on a different footing. In the instant case all that has been said by the assessee is that the machine is fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine. An attachment of this kind without the necessary intent of making the same permanent cannot, in our opinion, constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently. In that view of the matter we see no difficulty in holding that the plants in question were not immovable property so as to be immune from the levy of excise duty.”

24. The Supreme Court in *Triveni Engineering (supra)*, held that the *marketability* test requires that the goods as such should be in a position to be taken to the market and sold. Therefore, the *Solid and Correct Engineering (supra)* line of reasoning emphasizes that if *functionality depends upon embedment and assimilation, leading to extinction of movable character*, the property is immovable. *Triveni Engineering (supra)*, on the other hand, highlighted the marketability of the goods: whether they can be taken to the market and sold. From the above finding, it follows that to be taken to the market and sold, the turbo alternator has to be separated into its components – turbine and other alternator – but then it would not remain turbo alternator. Therefore, the court held that since turbo alternator gets dismantled into steam turbine and alternator, the test of permanency fails.

25. In this case, the question that fell for consideration was whether a turbo alternator comprising two components (i) steam turbine and (ii) complete alternator and fixing the same on a platform brought about a new

dutiable product. The court held that the process of fixing the same on a platform and aligning them in a specified manner, was nothing but a manufacturing process and a new commodity come into existence in the said process. The machine so manufactured was, however, erected on a platform specially constructed for that purpose which made the machine immovable in character. The Court declared that while determining whether an article is permanently fastened to anything attached to the earth, both the intention as well as the factum of fastening has to be ascertained from the facts and circumstances of each case. The following passage is apposite in this regard:

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

26. In *Sirpur Paper Mills Ltd.* (supra), the Supreme Court was dealing with a situation similar to what is involved in the present case. The issue there was whether the paper machine assembled at site mainly with the help of components bought from the market was dutiable under the Excise Act. The assessee's argument was that as the machine was embedded in a concrete base, it was immovable property though embedding was meant only to provide a wobble free operation of the machine. Repelling that contention, this Court held that just because the machine was attached to earth for a

more efficient working and operation the same did not *per se* become immovable property. The Court observed:

“5. Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. For example, a factory owner or a householder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of the water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper-making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the Company. Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property.”

27. In *Narne Tulaman Manufacturers (supra)*, the Court examined whether assembly of parts of a machine used by an assessee to bring into existence a weighbridge as a complete machine amounted to “manufacture” and liable to duty even when its parts are separately taxable. Answering the question in affirmative, the Court held that the assembling of the components of the weighbridge brought into existence a complete weighbridge which had a distinctive name, character and use hence eligible to duty. The fact that the assessee was himself manufacturing only one part of the component used in the erection of a weighbridge did not mean that the complete machine once the same was assembled by using duty paid parts was not eligible to excise duty. In *Solid and Correct Engineering (supra)*, the Supreme Court referred to the English law, where the general rule is that what is annexed to the

freehold becomes part of the realty under the maxim ‘*quicquid plantatur solo, solo credit*’. This maxim, does not however, apply in India. Even so, the question whether a chattel is imbedded in the earth as to become immovable property is decided on the same principles as those which determine what constitutes an annexation to the land in English law. English law evolved the twin tests of degree or mode of annexation and the object of annexation. Reference was made to *Wake v. Halt* (1883) 8 App Cas 195 where, speaking for the Court of Appeal, Lord Blackburn stated:

“The degree and nature of annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land.”

28. Here, the assessee submit that the distinction between *Triveni Engineering (supra)* and the later judgment of *Solid and Correct Engineering (supra)*, that in *Triveni (supra)*, the Supreme Court applied dismantling of components and re-assembly as failing the permanency test.

“20. Further, in the instant case, it is a common ground that a turbo alternator comes into existence only when a steam turbine and alternator with all their accessories are fixed at the site and only then it is known by a name different from the names of its components in the market. The Tribunal recorded the finding that fixing of steam turbine and the alternator is necessitated by the need to make them functionally effective to reduce vibration and to minimise disturbance to the coupling arrangements and other connections with the related equipments. It also noted that removal of the machinery does not involve any dismantling of the turbine and alternator in the sense of pulling them down or taking them to pieces but only undoing the foundation bolts arrangement by which they are fixed to the platform and uncoupling of the two units and,

therefore, the turbo alternator did not answer the test of permanency laid down by this Court in the case of Municipal Corporation of Greater Bombay (supra). In our view, the findings recorded do not justify the conclusion of the Tribunal inasmuch as on removal a turbo alternator gets dismantled into its components - steam turbine and alternator. It appears that the Tribunal did not keep in mind the distinction between a turbo alternator and its components. Thus, in our view, the test of permanency fails.”

The Supreme Court, however, later, in *Solid and Correct Engineering (supra)* concluded that any plant fixed by nuts and bolts to a foundation involving no assimilation of the machinery with the structure permanently and where the civil foundation was necessary to provide a wobble free operation to the machine, the test of permanency fails.

29. Certain other decisions of the Supreme Court and High Courts were relied on. In *Vam Organics Chemicals Ltd* 1989 (39) ELT 72, the assessee used molasses to manufacture the dutiable final product. At the intermediate stage, ethyl alcohol emerged which was a non-excisable product. The Revenue contended that credit on inputs would have been allowed had ethyl alcohol (intermediate product) been an excisable but exempted product. This contention was rejected and credit was allowed. In *Collector of Central Excise v. Hindustan Sainitaryware & Industries Ltd.* 2002 (145) ELT 3 (SC), it was held that plaster of Paris used in the making of moulds (exempt from duty) was used as ‘input’ for the manufacture of sanitary ware (dutiable final product). *Aditya Cements Ltd. v. Union of India* 2008 (221) ELI 362, a decision of the Rajasthan High Court, considered whether the assessee was entitled to avail the credit on materials used for laying railway track (which is an immovable property emerging at intermediate stage) that was used for

transporting of coal to the factory. The coal so transported was used for the manufacture of dutiable final product. The High Court held that the assessee was entitled to avail credit on material used in laying railway track materials. *Ispat Industries Limited v Commissioner of Central Excise* 2006 (195) ELT 164, was a case where the High Court allowed credit of duty paid on angles, channels, plates, etc. which were used in erection, installation and commissioning of the machinery (immovable). The Revenue's appeal against this judgment was rejected by order dated 19.07.2007 in Central Excise Appeal No.187 of 2006, by the Supreme Court. In *Lloyds Steel Industries v Commissioner of Central Excise* 2004 (64) RLT 732, the High Court allowed credit of cement and steel used for construction of foundation that were not excisable goods. The Revenue's appeal against the judgment was dismissed. *Commissioner of Central Excise v. ICL Sugars Limited* 2011 (271) ELT 360 (Kar.) was a Karnataka High Court decision, rejecting the Revenue's appeal holding that plates, etc. used for fabrication and installation of a storage tank would be admissible for credit. The Revenue's sole contention to deny credit was that the storage tank was an immovable property and once erected to the earth becomes non-excisable. Negating this contention, the High Court allowed the credit.

30. The Revenue contends that the towers and shelters are not *per se* immovable property but transform and become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth. This argument has to be considered in the light of the decisions discussed above. Attachment of the towers in question with the help of nuts and bolts to a foundation (not more than one foot deep), intended to provide stability to the working of the towers and prevent

vibration/wobble free operation does not does not *per se* qualify its description as *attached to the earth* in any one of the three clauses (of Section 3 which defines “attached to the earth”) extracted above. Clearly, attachment of the towers to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not equivalent to entrenching in the earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is not comparable to attachment of a tower to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also, attachment of the tower to the foundation on which it rests would not fall in the third category (*attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached*), for an attachment to fall in that category it must be for *permanent beneficial enjoyment of that to which the tower is attached*.

31. The Revenue had relied on a decision of the Bombay High Court in the case of *Bharti Airtel Ltd. v. Commissioner of Central Excise, Pune – III* 2014 (35) STR 865, *Vodafone India Ltd. v. Commissioner of Central Excise, Mumbai* 2015 (40) STR 422 (Bom) and *State of AP v. Bharat Sanchar Nigam Ltd.* 2012 (25) STR 321. In *Bharti Airtel Ltd. (supra)*, the court was of the view that to provide telecommunication service, CENVAT credit on towers, pre-fabricated shelters and their accessories cannot be availed as the towers are affixed to the earth and became immovable property and *ipso facto*, non-marketable and non-excisable. In the *Bharat Sanchar Nigam Ltd (supra)*, the issue was regarding validity of levy of sales tax, under the

provisions of the A.P. VAT Act, 2005, *inter-alia*, on sharing of telecom infrastructure. On facts, some telecom companies erected towers in sites and permitted other similar service providers to fix their antennas on the towers and thus share the infrastructure, for which a monthly infrastructure share fee was received, towards consideration. The court concluded that since telecommunication towers of a height of around 90 meters are embedded either to the earth or to a building rooftop and fastening of such huge structure was necessary, they were excluded from the ambit of “goods” and constituted “immovable property” and that since transfer of right of the right to use immovable property does not fall within the scope of the VAT Act, there was no tax liability. The court did refer to the decision of the Supreme Court *Solid & Correct Engineering (supra)*, on the test of permanency and whether the chattel is capable of being moved to another place of use in the same position, or is liable to be dismantled or re-erected at a later place. However, the High Court concluded that 90 meters huge towers can be placed or erected at another place only after being completely dismantled at the existing site and cannot be moved to another place of use in the same position.

32. In *Vodafone India Limited (supra)*, the Bombay High court held that towers and shelters purchased by the assessee for providing telecommunication service to be immovable property and hence, the assessee was not entitled to the credit of duty paid on them. It in effect followed its previous decision in *Bharti Airtel Ltd (supra)*, and held so:

“14. On carefully going through the decision in Bharti Airtel's case we find that the said decision squarely applies to the case of the Appellant before us. We find that this Court has considered all aspects of the matter and then come to the

conclusions that it did. Mr. Salve, despite all the finesse at his command, was unable to persuade us to hold that the decision in Bharti Airtel's case requires a relook. The very provisions that were relied upon by Mr. Salve, were considered and interpreted by the Division Bench in Bharti Airtel's case. Not only are those findings binding on us but we are in full agreement with the same. Once the very rules that have been relied upon by Mr. Salve, are interpreted by the Division Bench of this Court, judicial discipline demands that this interpretation be followed by us. It is now quite well settled that an interpretation of a statutory provision, and equally a misinterpretation, by one Bench of the High Court would be binding on a coordinate Bench of that very High Court. The subsequent Bench cannot come to the opinion that a particular provision was misinterpreted and under that pretext seek to reinterpret it again. If the subsequent Bench is of the view that the statutory provisions are misconstrued and / or misinterpreted, the only recourse available to it would be to refer it to a larger Bench. In the present case, we see no reason to adopt this course of action. We are in full agreement with the reasoning given in Bharti Airtel's case and therefore, are unable to accept the submissions of Mr. Salve that the aforesaid decision requires a relook."

33. The assessee's arguments were that the decisions of the A.P. High Court in the *BSNL (supra)*, the Bombay High Court in *Bharti Airtel Limited (supra)* and in *Vodafone India Limited (supra)*, incorrectly appreciated and applied the *ratio* regarding the character of towers and shelters as not amounting to immovable property, deducible from the judgment in *Solid and Correct Engineering (supra)*. The assessees submitted that CESTAT erred in relying on the judgment of the AP High Court in the *BSNL (supra)*. That judgment was concerned with a sales tax issue, i.e. whether there was a transfer of right to use towers to construe the transaction as a deemed sale, and not input credit admissibility in the context of service tax. While holding

that possession and control is only with the telecom operators and therefore, there is no resultant transfer of right to use, the Court in the process also decided immovability. The High Court had not addressed the factual position whether the towers and shelters were movable. It applied the decision in the case of *Triveni (supra)*, which had already been considered, in the *Solid and Correct Engineering (supra)* ruling. Further, it is pertinent to note that the AP High Court in the case of *Commissioner of Central Excise, Vishakapatnam – II vs. Sai Sahmita Storages (P) Ltd.* 2011 (23) STR 341 (AP) in deciding for eligibility of CENVAT credit with respect to output service was extended the credit on cement and TMT bars used to construct warehouses which is undoubtedly an immovable property.

34. The assessees also rely on a circular of the Central Board of Excise and Customs (CBEC) No. 137/315/2007– CX.4 dated 26.02.2008. This circular clarified eligibility to CENVAT credit on towers and shelters and clearly narrated that the inputs or raw materials involved in the process of setting up of towers become immovable structure. The first two paragraphs of the Circular are extracted below:

“it has been brought to the notice of the Board that telecom operators are availing CENVAT credit on goods like angles, channels, beams, which are used for building transmission towers. Similarly, CENVAT credit is also being availed on pre-fabricated building, shelters, PUF panels, etc. used for housing/ storage of generating sets and other equipments. It appears that the telecom operators claim these items to be ‘inputs’ for providing telecom services.

2. The issue has been examined; the items mentioned above are used for erecting towers, and making housing/ storage units. Thus, these goods are used in making products that cannot be called as excisable goods, being attached to earth, and are not chargeable to excise duty. The items such as angles. Channels,

beams, etc., are this inputs for civil structures and as such, are not used for providing taxable service. Therefore, it is considered view of the Board that credit of duty paid on such items is not available to the telecom service providers.”

35. The circular was an offshoot of the decision of the Bombay High Court in *Hutchison Max Telecom P. Ltd.* 2008 (224) ELT 191 (Bom) where the *Triveni (supra)* immovability test was followed. The assessee contended that the Revenue during the hearing before the CESTAT 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.

36. In view of this court, in the facts of the present case, the permanency test has to be applied, in the context of various objective factors and cannot be confined or pigeonholed to one single test. In the present case, the entire tower and shelter is fabricated in the factories of the respective manufacturers and these are supplied in CKD condition. They are merely fastened to the civil foundation to make it wobble free and ensure stability. They can be unbolted and reassembled without any damage in a new location. The detailed affidavit filed by the assessees demonstrate that installation or assembly of towers and shelters is based on a rudimentary “screwdriver” technology. They can be bolted and unbolted, assembled and re-assembled, located and re-located without any damage and the fastening to the earth is only to provide stability and make them wobble and vibration free; devoid of intent to annex it to the earth permanently *for the beneficial enjoyment of the land of the owner*. The assessees have also placed on record the copies of the leave and license agreements, making it clear that the

licensee has the right to add or remove the aforesaid appliances, apparatus, equipment etc.

37. On an application of the above tests to the cases at hand, this court sees no difficulty in holding that the manufacture of the plants in question do not constitute annexation and hence cannot be termed as immovable property for the following reasons:

(i) The plants in question are not *per se* immovable property.

(ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.

(iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.

(iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.

38. A machine or apparatus annexed to the earth without its assimilation by fixing with nuts and bolts on a foundation to provide for stability and wobble free operation cannot be said to be one permanently attached to the earth and therefore, would not constitute an immovable property. Thus, the tribunal erred in relying on the Bombay High Court in *Bharti Airtel Ltd (supra)*. It is also important to understand that when the matter was carried out in the Bombay High Court and the judgment was delivered, the whole case proceeded on the presumption that these are immovable properties. The tribunal failed to appreciate the 'permanency test' as laid down by the Supreme Court in *Solid and Correct Engineering (supra)*.

Re Question No. 2 i.e. whether the assessee is entitled to claim CENVAT Credit on the towers, shelter either as capital goods or inputs in terms of Rule 2 (a) or 2 (k) of the CCR, 2004 and Whether towers and shelters would qualify as “accessories”?

39. The assessee contends that the tribunal failed to appreciate that the towers, MS Angles, Channels, etc. cleared as a set of CKD towers, and pre-fabricated shelters, are “capital goods” as defined in Rule 2(a) of the Credit Rules. It was argued that the items in question, towers and shelters are accessories supporting the BTS falling under HSN 8517. BTS falling under HSN 8517 is an identified capital good under Rule 2(a). It is stated that consequently accessories in support of HSN 8517 would qualify for capital goods credit *per se*. In this regard, the reliance is placed on *India Cements Ltd. v. Commissioner of Central Excise, Trichy-I* 2013 (297) ELT 508 (Madras) where the court, *inter alia*, observed after referring to the board circular 276/110/96 dated 02.12.1996, held that the benefit of the Modvat credit under Rule 57Q would be applicable to all components, spares and accessories of the specified goods, irrespective of their classification under any chapter heading. The relevant portion of the judgment reads as follows:

“13. Going by the liberal meaning given to Clause (d) in Rule 57Q that the position prior to 23-7-1996 when Credit was available for components, spares and accessories irrespective of the classification of specified Capital Goods, we have no hesitation in accepting the case of the assessee. Quite apart, even going by the circular, we agree with the argument advanced by the learned counsel for the assessee that the amendment under Notification No. 25/96, dated 31-8-1996 has to be read only as clarificatory and retrospective effect has to be given for availing Modvat Credit. In view of this reasoning, we find that Capital Goods itself were eligible for Modvat Credit under Rule 57Q.

14. Thus, in the light of the decision of this court following the Apex Court decision and in the background of the circular issued by the Government of India dated 2-12-1996 that the benefit of Modvat Credit under Rule 57Q would be applicable to all components, spares and accessories of the specified goods, irrespective of their classification under any chapter heading, we have no hesitation in granting the relief in favour of the assessee, thereby the order of the Customs, Excise and Service tax Appellate Tribunal is set aside. Consequently, the Civil Miscellaneous Appeal is allowed. No costs."

40. Reliance is also placed on the decision of the Supreme Court in *State of Punjab & Ors. v. Nokia India Private Ltd.* 2015 (315) ELT 162 (SC), where it was held that:

"16. The Assessing Authority, Appellate Authority and the Tribunal rightly held that the battery charger is not a part of the mobile/cell phone. If the charger was a part of cell phone, then cell phone could not have been operated without using the battery charger. But in reality, it is not required at the time of operation. Further, the battery in the cell phone can be charged directly from the other means also like laptop without employing the battery charger, implying thereby, that it is nothing but an accessory to the mobile phone. The Tribunal noticed that as per the information available on the website of Nokia/ the Company has invariably put the mobile battery charger in the category of an accessory which means that in the common parlance also/ the mobile battery charger is understood as an accessory. It has also been noticed by the Tribunal that a Nokia make battery charger is compatible to many models of Nokia mobile phones and also many models of Nokia make battery chargers which are compatible to a particular model of Nokia mobile phone/ imparting various levels of effectiveness and convenience to the users. "

"17 ...The word 'accessory' as defined in the Webster's Comprehensive Dictionary (International) Volume-I is defined as: "a person or thing that aids subordinately/ an adjunct/ appurtenance/ accompaniment (2) such items of apparel as

complete an outfit, as gloves/ a scert hat or handbag.(3) A person who/ even if not present, is concerned, either before or other in the perpetration of a felony below the crime of treason. Adj.(l) Aiding the principal design/ or assisting subordinately the chief event, as in the commission of a crime. (2) contributory/ supplemental/ additional: accessory nerves".

18. In M/s. Annapurna Carbon Industries Co. vs. State of Andhra Pradesh/ (1976) 2 SCC 273/ this Court while examining the question whether ':4rc Carbon" is an accessory to cinema projectors or whether comes under other cinematography equipment under Entry 4 of Schedule I to the A.P. General Sales Tax Act 1950 defined accessories as: "an object or device that is not essential in itself but that adds to the beauty/ convenience or effectiveness of something else".

19. In view of the aforesaid facts/ we find that the Assessing Authority, Appellate Authority and the Tribunal rightly held that the mobile/cell phone charger is an accessory to cell phone and is not a part of the cell phone. We further hold that the battery charger cannot be held to be a composite part of the cell phone but is an independent product which can be sold separately, without selling the cell phone. The High Court failed to appreciate the aforesaid fact and wrongly held that the battery charger is a part of the cell phone."

41. The assessees had also relied on Collector of Central Excise v MICO 2003 (152) ELT 36 (SC), where the Supreme Court held that part of a part is also part of a whole and, therefore, part of nozzle and nozzle holder would be eligible for exemption. Annapurna Carbon Industries Company v. State of A.P. 1976 37 STC 378 too was cited; there the court accepted the meaning of accessories as an object or device that is not essential in itself but that adds to the beauty or convenience or effectiveness of something else or is supplementary or secondary to something or greater or primary importance, which assists in operating or controlling or may serve as aid or accessories. Likewise, Collector of Central Excise v. Hyundai Unitech Electrical

Transmission Ltd. & Anr 2015 (323) E.L.T. 220(S.C.) was relied on; it was held that as windmill doors and tower doors are safety devices used as security for high voltage equipment fitted inside the tower for preventing unauthorized access, it would be sufficient to make them part of the electricity generator. Further, the court held that since the tower is held as a part of the generator, door thereof has to be necessarily a part of the generator. The assessees urged that the *ratio* in the said judgment would apply squarely to the facts of the present case as towers of windmill generator stand on a similar footing to the towers being used by the Appellants in the present case. Both are required to keep the equipment at the desired altitude for their respective effective use. Therefore, applying the *ratio* in *Hyundai Unitech (supra)*, the towers should be held as part of the antenna and BTS. Another decision relied on was *Pragati Silicons (P) Ltd. VS. Commissioner of Central Excise, Delhi* (2007) 9 SCC 470 which held that an “accessory” definitionally is something supplementary or subordinate in nature and need not be essential for the actual functioning of the product; similarly *Commissioner of Central Excise, Delhi v. Insulation Electrical Private Limited* (2008) 12 SCC 45, held that items manufactured can be adjuncts, merely to improve the efficiency and convenience of seats and do not form the seat and are accessories.

42. The Revenue has contended that these shelters and accessories do not fall within the list of notified items under the capital goods scheme, towers and shelters would not qualify as capital goods. The counsel for the Revenue relied on the decision of the Bombay High court. The Bombay High Court in the case of *Bharti Airtel (supra)* held that towers and shelters could not be

parts and accessories under the capital goods scheme. The relevant para is extracted hereunder for reference:

“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 vs. CCE Delhi, 2011 (270) ELT 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."

43. In the present case, the debate mainly centers round the definition of 'capital goods' in clause (a) of Rule 2 of the Credit Rules. The definition of 'input' in clause (k) of the said Rule also cropped up, at times, in connection with the appellant's alternative claim of CENVAT credit on certain items as inputs. Both the definitions as they stood in the period of dispute are reproduced below: --

(a) "capital goods" means: --

(A) the following goods, namely: --

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Central Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii);

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and

(vii) storage tank,

used—

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) for providing output service,

(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-

clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act;

(k) "input" means--

- (i) all goods, except light diesel oil, high speed diesel oil and 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;*
- (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 1.--The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2.--Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;

"Explanation 2 was amended by Notification No. 16/2009 - CE(NT) dt. 07/07/2009. The amended text, which has been referred to by both sides, reads as follows:

Explanation 2.--Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer but shall not include cement, angles, channels.

Centrally Twisted Deform (CTD) bar or Thermo-Mechanically Treated (TMT) bar and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods.

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 sub-ordinate 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 pre-fabricated 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 assessee 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) ELT 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.”

50. It was submitted that the definition of ‘input’ is but an abbreviation and whatever is used for providing output service, would be an input. The assessee submitted that it is impossible to provide the telephone services, without the tower. Further, pre-fabricated shelters and panels are used for the installation of transmission devices, DG sets and other electronic instruments. It was further, argued that a reading of the rule, made out a clear distinction between the inputs used in the manufacture of excisable goods and the inputs used for providing output service. While, in the case of manufacturing activity, for the goods to qualify as “input” within the meaning of Rule 2(k) of the Credit Rules, they had to be “used in” or “relation to” to the manufacturing activity. In the case of service, the goods only need to be “used for” providing the output service, and the definition does not stipulate that the goods should be used in or consumed in the provision of the Output service. The assessees relied on *Indian Chamber of Commerce v Commissioner of Income Tax*, WB AIR 1976 SC 348, while interpreting the term ‘for’ it was held that:

"For used with the active participle of a verb means 'for the purpose of (See judgment of Westbury C, 1127). 'For' has many shades of meaning. It connotes the end with reference to which anything is done. It also bears the sense of appropriate' or 'adapted to'; 'suitable to purpose- vide Black's Legal Dictionary"

51. It was highlighted that in the Larger Bench decision in *Union Carbide India Ltd. v. CCE, Calcutta – I* 1996 (86) ELT 613 (Tribunal), the tribunal

considered spare parts of machines to be eligible for credit as inputs under Modvat scheme. *Tata Engineering & Locomotive Co. Ltd. v. CCE, Pune* 1994 (70) ELT 70 (Tribunal), too held that credit on the machines which are excluded is available under input category. In *Oblum Electrical Industries Pvt. Ltd. v. Collector of Customs*, 1997 (94) ELT 449 (SC), it was held as under:

“In the notification two different expressions have been used namely, 'materials required to be imported for the purpose of manufacture of products' and 'replenishment of materials used in the manufacture of resultant products' which indicates that the two expressions have not been used in the same sense. The expression 'materials required to be imported for the purpose of manufacture of products' cannot be construed as referring only to materials which are used in the manufacture of the products. The said exemption must be given its natural meaning to include materials that are required in order to manufacture the resultant products. On that view, the exemption cannot be confined to materials which are actually used in the manufacture of the resultant product but would also include materials which though not used in the manufacture of the resultant product are required in order to manufacture the resultant product. Crystal beams imported by the appellant are materials, which though not used in the manufacture of H. T. Porcelain Insulators required for Lightning Arrestors, are materials which are required for producing the insulators in the kilns”

52. In *Industrial Machinery Manufacturers Pvt. Ltd. v. The State of Gujarat* (1965) 16 STC 380, where the Gujarat High Court held that the humidifiers used in order to maintain certain humidity for the purpose of increasing the strength of the yarn, thus avoiding breakages and improving the quality of the yarn, should be regarded as machinery 'used in the manufacture of goods and that it was not necessary to show that it was used

in the actual process of manufacture was also cited. *GTL Infrastructure Ltd. v CST, Mumbai* in 2015 (37) STR 577 (Tri- Mumbai), which held that towers would qualify as Inputs for the passive infrastructure provider too was relied on. The assessee submitted that towers remain same both for them as well as passive infrastructure providers and when they are considered as 'inputs' for passive infrastructure providers, the same treatment ought to be given to the assessee, who too provide passive infrastructure support to other telecommunication service providers. The other judgment relied on was of the Supreme Court in the case of *Member, Board of Revenue, West Bengal v. M/s. Phelps & Co. (P) Ltd.*, 1972 4 SCC 121, wherein the court by applying the commercial expediency test, allowed the credit of the gloves used by workmen engaged in handling corrosive substances in the course of manufacture. In *J.K. Cotton Cotton Spinning and Weaving Mills Co. Ltd. v. Sales tax Officer, Kanpur* 1997 (91) ELT 34 (SC), it was held that if a process or activity is so integrally related to the ultimate manufacture of goods so that without that process or activity manufacture may, even if theoretically possible, be commercially inexpedient, goods intended for use in the process or activity will qualify for credit, was relied. The court had in that case observed that:

"The expression 'in the manufacture of goods' should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression 'in the manufacture of goods'"

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 work “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 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 pre-fabricated 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 the case of the *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.

Re Question No. 3: whether the CESTAT erred in applying the nexus test with reference to MS angles and Channels, whereas according to the Appellant what was brought to the site were towers, shelters and accessories in CKD/SKD conditions for providing services?

54. The assessees claimed that duty was paid on MS Angles and channels and they were entitled to duty credit, which was not allowed by the Revenue. Now, the basic requirement for eligibility of any duty credit is that the goods on which duty is paid (credit of which is claimed) should have a connection or nexus for discharging tax on output service. The credit availed on input is used for discharging tax on output service. In the present case, the duty paid MS angles, channels etc. are used in the fabrication of towers on a concrete platform. However, they are directly not involved in the provision of the telecommunication service. But inputs like MS angles and channels have gone into the making of such towers which in turn are used for providing infra-support service/ telecom service. In the present case, the duty paid items are MS Angles and Channels/ shelters brought to the site are installed/ erected and further put to use for mounting/ installing telecommunication antenna and other equipment. The assessees complained that their transactions do not involve purchase of angles, channels and beams for construction of towers at site. The entire tower and shelter are fabricated in the factories of the respective manufacturers and these are supplied in CKD condition. These are merely fastened to the civil foundation to make it

wobble free and can be unbolted and reassembled without any damage in a new location. The assessees rely on *Hyundai Unitech (supra)* where the Supreme Court held that doors and electrical boxes are components and/or parts of wind operated electricity generators.

55. The Revenue contends that the MS Angles and channels used for assembling towers and shelters do not fall in the definition of 2(a) i.e. capital goods. It was argued that the definition of capital goods in Rule 2(A)(a) includes all goods falling under Chapter 82, 85, Chapter 90, of the first schedule of the CETA. In this context, it was submitted that the items in dispute are articles of iron and steel which falls under the Chapter 73 and therefore, do not qualify under the definition of capital goods for grant of CENVAT credit. Further, it was submitted that the items in dispute have been purchased/ invoiced under Chapter 73 and therefore, cannot be held to be capital goods.

56. The inputs such as MS Angles and channels are used for the providing infra-support service/ telecom service. To apply the term “used for” in the definition of inputs, there should be a nexus between the inputs goods and the output service. In the opinion of this court, clearly goods in question have gone into the making of such towers which in turn are used for providing infra-support service/ telecom service. It is therefore, held that the CESTAT erred in applying the nexus test and therefore, credit has to be extended to the duty paid MS angles and channels.

Re. Question No. 4:i.e whether the Appellant was justified in terms of Rule 4(1) of the CCR, 2004, in claiming CENVAT Credit of excise duty paid by the manufacturer of towers and shelters after receipt of such towers and shelters at their premises (i.e. tower site)

57. In the present case, the CESTAT denied CENVAT credit on the ground that on installation, the towers and shelters and parts thereof become immovable property and therefore, are not entitled for CENVAT credit as “inputs”. The Tribunal followed the decision of the Bombay High Court in the case of *Vodafone India Ltd. (supra)* and *Bharti Airtel (supra)*. While holding that CENVAT Credit was inadmissible, CESTAT also relied on the decision of the Larger Bench in the case of *Vandana Global Ltd. v. CCE, Raipur*, 2010 (253) ELT 440. The assesseees urge that the towers, shelters and parts thereof were received in CKD condition and at the time of their receipt, they were movable goods. Therefore, the assesseees are eligible to take CENVAT credit. It is argued that the definition of ‘input service’ under Rule 2(l) is much wider than the definition of ‘inputs’ under Rule 2(k) of the Credit Rules. Further, in terms of Rule 3 (of the Credit Rules) the assesseees assert eligibility to CENVAT credit of the duty paid on all inputs and capital goods which are required for providing the output service.

58. Rule 4(1) of the Credit Rules prescribes the conditions/timing of availing CENVAT credit and allows credit on inputs after receipt in the premises of the output service provider. The assesseees urged that a reading of the rules, entitles it to credit immediately on receiving the inputs irrespective of the subsequent treatment (i.e. fastening, bolting etc. whether or not resulting into an immovable property). It was argued that CESTAT failed to appreciate that any subsequent treatment of capital goods or inputs after receipt by the provider of output service is not relevant for the purpose of availing credit in terms of Rule 3 of Credit Rules. The only condition which needs to be satisfied is that the said goods must be used for providing the output service, which is not disputed by the Respondent in the present

case. The assessees argued that there was no break of chain linking availability and actual availment of CENVAT credit. After making a reference to the sample invoices, the assessees pointed out that the towers and shelters are purchased in CKD condition and not angles, beams or bars. The activity of installation is done either at the behest of the supplier or at the assessee's request. The third-party service provider merely erects and installs the towers and shelters, thereby collecting labour charges for rendition of service which is subject to service tax. Thus, the activity of the service provider is confined only to installation of towers and shelters brought in CKD condition at the towers site. There is no loss of identity of goods or emergence of fresh identity with a distinct character, name or use as also there is no transformation or value addition.

59. It was argued that as long as the identity of inputs received and inputs installed are one and the same, in the absence of any manufacturing operation, there is no breakage of the credit chain. The manufacturer/ service provider sourcing the capital goods would be entitled to utilize the duties paid on the capital goods for payment of Excise duties on final products or resultant output services. The assessees claim credit on civil foundations as well, which are prepared by third party service providers who pay service tax on these activities which are claimed as input service credit by (the assessees). In this regard, they rely on Explanation- II. They relied on the CESTAT's decision in *Bharti Airtel (supra)*, on word in it was held that Explanation II would apply only to manufacturers and inputs and output service providers. However, a similar restriction was not introduced in the definition of input services. Therefore, the assessees claimed that they are

entitled to claim credit of input services on these activities towards rendition of output services namely, business support services.

60. During the hearing, Revenue urged that the mobile towers and shelters when erected become immovable structure and does not fall within the definition of 'capital goods' and, therefore, the CENVAT credit cannot be granted thereof. Further, it submits that the Supreme Court through various decisions has laid down the twin test of movability and marketability for the levy of duty of excise and consequently, grant of CENVAT credit. In the regard, reliance was placed on *Triveni Engineers*, particularly the following observations:

“4. There can be no doubt that if an article is an immovable property, it cannot be termed as 'excisable goods' for purposes of the Act. From a combined reading of the definition of 'immovable property' in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the Excise Law. Whether an article is permanently fastened to anything attached to the earth require determination of both the intention as well as the factum of fastening to anything attached to the earth and this has to be ascertained from the facts and circumstances of each case.”

61. The next decision cited was *Quality Steel Tubes Pvt. Ltd. v. Controller of Central Excise*, (1995) 2 SCC 372 in which the Supreme Court considered the question whether the tube mill and welding head erected and installed by the appellant for the manufacture of tubes and pipes out of duty-paid raw material were assessable to duty under residuary Tariff Item No. 68 of the Schedule, being excisable goods within the meaning of Central Excise Act. While re-stating the test, namely, first the article must be goods and secondly

that it should be marketable or capable of being brought to market, it was held that goods which are attached to the earth and thus become immovable did not satisfy the test of being goods within the meaning of the Central Excise Act nor can be said to be capable of being brought to the market for being sold. In that case, it was found that both the tests were not satisfied and, therefore, the tube mill and welding head erected by the appellant were not eligible to excise duty. It was held that erection and installation of a plant could not be held to be excisable goods and if such wide meaning was assigned, it would result in bringing in its ambit structures, erections and installations which would surely not be in consonance with accepted meaning of excisable goods and its eligibility to duty. The relevant para is extracted hereunder for ready reference:

“5. In several decisions rendered by this Court commencing from Union of India and Anr., v. Delhi Cloth and General Mills Co. Ltd.: to Indian Cable Co. Ltd. v. Collector of Central Excise, Calcutta: 1994ECR20(SC) the twin test of eligibility of an article to duty under Excise Act are that it must be a good mentioned either in the Schedule or under Item 68 and must be marketable. In Delhi Cloth Mills (supra) it having been held that the word 'good' applies to those goods which can be brought to market for being bought and sold it is implied that it applies to such goods as are moveable. The requirement of the goods being brought to the market for being brought and sold has become known as the test of marketability which has been reiterated by this Court in Collector of Central Excise v. Ambalal Sarabhai Enterprises: The Court has held in Union Carbide India Ltd. v. Union of India and Ors.: that even if a good was capable of being brought to market, it would satisfy the test of marketability.

The basic test, therefore, of levying duty under the Act is two fold. One, that any article must be a good and second, that it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become Immovable do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being brought and sold. Therefore, both the tests, as explained by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been erected and installed in the premises and embedded to earth they ceased to be goods within meaning of Section 3 of the Act.

6. Learned Counsel for the Revenue urged that even if the goods were capable of being brought to the market it would attract levy. True, but erection and installation of a plant cannot be held to be excisable goods. If such wide meaning is assigned it would result in bringing in its ambit structures, erections and installations. That surely would not be in consonance with accepted meaning of excisable goods and its eligibility to duty.

62. *Sirpur Paper Mills (supra)* was also cited, especially the following observations:

“5. Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. For example, a factory owner or a house-holder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper making machine

can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the company. Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property.”

63. The other decision cited was *Ahmedabad Municipal Corporation vs. GTL Infrastructure Limited & Ors*, (2017) 3 SCC 545, where it was held as under:

“12. The short contention of the cellular operators advanced before the high court is the Section 127(1)(c) read with Section 145A of the Gujarat Act are legislatively incompetent as mobile towers are beyond the scope of Entry 49 of List II of the seventh schedule to the Constitution which is in the following terms.

“ 49. Taxes on land and buildings.”

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31. Viewed in the light of the above discussion, if the definition of "land" and "building" contained in the Gujarat Act is to be understood, we do not find any reason as to why, though in common parlance and in everyday life, a mobile tower is certainly not a building, it would also cease to be a building for the purposes of Entry 49 List II so as to deny the State Legislature the power to levy a tax thereon. Such a law can trace its source to the provisions Entry 49 List II of the Seventh Schedule to the Constitution.”

64. CBEC Circular No. 58/1/2002-CX dated 15.01.2002, was relied on, to say that the 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 (1) 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 assemble 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 moveable 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 moveable 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. 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 para 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 Vs. 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 Vs. 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 Vs. 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.”

66. The Division Bench of the Bombay High Court in *Coca Cola India Pvt. Ltd. v. Commissioner of Central Excise, Pune – III*, 2009 (242) ELT 168 (Bom) construed Section 2 (l) as follows:

“39. The definition of input service which has been reproduced earlier, can be effectively divided into the following five categories, in so far as a manufacturer is concerned:

(i) Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products

(ii) Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal

(iii) Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory,

(iv) Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs,

(v) Services used in relation to activities relating to business and outward transportation upto the place of removal;

*Each limb of the definition of input service can be considered as an independent benefit or concession or exemption. If an assessee can satisfy any one of the limbs of the above benefit, exemption or concession, then credit of the input service would be available. This would be so even if the assessee does not satisfy other limb/limbs of the above definition. To illustrate, input services used in relation to setting up, modernization, renovation or repairs of a factory will be allowed as credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in relation to manufacture of final products and transportation of final products upto the place of removal. This would follow from the observation of the Supreme Court in **Kerala State Co-operative Marketing Federation Ltd. and Ors. v. Commissioner of Income Tax: 1998 (5) SCC 48**, which is as under:*

7. We may notice that the provision is introduced with a view to encouraging and promoting growth of co-operative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a co-operative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption.”

67. In the case of *CCE, Pune v. Bellsonica Auto Components India Pvt. Ltd.*, 2015 (40) STR 41 (P & H), the respondents manufactured metal

components for automobiles and supplied the product to Maruti Udyog Limited who used them in respect of the automobiles manufactured by them. The respondents paid service tax in respect of the lease rent. Further, the respondents set up factory for which they availed the service of erection, installation and commissioning engineers who had paid the Service tax in respect of the amounts paid to them. The respondents availed CENVAT credit in respect of the said service tax paid. The question for consideration before the court was “*whether the said services fall within the meaning of the term ‘input service’ in Section 2(l)(ii)*”. The respondent analyzed Section 2 (l) by dividing it into two parts terming them the ‘mean’ part and the ‘includes’ part and that the present case would fall under both the parts of the definition as the phraseology is wide enough to cover the said services, the same being directly or indirectly or in any event in relation to the manufacture of the respondents’ final product. The Court after relying on the decision of the Bombay High Court in *Coca Cola India Pvt. Ltd. (supra)*, held that the respondent had rightly availed CENVAT credit. The relevant portion of the judgment is extracted hereunder:

“7. We are entirely in agreement with Mr. Amrinder Singh's submission on behalf of the respondents, that the CENVAT Credit taken of the tax paid in respect of the said input services can be utilized by the respondents in accordance with the CENVAT Credit Rules. Mr. Amrinder Singh rightly analysed Section 2(l) by dividing it into two parts terming them the 'mean' part and the 'includes' part and that the present case would fall under both the parts of the definition as the phraseology is wide enough to cover the said services, the same being directly or indirectly or in any event in relation to the manufacture of the respondents' final product.

8. The land was taken on lease to construct the factory. The factory was constructed to manufacture the final product. The land and the factory were required directly and in any event indirectly in or in relation to the manufacture of the final product and for the clearance thereof up to the place of removal. But for the factory the final product could not have been manufactured and the factory needed to be constructed on land. The land and the factory are used by the manufacturer in any event indirectly in or in relation to the manufacture of the final product, namely, metal-sheets. The respondents' case, therefore, falls within the first part of Rule 2(l) aptly referred to by Mr. Amrinder Singh as the "means part".

9. The respondents' case also falls within the second part of Rule 2(l) i.e. the "inclusive" part. The definition of the words "input service" also specifically includes the services used in relation to setting up of a factory. Mr. Amrinder Singh rightly contended that it was not the appellant's case that the services were not used for the setting up of the factory. The doubt in this regard is set at rest by the second part of Section 2(l)(ii) which includes within the ambit of the words 'input service' the setting up of a factory and the premises of the provider of the output service. The inclusive definition, therefore, puts the matter, at least so far as the payment for services rendered by the civil contractor for setting up the factory is concerned, beyond doubt. As the plain language of Section 2(l)(ii) indicates, the services mentioned therein are only illustrative. The words "includes services" establish the same. It can hardly be suggested that the lease rental is not for the use of the land in relation to the manufacture of the final product."

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.

Re. Question No. 5 i.e. whether emergence of immovable structure at intermediate stage (assuming without admitting) is a criterion for denial of CENVAT credit?

69. The learned counsel for the assessees argued that, for instance, there is an emergence of immovable property in the intermediate stage, then too, the credit on input or input service is admissible even if the item is used in an intermediate product which is exempt from payment of duty. Reliance in this regard was placed on the following judgments: *Tata Iron and Steel Company v. CCE*, 2000 (117) ELT 669; *Madras Aluminum Company Ltd. Vs. CCE*, 2001 (136) ELT 182; *Mahalaxmi Glass Works Ltd. v. CEE*, 1999 (113) ELT 558 and the decision of the Andhra Pradesh High Court in *CCE, Vishakhapatnam- II v. Sai Sahmita Storages (P) Limited*, 2011 (270) ELT 33 (A.P.). In *Tata Iron and Steel Company (supra)*, the court observed that a product may be a final product, *ipso facto*, or that it may be an intermediate one, for another article; therefore, tools cleared on payment of duty were final products; however, those used captively were intermediate goods and entitled to credit. *Madras Aluminum Company Ltd (supra)* was a case where

the product was used in water boiler for the preparation of softening agents to reduce scale formations and avoid boiler breakdown at the time of steam generation for use as also to reduce corrosive effects of acid, credit was allowed because it aided in *“preparation of the machinery for more effective functioning of the machine as eligible inputs. Therefore, no reason is found to deny the credit on these items.”*

70. Before CENVAT Credit Rules, 2001, the previous rules provided for MODVAT. The CENVAT Credit Rules provide specific exemption by addition to Rule 2(g) stating that the input goods used in the manufacture of capital goods which are further used in the factory of manufacturer. Thus, in terms of the definition of ‘input’ contained in 2(g) read with Explanation (2), any input which is used in the manufacture of capital goods, which is further used in the factory of the manufacture is eligible for credit. It would also be useful to notice that in *Mahalaxmi Glass* (supra) the Revenue refused credit, stating that furnace was immovable property as it was built at site. It was held that the bricks used to build the furnace were *“undoubtedly part of the furnace which Capital Goods is. The fact that the furnace in questions was not classifiable under a particular tariff heading would not affect the fact that it is covered by the category of machines machinery etc. specified in Clause 1(a) to the explanation to Rule 173Q. The bricks which form part of the furnace would therefore be eligible for credit under Clause 1(b). In the absence of any express provision to deny credit to parts of such goods Commissioner's reasoning cannot be upheld. We cannot import anything into the rule which does not exist in it.”*

71. *Sai Sahmita Storages (P) Limited*, is, in our opinion, a decision that held that a plain reading of the definition of Rule 2(k) would demonstrate

that all goods used in relation to manufacture 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.

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 per-fabricated shelters, are not immovable property. Therefore, the CESTAT erred in relying upon the decision of the *Bharti Airtel (supra)*.

74. This question of law too, is therefore, answered against the Revenue and in favour of the assessee/appellants.

75. In view of the foregoing analysis- and since all the questions of law framed in these appeals have been answered in favour of the assessee and against the Revenue, the assessee's appeals have to succeed and are allowed; for the same reasons, the Revenue's appeals are to be rejected; they are therefore, dismissed. In the peculiar circumstances of this case, there shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

OCTOBER 31, 2018