CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH

SERVICE TAX APPEAL NO. 00132 of 2010

(Arising out of the Order-in-Original 36/2009-ST dated 22/10/2009 passed by The Commissioner of Central Excise, Customs & Service Tax, Cochin)

M/s Bharti Airtel Limited, **...Appellant**
S.L. Avenue, N.H. Byepass,
Kundanoor Junction, Maradu P.O.
Cochin – 682 304 Kerala.

Versus

The Commissioner of Central Excise, Customs & Service Tax, **...Respondent**
Cochin Commissionerate,
C.R. Building, I.S. Press Road,
Cochin – 682 018.

APPEARANCE:

Shri Ravi Raghavan, Advocate for the Appellant
Shri P. Rama Holla, Authorised Representative for the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 28.07.2021
DATE OF DECISION: 13.09.2021

FINAL ORDER NO. 20750/2021

JUSTICE DILIP GUPTA

M/s Bharti Airtel Ltd.[1] has filed this appeal for setting aside the order dated 22 October 2009 passed by the Commissioner of Central Excise and Customs, Cochin[2], by which the demand of Rs. 7,56,02,863/-, found to be the ineligible credit utilised by the appellant during the period from September 2004 to December 2007, has not only been confirmed but penalty and interest have also been imposed.

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1 **the appellant**
2 **the Commissioner**

2. The appellant is a Basic Telephone, Global System Mobile Communications[3], Broadband service and network service provider. The Mobile Telecom Service of the appellant is based on GSM. The entire mobile cellular phone network consists of the following equipments:

- Mobile Switching Centre (MSC)
- Base Station Control (BSC)
- Base Transceiver Station (BTS)
- Microwave Radio Station
- Tower & Shelters
- Computer/Software printer.

3. The appellant claims that for the purpose of setting up, operation and maintenance of the telecom network throughout the country, it set up Mobile Towers and Shelters. The GSM network is basically composed of three broad systems namely, the network subsystem, the radio subsystem, and the operation support subsystem. GSM provides not only air interface, but also the main interfaces that identify different systems. The operation and transmission system requires radio antennas to transmit and receive radio signals. The radio signals have to be beamed at a particular height so that the waves can travel without any hindrance from the high rise buildings, big trees and mountains. The cellular operators, therefore, have to install a cell site for catering to its cellular coverage inside public areas. This cell site comprises of a tower, shelter, electrical setup and other electronic related equipments. Microwave antennas and radio antennas are mounted on the towers. A tower consists of iron angles, bars and beams and is erected to raise the height of the antenna. The GSM and Microwave antennas hoisted on the tower, transmit mobile signals into atmosphere to spread-up mobile

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3 **GSM**

coverage in public areas. The shelter is another core part of a cell site, which hoists all electronics related gadgets.

4. The appellant further claims that in order to build the above infrastructure facilities, it procured various telecommunication equipments that were imported or indigenous, other goods and iron and steel angles, bars and beams and used them for providing output services. The appellant reimbursed/paid service tax, excise duty and countervailing duty (CVD) on these goods and availed CENVAT credit on Capital Goods, Input and Input Services under the CENVAT Credit Rules, 2004[4]. When these Rules were introduced w.e.f. 10.09.2004, in super session of the erstwhile CENVAT Credit Rules, 2002, and Service Tax Credit Rules, 2002, the appellant started availing CENVAT credit of the excise duty paid on towers/tower materials.

5. During the period from September 2004 to December 2007, for determining the CENVAT credit available for meeting the requirement to pay service tax on the output service, the appellant considered the entire credit on input service and only 50% of the credit on 'capital goods'.

6. However, a show cause notice dated 14.05.2008 was issued to the appellant to show cause as to why :

> "(i) A total amount of Rs. 14,36,30,206/- consisting of Rs. 7,56,02,863/- being ineligible CENVAT Credit availed on goods falling under Chapter 72 and 73 during the period 09/2004 to 12/2007 and Rs. 6,80,27,343/- being the ineligible credit taken in excess of 50% of the duty paid on capital goods during the year 2005-06, should not be recovered from them under proviso to Section 73 (1) of the Finance Act 1994, readwith Rule 14 of the CENVAT Credit Rules, 2004 ;
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> (ii) Interest at the appropriate rate should not be paid by the assessee under Section 75 of the Act read with Rule 14 of the Rules ;
>
> (iii) Penalty under Rule 15 of the Rules should not be imposed on the assessee for wrong availment of the CENVAT credit as mentioned above ; and

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4 Credit Rules

(iv) Penalty should not be imposed under Section 76, 77 and 78 of the Act."

7. This show cause notice was issued on the ground that the definition of 'capital goods' in terms of rule 2 (a) of the Credit Rules does not include goods falling under Chapter 72 and 73 and Tower/Tower materials cannot be considered as components/spares and accessories of the capital goods; that the angles, channels and beams, prima facie, cannot be treated as inputs; that the angles, channels, beams etc., are used to fabricate the tower and the activity of erection of towers does not amount to manufacture as the tower is in the nature of immovable fixture; and that the tower in itself is not treated as excisable goods and hence not entitled to be treated as input for the purpose of availing CENVAT credit.

8. The appellant filed a detailed reply to the show cause notice on 22.07.2008 rebutting the allegations levelled against it on the grounds that the proposal to disallow CENVAT credit on capital goods for the period September 2004 to April 2007 is time barred; that the audit was conducted in the company by the audit team and the appellant was not informed that it was not eligible to take credit on capital goods; that a cell site of a cellular operator consists of antennae which receives and transmits signals so as to facilitate the output service of the assessee; that the towers are structures installed to support GSM and Microwave Antennae; that the towers and its materials which are integral to the erection of the cell sites for providing cellular coverage in public areas are, therefore, capital goods used in providing the output service for the assessee; and that it is entitled to take CENVAT credit. In relation to the proposal to disallow the credit on capital goods availed in excess of 50%

of the duty paid during the year 2005-2006, it was submitted by the appellant that it had considered only 50% of the credit on capital goods.

9. The Commissioner passed an order dated 22.10.2009 confirming the recovery of CENVAT credit of Rs. 7,56,02,863/- alongwith interest and penalty.

10. Shri Ravi Raghavan, learned Counsel appearing for the appellant made the following submissions :-

i. The towers/tower materials and pre-fabricated buildings/ shelters on which CENVAT credit has been availed by the appellants are capital goods and the said availment is valid;

ii. In any case, the appellant is entitled to avail CENVAT credit of towers/tower materials and pre-fabricated shelters as inputs;

iii. The towers, shelters and parts thereof, at the time of their receipt were movable goods and, therefore, the Appellant is eligible to take CENVAT credit on the same. At the site, they are bolted and placed on a platform either on the ground or on top of a building to ensure that there is no vibration to the tower. The same can be dismantled again and moved to a different place and erected again. 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 non-excisable commodity when received. In support of this submission, reliance has been placed on the decision of the Delhi High Court in **Vodafone Mobile Services Ltd.**

and Others vs. **Commissioner of Service Tax, Delhi[5],** which considered and distinguished the decision of the Bombay High Court in **Bharti Airtel Limited** vs. **CCE, Pune – III[6];**

iv. The CENVAT credit on capital goods for the period October 2005 to March 2006, has been utilized only to the extent of 50% of the CENVAT credit on capital goods available;

v. The availability of credit on towers, angles, channels, beams and shelters have always been a subject matter of dispute/ litigation and accordingly, the extended period of limitation cannot be made applicable in cases of such interpretational nature. There was a conflict of opinion on the said issue which was ultimately addressed by a Larger Bench of the Tribunal in **Tower Vision India Pvt. Ltd.** vs. **Commissioner of Central Excise, Delhi[7]**. It is a settled position that when a matter is referred to a Larger Bench to resolve conflict of opinion, extended period of limitation is not invokable;

vi. Since the demand itself is not sustainable, no interest will be payable in the instant case; and

vii. Since no mens-rea or suppression can be associated with availment of credit in the instant case, penalty is to be set aside.

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5 2019 (27) G.S.T.L. 481 (Del.)
6 2014 (35) S.T.R. 865 (Bom.)
7 2016 (42) S.T.R. 249 (Tri. – LB)

11. Shri P. Rama Holla learned Authorized Representative appearing for the Department however, supported the impugned order and made the following submissions:

i. Availment of CENVAT credit claimed on the items is not allowed, either its 'inputs' or 'capital goods' and in support of this submission, placed reliance on the following decisions:

a. Vodafone Essar South Ltd. vs. CST, Bangalore[8]
b. Bharti Airtel Ltd. vs. CCE, Pune-III[9]
c. Tower Vision India Pvt. Ltd. vs. CCE (Adj.), Delhi[10]
d. Vodafone India Ltd. vs. CCE, Mumbai-II[11]
e. Bharat Sanchar Nigam Ltd. vs. CCE[12]
f. Vodafone Essar South Ltd. Aircel Cellular Ltd, Dishnet Wireless Ltd. vs. CST, Chennai[13]
g. Bharti Airtel Ltd. vs. CCE, Bangalore-I[14];

ii. Explanation 2 to rule 2(k) of the Credit Rules excludes the said items from the preview of CENVAT credit;

iii. The demand relating to availing more than 50% of capital goods credit in 2005-2006 in violation of rule 4(2)(a) of Credit Rules has been confirmed by the adjudicating authority on factual and legal provisions prevailing during the relevant period; and

iv. As the appellant had violated the statutory provisions relating to the availment of CENVAT credit of capital goods, by availing 100% of credit on capital goods instead of 50%, it is liable for payment of interest from the date of taking

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8 2020(43) GSTL 249 (Tri.-Bang)
9 2014 (35) S.T.R. 865 (Bom.)
10 2016 (42) S.T.R. 249 (Tri. – LB)
11 2015(324) E.L.T 434
12 2018(7) TMI 1673-CESTAT Bangalore
13 2018(1) TMI 1218-CESTAT Chennai
14 2021(4) TMI 306-CESTAT Bangalore

excess credit till the date it became eligible for the balance 50% credit.

12. The submissions advanced by the learned Counsel for the appellant and the learned Authorized Representative of the Department have been considered.

13. Two issues arise for consideration in this appeal, namely irregular availment of CENVAT credit of Rs. 7,56,02,863/- on goods like angles, beams, channels, etc., used in erection of towers/pre-fabricated buildings/shelters and excess availment of credit of Rs. 6,80,27,343/- on capital goods taken in excess of 50% during the year 2005-2006.

Issue No. 1

14. The contention advanced by the learned counsel for the appellant is that tower/tower materials and pre-fabricated buildings/shelters on which CENVAT credit has been availed by the appellant are 'capital goods' and, therefore, the availment of CENVAT credit is valid.

15. The impugned order has denied CENVAT credit of duty paid on goods like angles, beams, channels, tower/tower materials and pre-fabricated shelters on the ground that the said items do not fall under rule 2(a) of the Credit Rules and also on the ground that they do not qualify as accessories or components.

16. To appreciate this submission, it would be necessary to reproduce rule 2(a) of the Credit Rules that defines 'capital goods'. It is as follows:

> **"Rule 2. Definitions. –** In these rules, unless the context otherwise requires, -
>
> **(a) "capital goods" means :-**
> (A) the following goods, namely :-
> (i) all goods falling under Chapter 82, Chapter 84, **Chapter 85**, Chapter 90, heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the 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;"

(emphasis supplied)

17. The contention of the appellant is that tower/tower materials and pre-fabricated shelters are integral to the erection of the cell sites for providing a cellular coverage in public areas and would be 'capital goods' used in providing the output services for the appellant. According to the appellant, a cell site of a cellular operator consists of antennae, which receives and transmits signals so as to facilitate the telecommunication service of the appellant. These antennae are mounted on the tower and a typical tower would have more than four or five antennaes to receive and transmit the signals. The appellant contends that the towers help the antennae in avoiding obstacles; in avoiding earth's curvature; in providing deep indoor coverage; and in covering large area. Thus, without the towers the antennae cannot be erected and positioned for the purpose of transmitting the microwave signals so as to get the maximum coverage and, therefore, the towers become part and parcel of the various equipments used for providing the output service of telecommunication service**.**

18. The appellant, therefore, contends that the antennae are **'capital goods'** used for providing telecommunication service by the appellant

and are classifiable under Chapter 85 of the Central Excise Tariff Act[15]. The appellant further contended that tower/tower materials and pre-fabricated shelters would fall under 'components, spares and accessories' of capital goods since they act as components and accessories to the antennae at the cell site.

19. Learned counsel for the appellant also contended that the appellant is entitled to avail CENVAT credit of tower/tower materials and pre-fabricated shelters as **'inputs'** since the term 'all goods' mentioned in rule 2(k)(ii) of the Credit Rules would cover all goods used for providing any output service, except those which are specifically excluded in the said rule. Rule 2(k) of the Credit Rules is reproduced below**:**

> "(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;**
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> **(emphasis supplied)**

20. Learned counsel also submitted that towers/shelters and parts thereof, at the time of their receipts were movable goods and, therefore,

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15 Tariff Act

the appellant can take CENVAT credit on the same. According to the appellant, the entitlement of CENVAT credit is to be determined at the time of receipt of the goods and the fact that they are later fixed/ fastened to the earth for use would not make them a non-excisable commodity when received.

21. In support of the aforesaid contentions, learned counsel for the appellant placed reliance on a decision of the Delhi High Court in **Vodafone Mobile Services**.

22. Learned Authorized Representative appearing for the Department however, placed reliance on a decision of the Bombay High Court in **Bharti Airtel Ltd.** and also submitted that:

i. The angles, channels, beams, pre-fabricated buildings /shelters used for erecting towers are not directly used for providing the output service, though the same are used indirectly ;

ii. The definition of 'input' cannot be given an enlarged connotation in absence of the words 'directly or indirectly' and 'in or in relation to';

iii. The towers are admittedly attached to earth. Erection of towers attaching to earth does to amount to manufacture of goods and, therefore, the erected towers cannot be called 'capital goods';

iv. Merely for the sake of availing CENVAT credit of duty paid on the material used in erecting towers, the appellant cannot classify the towers under Chapter 85 of the Central Excise Tariff and claim that the angles, channels and beams are component and accessories of 'capital goods';

v. The CENVAT Credit cannot be availed on angles, channels and beams as 'inputs' or 'capital goods';

vi. The CENVAT Credit has been over-utilized by utilizing 100% of credit instead of 50% and the appellant is liable to pay interest on excess credit from the date of taking credit till 01.04.2006 under rule 14 of Credit Rules; and

vii. The extended period of limitation can be invoked as the appellant did not declare the details of items on which credit was taken in the ST-3 returns filed by it.

23. It would be necessary to examine the two decisions rendered by the Delhi High Court in **Vodafone Mobile Services** and the Bombay High Court in **Bharti Airtel Ltd.**

Vodafone Mobile Services - Delhi High Court

24. The submissions advanced on behalf of the appellant of **Vodafone Mobile Services** are contained in the paragraphs 13, 14, 15 and 16 of the judgement and they are reproduced below:

> "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 assessees 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.
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> 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) E.L.T. 273 (sic). 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."**

(emphasis supplied)

25. The submissions advanced by the Department are contained in paragraphs 17, 18 and 19 of the judgment and are reproduced below:

"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 assessees. 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 C.B.E. & C. by its Circular dated 4-1-2008 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) E.L.T. 273 (S.C.) 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."

(emphasis supplied)

26. The Delhi High Court first examined whether the towers, shelters and accessories used by the appellant were immovable property and in this connection, after referring to the decision of the Bombay High Court in **Bharti Airtel Ltd.,** on which reliance was placed by the Department, observed as follows:

"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)."

(emphasis supplied)

27. The Delhi High Court, thereafter, examined whether the appellant was entitled to claim CENVAT credit on towers, shelters either as 'capital goods' or 'inputs' in terms of rules 2(a) or 2(k) of the Credit Rules and whether the towers and shelters would qualify as 'accessories'. The High Court, after noticing the definition of 'capital goods' in rule 2(a) of the Credit Rules and the definition of 'input' in rule 2(k) of the Credit Rules, observed as follows:

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

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

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

"anything which is joined to another thing as an ornament or to render it more perfect, or which accompanies it, or is connected with it as an incident, or as subordinate to it, or which belongs to or with it, adjunct or accompaniment. A thing of subordinate importance. Aiding or contributing in secondary way of assisting in or contributing to as a subordinate. ''

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

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

48. **In the present cases, the Tribunal, in this Court's view erred in interpreting the definition of "capital goods". It merely adopted the ratio laid down by the Bombay High Court in the case of the *Bharti Airtel* (supra) and *Vodafone India* (supra). Both those are subject matter of appeals before the Supreme Court. This Court is of the opinion, with due respect to the Bombay High Court that those two judgments are contrary to settled judicial precedents, including the later view of the Supreme Court in *Solid and Correct Engineering* (supra).** In this conclusion, it is held that the Tribunal clearly erred in concluding that the towers and parts thereof and the prefabricated shelters are not capital goods with the meaning of Rule 2(a) of the Credit Rules. This question is answered in favour of the assessee and against the Revenue."

(emphasis supplied)

28. Alternatively, the Delhi High Court also examined whether the towers and shelters would qualify as 'inputs' under rule 2(k) of the Credit Rules and observed as follows:

> "53. On examination of the definition and the decisions, the Court is of the considered opinion that the term "all goods" mentioned in Rule 2(k) of the Credit Rules would cover all the goods used for providing output services, except those which are specifically excluded in the said Rule. **Therefore, the definition is wide enough to bring all goods which are used for providing any output service.** Further, from the decisions of the Supreme Court and other judgments referred to previously, the test applicable for determining whether inputs are used in the manufacture of goods is the 'functional utility' test. If an item is required for providing out the output services of the service provider on a commercial scale, it satisfies the functional utility test. In the facts of the present case, what emerges is that, BTS is an integrated system and each of its components have to work in tandem with each other in order to provide the required connectivity for cellular phone users and for efficient telecommunication services. **The towers and pre-fabricated shelters form an essential in the provision of telecommunication service. The CESTAT - in the opinion of this Court - failed to appreciate that it is well settled that the word "used" should be understood in a wide sense, so as to include passive as well as active use.** The towers in CKD condition are used for the purpose of supplying the service and therefore, would qualify as 'inputs'. There is actual use of the tower and shelters in conjunction with the Antenna and the BTS equipment in providing the output service, which also includes provision of the Business Support Service. The CESTAT has failed to appreciate that the towers and the parts thereon and the prefabricated shelters are inputs, in accordance with the provisions of Rule 2(k) of the Credit Rules. The CESTAT has erred in holding that there is no nexus between the inputs and the output service. The CESTAT also failed to consider the decision of the AP High Court in case of *M/s. Indus Towers Ltd.* v. *CTO, Hyderabad* - (2012) 52 VSR 447, which clearly ruled that the towers and shelters are indeed used and are integrally connected to the rendition of the telecommunication services."
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> **(emphasis supplied)**

Bharti Airtel Ltd. – Bombay High Court

29. After referring the definition of 'capital goods' and 'inputs', the Bombay High Court observed as follows:

> "23. In the context of these definitions the contentions as raised by the appellant are required to be examined. **The position of the goods in question vis-a-vis the plain application of the rules is that the tower and parts thereof are fastened and are fixed to the earth and after their erection become immovable and therefore cannot be goods.** Further in the CKD or SKD condition the tower and parts thereof would fall under the Chapter Heading 7308 of the Central Excise Tariff Act. Heading 7308 is not specified in clause (i) or clause (ii) of Rule 2(a)(A) of the Credit Rules so as to be capital goods. **The goods in question would not be capital goods for the purpose of Cenvat credit as they are neither components, spares and accessories of goods falling under any of the chapters or headings of the Central Excise Tariff Schedule as specified in sub-clause (i) of the definition of capital goods."**
>
> **(emphasis supplied)**

30. The Bombay High Court, thereafter, examined the alternate contention raised by the appellant and in this connection considered the decisions relied upon on behalf of the appellant to contend that the towers and parts thereof are not immovable properties and that the towers and shelters are used for providing telecommunication services as the antennae and Base Transreceiver Station are fitted into the towers and shelters respectively and, therefore, towers and parts thereof and shelter qualify as 'inputs' under rule 2(k) of the Credit Rules. The Bombay High Court observed as follow:

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

within the definition of capital goods and hence the appellants cannot claim the credit of duty paid on these items. Even applying the ratio of the judgments as relied upon by the appellants as observed above the said goods in the present context cannot be classified as capital goods.

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

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

> **and input indicates that only those goods as used by a manufacturer would qualify for credit of the duty paid.** As observed hereinabove a service provider like the appellant can avail of the credit of the duty paid only if the goods fall within the ambit of the definition of capital goods as defined under Rule 2(a)(A) of the Credit Rules. The contention of the appellant that they are entitled for the credit of the duty paid towers and PFB and printers is defeated by the very wording of the definition of input. In any case towers and PFB are in the nature of immovable goods and are non-marketable and non-excisable . If this be the position then towers and parts thereof cannot be classified as inputs so as to fall within the definition of Rule 2(k) of the Credit Rules. We clarify that we are not deciding any wider question but restricting our conclusion to the facts and circumstances which have fell for our consideration in these appeals.
>
> 34. **We therefore find no infirmity or illegality in the findings as recorded by the tribunal in holding that the subject items are neither capital goods under Rule 2(a) nor inputs under Rule 2(k) of the Credit Rules and hence Cenvat credit of the duty paid thereon was not admissible to the appellants.** The appeals are devoid of merit and accordingly stand rejected. No orders as to costs."
>
> **(emphasis supplied)**

31. It is, therefore, clear that two conflicting views have been expressed by the Delhi High Court in **Vodafone Mobile Services** and the Bombay High Court in **Bharti Airtel Ltd.** It, therefore, needs to examined as to which of these two decisions should be relied upon in this appeal, which is being decided by the Bangalore Bench of the Tribunal.

32. A Lager Bench of the Tribunal consisting of five Hon'ble Members in **Collector of Central Excise Chandigarh** vs. **Kashmir Conductors**[16] decided which High Court has to be followed when different High Courts have taken conflicting views on a proposition of law and the observations are:

> "10. **The question as to how the Tribunal should proceed in the face of conflicting decisions of High Courts has been considered in *M/s. Atma Steels P. Ltd. and others* v. *Collector of Central Excise, Chandigarh* reported in l984 (17) E.L.T. 331 wherein the Larger Bench consisting of five Members held that, in view of its All India jurisdiction and peculiar features, the Tribunal cannot be held bound to the view of any one of the High Courts, but has the judicial freedom, to consider the conflicting views, reflected by different High Courts, and adopt the one**

16 **1997 (96) E.L.T. 257 (Tribunal)**

> **considered more appropriate to the facts of a given case before the Tribunal. The Tribunal also indicated that this should be so, irrespective of the fact whether one particular assessee was within the jurisdiction of a specified High Court or the original adjudicating authority was located there.**
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> ******
>
> 10.2 **In a recent decision of the Tribunal** in the case of *Madura Coats* v. *CCE, Bangalore* reported in 1996 (82) E.L.T. 512, **it has been held that the decision of a particular High Court should certainly be followed by all authorities within the territorial jurisdiction of that High Court and that the authorities in another State are not bound to follow the views taken by a particular High Court in the absence of a decision by the jurisdictional High Court with regard to constitutionality of a provisions.** The Tribunal has held that since the adjudication of vires of a provision of a statute or Notification is outside the jurisdiction of the Tribunal and the jurisdictional High Court i.e., the High Court having jurisdiction over the authority and the assessee, has not struck down the provision or Notification as *ultra vires*, the Tribunal has to follow the same and the assessee is entitled to take the stand that he is entitled to the benefit of the particular provision or Notification since the jurisdictional High Court has not struck it down, even though some other High Court may have done so. **In case the conflict of decisions among High Courts does not relate to vires of any provision or Notification, it has been held that the Tribunal has to proceed in accordance with the decision in *Atma Steels P. Ltd.* in the light of the decision of Supreme Court in the *East India Commercial Company* case i.e. where the jurisdictional High Court has taken a particular view on interpretation or proposition of law, that view has to be followed in cases within such jurisdiction. If the jurisdictional High Court has not expressed any view in regard to the subject matter and there is conflict of views among other High Courts, then the Tribunal will be free to formulate its own view in the light of *Atma Steels P. Ltd.* case; however, there is a decision of only one High Court in regard to disputed interpretation or proposition of law, the Tribunal is bound to follow that order since it is not at liberty to disregard the solitary High Court decision."**
>
> **(emphasis supplied)**

33. It would be seen from the aforesaid decision of the Larger Bench of the Tribunal that when a Jurisdictional High Court has not expressed any view in regard to the issue and conflicting views have been taken by High Courts, other than the Jurisdictional High Court, then the Tribunal will be free to formulate it own view in the light of the decision of the Larger Bench of the Tribunal in **M/s. Atma Steels P. Ltd. and Others** vs. **Collector of Central Excise, Chandigarh[17].** In the said

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17 1984 (17) E.L.T. 331

decision rendered in **Atma Steels,** the Tribunal observed that it would have the judicial freedom to consider the conflicting views reflected by different High Court and adopt the one it considers to be more appropriate to the facts of the case before the Tribunal.

34. In the present case, the judgment of the Bombay High Court rendered in **Bharti Airtel** was considered by the Delhi High Court in **Vodafone Mobile Services** and it was distinguished as is clear from paragraph 48 of the judgment that has been reproduced above. In this connection the Delhi High Court had also placed reliance upon a later decision on the Supreme Court in **Solid and Correct Engineering Works[18].**

35. It is, therefore, considerd appropriate to follow the decision of the Delhi High Court in **Vodafone Mobile Services.** The appellant would, therefore, be entitled to claim CENVAT credit on tower/tower materials and pre-fabricated buildings/shelters.

36. This decision of the Delhi High Court has also been followed by the Tribunal in following decisions:

i. **Bharti Hexacom Limited** vs. **Commissioner of Central Excise and Customs, Central Goods and Service Tax, Jaipur-I[19]**
ii. **Bharti Airtel Limited** vs. **CCE & ST – Gurgaon-II[20]**
iii. **CCE Gurgaon-II** vs. **Bharti Infratel Ltd.[21]**
iv. **Bharti Infratel Limited** vs. **Commissioner of Service Tax, Delhi – IV[22]**

<u>Correct availment CENVAT credit on capital goods</u>

37. Learned counsel for the appellant also submitted that CENVAT credit on capital goods has been availed by the appellant correctly. In

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18 **2010 –TIOL – 25 – SC – CX**
19 **ST Appeal No. 50835 of 2017 decided on 25.05.2021**
20 **ST Appeal No. 55383 of 2013 decided on 03.09.2019**
21 **ST Appeal No. 52951, 52377-52378 of 2015 decided on 21.02.2019**
22 **ST Appeal No. 52382 of 2015 decided on 22.05.2019**

this connection, learned counsel pointed out that CENVAT credit on capital goods for the period from October 2005 to March 2006 was utilized only to be extent of 50% of the CENVAT credit available on capital goods and, therefore, the appellant is not liable to pay interest and penalty on the unutilized CENVAT credit. In this connection learned counsel for the appellant placed reliance upon the decision of the Bombay High Court in **Commissioner of Central Excise, Pune-II** vs. **Satish Industries**[23] and the decision of the Karnataka High Court in **Commissioner of C. Ex. & S.T., Bangalore** vs. **Bill Forge Pvt. Ltd.**[24]

38. Learned Authorized Representative appearing for the Department, however, supported the impugned order and stated that the Commissioner committed no legality in requiring the appellant to pay interest and penalty.

39. The Commissioner, in paragraph 47 of the order noted that the appellant **had taken 100% credit in their account**, while the appellant stated that it **had not utilized more than 50% credit** in the same Financial Year. The Commissioner did note that the appellant had not **utilized** the credit even though it had taken excess credit, but still the Commissioner held that against the credit of Rs. 13,60,54,686/-, the appellant was entitled to take CENVAT credit of only 50% i.e. Rs. 6,80,27,343/- on capital goods during the year 2005-2006 and, therefore, for the balance credit of Rs. 6,80,27,343/-, the appellant was liable to pay interest and penalty after April 01, 2006.

40. The issue, therefore, is whether the appellant had utilized more than 50% of the credit on capital goods during the Financial Year 2005-

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23 2013 (298) E.L.T. 188 (Bom.)
24 2012 (26) S.T.R. 204 (Kar.)

2006 because if the appellant had not utilised more than 50% of the credit on 'capital goods', it would not be liable to pay interest or penalty. This issue was decided in favour of the appellant by the Bombay High Court as well as the Karnataka High Court.

41. In **Satish Industries,** the Bombay High Court observed as follows:

> "3. On perusal of the order passed by the Commissioner (Appeals) as also CESTAT, it is seen that the said authorities have not upheld the action of the assessee in availing 100% of the credit in the initial year but have held that by the time the appeal was heard the initial financial year being over in addition to the 50% credit of the initial year, the assessee became entitled to the remaining 50% of the credit available in the following financial year and thus the assessee was entitled to 100% credit on the date of the appellate order. **It is not the case of the Revenue that the credit wrongly availed by the assessee has been utilized in the initial financial year.** If the credit of the subsequent financial year wrongfully taken in the initial financial year if not utilized till the commencement of the subsequent financial year, then no prejudice is caused to the Revenue and the decision of the Tribunal deserves acceptance."
>
> **(emphasis supplied)**

42. In **Bill Forge Pvt. Ltd.,** the Karnataka High Court observed as follows:

> "19. Rule 14 of the CENVAT Credit Rules, 2004 reads as under:
>
> > **Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded.** - Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacture or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply *mutatis mutandis* for effecting such recoveries.
>
> **A reading of the aforesaid provisions makes it very clear that the said provision is attracted where the Cenvat Credit has been taken or utilized wrongly or has been erroneously refunded.** In view of the aforesaid judgment of the Apex Court, the question of reading the word 'and' in place of 'or' would not arise. **It is also to be noticed that in the aforesaid Rule, the word 'avail' is not used.** The **words used are 'taken' or 'utilized wrongly'.** Further the said provision makes it clear that the interest shall be recovered in terms of Section 11A and 11B of the Act.
>
> 20. **From the aforesaid discussion what emerges is that the credit of excise duty in the register maintained for the said purpose is only a book entry. It might be utilised later for payment of excise duty on the excisable product.** It is

entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. It matures when the excisable product is received from the factory and the stage for payment of excise duty is reached. **Actually, the credit is taken, at the time of the removal of the excisable product.** It is in the nature of a set off or an adjustment. **The assessee uses the credit to make payment of excise duty on excisable product. Instead of paying excise duty, the cenvat credit is utilized, thereby it is adjusted or set off against the duty payable and a debit entry is made in the register.** Therefore, this is a procedure whereby the manufacturers can utilise the credit to make payment of duty to discharge his liability. **Before utilization of such credit, the entry has been reversed, it amounts to not taking credit. Reversal of cenvat credit amounts** to non-taking of credit on the inputs.

21. Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest. Section 11AB of the Act is attracted only on delayed payment of duty i.e., where only duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty, shall in addition to the duty is liable to pay interest. Section do not stipulate interest is payable from the date of book entry, showing entitlement of Cenvat credit. Interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly.

22. **In the instant case, the facts are not in dispute. The assessee had availed wrongly the Cenvat credit on capital goods. Before the credit was taken or utilized, the mistake was brought to its notice. The assessee accepted the mistake and immediately reversed the entry. Thus the assessee did not take the benefit of the wrong entry** in the account books. As he had taken credit in a sum of Rs. 11,691-00, a sum of Rs. 154-00 was the interest payable from the date the duty was payable, which they promptly paid. The claim of the Revenue was, though the assessee has not taken or utilized this Cenvat credit, because they admitted the mistake, the assessee is liable to pay interest from the date the entry was made in the register showing the availment of credit. According to the Revenue, once tax is paid on input or input service or service rendered and a corresponding entry is made in the account books of the assessee, it amounts to taking the benefit of Cenvat credit. Therefore interest is payable from that date, though, in fact by such entry the Revenue is not put to any loss at all. When once the wrong entry was pointed out, being convinced, the assessee has promptly reversed the entry. In other words, he did not take the advantage of wrong entry. He did not take the Cenvat credit or utilized the Cenvat Credit. It is in those circumstances the Tribunal was justified in holding that when the assessee has not taken the benefit of the Cenvat credit, there is no liability to pay interest. Before it can be taken, it had been reversed. In other words, once the entry was reversed, it is as if that the Cenvat credit was not available. Therefore, the said judgment of the Apex Court has no application to the facts of this case. It is only when the assessee had taken the credit, in other words by taking such credit, if he had not paid the duty which is legally due to the Government, the Government would have sustained loss to that extent. Then the liability to pay

> interest from the date the amount became due arises under Section 11AB, in order to compensate the Government which was deprived of the duty on the date it became due. Without the liability to pay duty, the liability to pay interest would not arise. The liability to pay interest would arise only when the duty is not paid on the due date. If duty is not payable, the liability to pay interest would not arise."
>
> **(emphasis supplied)**

43. In view of the specific finding recorded by the Commissioner in the impugned order that though the appellant had taken credit of Rs. 13,60,54,686/- during the year 2005-2006, but the appellant had utilized only half the amount i.e. Rs. 6,80,27,343/-, the appellant would not be liable to pay interest or penalty on the balance amount since it was not utilised by the appellant, in view of the aforesaid two decisions of the Bombay High Court and the Karnataka High Court in **Satish Industries** and **Bill Forge Pvt. Ltd.**

Invocation of Extended Period

44. The last submission advanced by learned counsel for the appellant is on the invocation of the extended period contemplated under the proviso to section 73(1) of the Finance Act. The Commissioner held that the extended period was correctly invoked by the Department since there was suppression of facts with intent to avoid payment of service tax for the reason that the appellant had failed to furnish full details of the CENVAT credit taken during the period.

45. Learned counsel for the appellant submitted that since the availability of credit on tower, angels, channels, beams and shelters was a subject matter of litigation, the extended period of limitation could not have been invoked as the appellant entertained a bonefide belief that it was entitled to take CENVAT credit. In support of this submission learned counsel pointed out that conflict of opinion on the said issue was ultimately resolved by a Larger Bench of the Tribunal in **Tower Vision**

India. In support of this contention learned counsel also placed reliance upon decisions of the Tribunal.

46. In the instant case, the period of dispute is from September 2004 to December 2007. The show cause notice was issued on 14.05.2008. The period from April 2007 to December 2007 would fall within the normal period, while that from September 2004 to March 2007 would fall beyond the normal period contemplated under section 73(1) of the Finance Act.

47. A Division Bench of the Tribunal in **M/s. Bharti Airtel Ltd.** vs. **C.C.E. Bangalore-I,** observed as follows:

> "As discussed above, in the instant issue different High Courts have given different judgements. There was difference of opinion between members of CESTAT. The issue was referred to Larger Bench. **It clearly indicates that the issue involved is of interpretation of a question of Law and therefore, mala fides cannot be attributed.** The appellants submitted that they have been regularly filing returns. Hon"ble High Court of Karnataka MTR Foods Ltd 2012(282) ELT 196 held that under such circumstances, extended period cannot be invoked. **We find that Hon"ble High Courts/Tribunals have consistently held that extended period cannot be invoked under such circumstances and demands are barred by limitation."**
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> **(emphasis supplied)**

48. In **Vodafone Essar South Ltd.,** the Tribunal observed as follows:

> "In view of the various decisions settling the issue, we are of the considered view that the issue in the present appeals was of an interpretation nature i.e. as to the eligibility of Cenvat credit or otherwise on the towers and building and had to be settled in the hands of the High Court. Therefore, the appellant could have entertained a *bona fide* belief."

49. Thus, in view of the observations made in the aforesaid decisions of the Tribunal and the fact the issue as to whether credit could be taken or not was ultimately resolved by a Larger Bench of the Tribunal, the extended period of limitation could not have been invoked by the Department. The confirmation of demand for the period prior to March 2007, therefore, cannot also be sustained for this additional reason.

50. Thus, for all the reasons stated above, the impugned order dated 22.10.2009 passed by the Commissioner cannot be sustained and is, accordingly, set aside. The appeal is, accordingly, allowed.

(Pronounced in open court on 13/09/2021.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

PK/Shreya