CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO. 1

SERVICE TAX APPEAL NO. 86623 OF 2021

(Arising out of Order–in-Appeal No. PVNS/23/RGD-APP/2019-20 dated 30.08.2019 passed by Commissioner of Central Tax, Central Excise and Service Tax, Raigarh (Appeals))

M/s. Reliance Jio Infocomm Ltd. **.... Appellant**
Building No. 5B, 1st Floor,
Reliance Corporate Park,
Thane Belapur Road, Ghansoli,
Navi Mumbai-400701

Versus

Assistant Commissioner, CGST & Central Excise, Belapur-IV Division **.... Respondent**
Ground Floor, CGO Complex, CBD Belapur,
Navi Mumbai-400614

APPEARANCE:

Shri Rafique Dada, Senior Advocate, Shri Vipin Jain, Shri Vishal Agarwal, Shri Zuber Dada, Shri Kartik Dedhe, Advocates for the Appellant

Shri Shambhu Nath and Shri Dilip Shinde, Authorised Representatives of the Department

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 16.03.2022
Date of Decision: 18.04.2022

FINAL ORDER NO. A/85331/2022

JUSTICE DILIP GUPTA:

Reliance Jio Infocomm Ltd[1] has filed this appeal to assail the order dated 30.08.2019 passed by the Commissioner of Central Tax (Appeals), Raigarh[2] by which the appeal, that was filed by the appellant for setting aside the order dated 10.04.2018 passed by the Assistant Commissioner rejecting the refund claim filed by the

---

1 the appellant
2 the Commissioner (Appeals)

appellant under section 11B of the Central Excise Act, 1944 as made applicable to service tax matters by section 83 of the Finance Act 1994[3], has been dismissed.

2. The appellant is a telecom operator and claims to be offering Long Term Evolution-Fourth Generation[4] wireless telecommunications. For the purpose of rendering such telecommunication services, various monopoles, masts, poles and telecom towers which house the radio transmission and reception equipments such as antennas, routers, switches and electrical utility items like SMPs and battery have been installed by the appellant across the country. Monopoles, masts, poles and telecom towers shall collectively, for the sake of convenience, be called as 'towers', though they are known as separate articles in the market.

3. The dispute in the present appeal is:

a) Whether the appellant is justified in availing CENVAT credit of central excise duty paid on towers, doors, racks, fall arrestor system, insulation material etc. as inputs and/or capital goods as defined in rules 2(k) and 2(a) of the CENVAT Credit Rules, 2004[5] during the period from March 2014 to June 2017 for payment of service tax on the telecommunication services provided by the appellant; and

b) Whether the appellant is entitled to refund of the said CENVAT credit, which was reversed by it 'under protest' on 29.06.2017 21.09.2017 and 14.10.2017, without there being either a determination on the issue of eligibility to avail CENVAT credit or issue of a show cause notice.

---

3 the Finance Act
4 LTE 4G
5 the 2004 Rules

5. The appellant claims that the 4G towers installed by it are different from the 2G/3G towers that used to be installed earlier by other operators for the reason that the towers of the appellant are merely fastened above the ground on a foundation using **nuts and bolts,** unlike the towers of operators providing 2G/3G services whose towers were **embedded in the earth**. According to the appellant, the towers installed by it can be moved to other locations and in fact, have been moved on several occasions without causing any damage to the towers.

6. The department conducted an audit of the records of the appellant for the period April 2010 to September 2015 and the appellant was called upon to explain its eligibility to credit availed on towers. The appellant submitted an explanation but by a letter dated 03.11.2015 the Superintendent issued an audit report stating that the appellant had wrongly availed credit on telecom towers.

7. The appellant, thereafter, reversed CENVAT credit amounting to Rs.2,53,53,30,484/- 'under protest'. The said credit was availed during the period March 2014 to June 2017, out of which credit of Rs.2,44,03,60,834/- was availed as 'inputs' and credit of Rs.9,49,69,650/- was availed as 'capital goods'.

8. Soon after the reversals were made, the appellant was advised that such reversal of credit was not warranted in the absence of any show cause notice or determination of liability and in any event, the judgments of the Bombay High Court in **Bharti Airtel Ltd.** vs. **Commissioner of Central Excise, Pune-III**[6] and **Vodafone India Ltd.** vs. **Commissioner of Central Excise, Mumbai-II**[7] did not

---

6 **2014 (35) S.T.R. 865 (Bom.)**
7 **2015 (40) S.T.R. 422 (Bom.)**

apply to the facts of the case of the appellant. Accordingly, the appellant filed a claim for refund of the credit reversed by an application dated 10.11.2017 pointing out that the telecom towers installed by it were movable in nature since they were merely fixed with nuts and bolts on a foundation and not embedded in the earth as a result of which they could be dismantled and relocated without causing any damage.

9. The Assistant Commissioner, Belapur, however, issued a show cause notice dated 17.01.2018 alleging that the goods on which CENVAT credit had been availed were neither 'capital goods' nor 'inputs' as defined under the 2004 Rules as they were 'attached to the earth', being immovable structures 'fixed to ground'. The show cause notice also relied on the judgment of the Bombay High Court in **Bharti Airtel** and alleged that since the said goods were immovable property, credit was not admissible. Accordingly, the show cause notice proposed to reject the refund application.

10. The appellant filed a detail reply dated 07.02.2018 to the aforesaid show cause notice and justified its eligibility to avail credit and also its entitlement to claim refund.

11. The submissions made by the appellant were not accepted and the refund application was rejected by the Assistant Commissioner for the following reasons:

(i) Towers and parts thereof are fixed to the earth on installation and become immovable and, therefore, cannot be considered to be goods;

(ii) The Bombay High Court in **Bharti Airtel** and **Vodafone India** held that telecommunication towers, being immovable in nature, are neither capital goods nor inputs;

(iii) Towers, whether fixed on rooftop or land, occupy space and enjoy the benefit of the area on which it is fixed. It creates restriction on mobility of others to use that particular area or space;

(iv) The decisions of the Supreme Court in **Commissioner of Central Excise, Ahmedabad** vs. **Solid & Correct Engineering Works**[8] and **Mallur Siddeswara Spinning Mills (P) Ltd.** vs **Commissioner of Central Excise, Coimbatore**[9] and that of the Tribunal in **I.G.E. (India) Ltd.** vs. **Collector of Central Excise**[10] were inapplicable as the same were rendered in the context of a generator or X-ray equipment, which are 'capital goods' in terms of rule 2(a) of 2004 Rules, unlike towers which are not 'capital goods';

(v) Towers are classifiable under Excise Tariff Heading[11] 7308, which is not one of the specified headings covered under rule 2(a) (A) of the 2004 Rules. Also, towers cannot be said to be part, component or an accessory of specified capital goods; and

(vi) In terms of the definition of 'input' in rule 2(k) of the 2004 Rules, a manufacturer is entitled to credit of inputs and not a service provider. In so far as a service provider is concerned, it can avail credit only if inputs are used for manufacturer of capital goods as defined in rule 2(a). Towers, not being capital goods, credit as inputs is not admissible.

12. Feeling aggrieved by the said order dated 10.04.2018 passed by the Assistant Commissioner, the appellant filed an appeal before the Commissioner (Appeals) contending that the judgment rendered by the Delhi High Court in **Vodafone Mobile Services Limited** vs.

---

8 2010 (252) E.L.T. 481 (S.C.)
9 2004 (166) E.L.T. 154 (S.C.)
10 1991 (53) E.L.T. 461 (S.C.)
11 ETH

Commissioner of Service Tax, Delhi[12] was applicable to the case of the appellant and that the judgments of the Bombay High Court in **Vodafone India** and **Bharti Airtel** were inapplicable, as the mobile towers of the appellant were merely fixed or attached to the foundation by nuts and bolts and were not embedded into the earth.

13. The Commissioner (Appeals) did not accept the contention advanced by the appellant and upheld the order passed by the Assistant Commissioner on the grounds that:

(i) The towers and parts thereof are fastened and fixed to the earth and after their erection become immovable property and therefore, cannot be considered as goods;

(ii) Also, the towers and parts thereof in CKD condition are classifiable under ETH 7308 and do not satisfy the conditions stipulated in clauses (i) and (ii) of rule 2(a) (A) of the 2004 Rules so as to be eligible for credit as capital goods;

(iii) The towers and their parts are also not components, spares or accessories of capital goods falling under any of the Chapter Headings specified in clause (i) of rule 2(a)(A) of the 2004 Rules;

(iv) The Bombay High Court in **Bharti Airtel** and **Vodafone India** held that telecommunication towers, being immovable in nature, are neither capital goods nor inputs under the 2004 Rules and consequently credit is not admissible;

(v) The judgment of the Supreme Court in **Solid & Correct Engineering** is not applicable as the plant in that case was fixed at site to a foundation to give stability to the plant and to keep its operation vibration free and that the said plant was

---

12 2019 (27) G.S.T.L 481 (Del.)

moved after completion of the road construction and repair project; and

(vi) The judgment of the Delhi High Court in **Vodafone Mobile Services** would also not be applicable since the judgments of the jurisdictional Bombay High Court in **Bharti Airtel** and **Vodafone India** are binding.

14. This appeal has been filed to assail the order dated 30.08.2019 passed by the Commissioner (Appeals).

15. Shri Rafique Dada, learned senior counsel assisted by Shri Vipin Jain, Shri Vishal Agarwal, Shri Zuber Dada and Shri Kartik Dedhe made following submissions:

(i) As it is not the case of the department that the towers and other accessories on which CENVAT credit has been availed are rooted in the earth or embedded in the earth or attached to what is embedded in the earth for permanent beneficial enjoyment of that to which it is attached or permanently fastened to anything attached to the earth, credit cannot be questioned on the ground that on installation the towers and other accessories become immovable property and consequently cease to be goods;

(ii) The towers installed by the appellant are not permanently fastened or permanently fixed on the foundation. The towers of the appellant are fastened with ‘nuts and bolts’ on the foundation which is erected above the ground. The nuts and bolts assembly for all the towers is above the ground. Therefore, no part of the tower is ‘embedded’ in the earth, unlike the erstwhile towers in **Bharti Airtel** and **Vodafone India** decided by the Bombay High Court. The appellant had, at all stages of the proceedings, made this averment in all its

pleadings and the same has not been disputed by the department at any stage;

(iii) The telecom services provided by the appellant are based on LTE 4G technology and operate in a spectrum where the average height and weight of towers is lesser than that of erstwhile towers used by operators to render services based on 2G/3G technology;

(iv) The towers of the appellant, being merely attached on the foundation with nuts and bolts, can be easily moved and have, in fact, been moved to the other locations without any damage, unlike the traditional towers, which on account of being embedded in the earth, suffered damage on relocation;

(v) The facts of the present case are entirely different from those before the Bombay High Court in **Bharti Airtel** and **Vodafone India**, where the High Court examined the question as to whether a tower which was **admittedly** 'embedded in the earth' was to be regarded as immovable property or not. In **Bharti Airtel**, there was a clear concession made by the operator that the tower was immovable. In **Vodafone India**, there was no such direct admission but it was contended that despite the towers being 'embedded in the earth', the same were to be considered as movable property since, such embedment was not for the beneficial enjoyment of land. The decision of the Delhi High Court in **Vodafone Mobile Services** is squarely applicable to the facts of the appellant;

(vi) The judgments of the Bombay High Court in **Bharti Airtel** and **Vodafone India** have also not considered the test of permanency as laid down by the Supreme Court in **Solid & Correct Engineering** and the eligibility of credit is required to be determined at the time of receipt of the goods;

(vii) The show cause notice did not dispute that the towers were used for the provision of output services. The Assistant Commissioner and the Commissioner (Appeals) have also not come to such a conclusion. The only reason that has been assigned is that the Bombay High Court has held in **Bharti Airtel** that the telecom towers, being immovable, do not qualify as capital goods or inputs. As the towers in the instant case are not immoveable, the judgement of the Bombay High Court in **Bharti Airtel** would not be applicable for holding that telecom towers do not qualify as inputs and/or capital goods;

(viii) Insofar as the credit availed as 'capital goods' to the tune of Rs.9,49,69,651/- is concerned, the same is with respect to the goods which have been classified under Chapters 84 and 85 of the First Schedule to the Central Excise Tariff Act, 1985[13], which Chapters are specified under clause (i) of rule 2 of 2004 Rules, as being capital goods;

(ix) The balance credit has been availed as 'inputs' in respect of which there is no dispute that the same were used for provision of output service, which is the only requirement in law; and

(x) Even if the said credit had been availed as capital goods, the same would have been admissible, as the towers are clearly 'accessories', if not parts and components, of the 'e-Node B' system;

16. Shri Shambhunath and Shri Dilip Shinde, learned authorized representatives of the department have, however, supported the impugned order passed by the Commissioner (Appeals) and made the following submissions:

---

13 the Excise Tariff Act

(i) The refund application filed by the appellant is premature as the refund reversed on protest becomes due only if the show cause notice issued under rule 14 of the 2004 Rules is decided in favour of the appellant. In the present case, the show cause notice dated 12.03.2019 has not been adjudicated upon and so the finding recorded by the Commissioner (Appeals) is correct. In this connection reliance has been placed upon the judgments of the Jharkhand High Court in **Gyan Enterprises Trade Division** vs. **Coal India Ltd.**[14] and of the Karnataka High Court in **Primacy Industries Ltd.** vs. **Union of India**[15];

(ii) The goods, being towers and their parts, would fall under Chapter 73 of the Excise Tariff Act and, therefore, would not be "capital goods" under rule 2(a) of the 2004 Rules;

(iii) The towers are also not accessories of the telecommunication devices fixed on the towers as the towers do not perform any function of the telecommunication equipments;

(iv) The contention of the appellant that the towers enhance the effectiveness of the telecommunications system is not correct;

(v) The towers are used as a structure supporting telecommunication equipment and as per definition of "input" in rule 2(k) of the 2004 Rules, goods used for laying of foundation or making of structures for support of capital goods are specifically excluded from the definition of "input" with effect from 01.07.2012;

(vi) The contention of the appellant that the judgments of the Bombay High Court in **Bharti Airtel** and **Vodafone India** would not be applicable since the services provided by the appellant are based on LTE 4G technology, unlike the towers

---

14 2017 (347) E.L.T. 65 (Jhar.)
15 2020 (374) E.L.T. 578 (Kar.)

used by the other operators to render services based on 2G/3G technology, is not tenable since the towers used for supporting 2G/3G/4G technology are towers supporting capital goods. In support of this contention, reliance has been placed on the Larger Bench decision of the Tribunal in **M/s. Wipro Ltd. v. Commissioner of Central Excise, Bangalore-III**[16] ; and

(vii) Telecommunication towers irrespective of size or location used for support of capital goods for transmitting 2G/3G/4G are neither "capital goods" nor "input" under the 2004 Rules.

17. The submissions advanced by the learned senior counsel for the appellant and the learned authorized representatives of the department have been considered.

18. The appellant has, to support its claim, stated the following facts:

(i) The appellant is an all India based telecom operator having a license and spectrum capable of offering LTE 4G wireless telecommunication services and for providing such services it was necessary for the appellant to set up e-Node B sites at various locations;

(ii) An e-Node B site generally comprises the following:

a. Radio transmission and reception equipments like antennas, routers, switches. These equipments shall collectively be referred to as **"transmission/reception equipments"**;

b. Electrical utility items like SMPS, battery and DG and associated electrical cables. These can collectively be referred to as **"electrical utility items"**;

---

16 2018 (363) E.L.T. 1111 (Tri. – L.B.)

c. Towers comprising masts or poles or pipes or angles. These can collectively be called **"towers"**; and

d. Ancillary items like arrestor, bolts, bus bar, cabinet, canopy, clamp, fall protection system, insulation material, pipe pole mount and rack. These can collectively be called **"ancillary items"**.

(iii) The towers at such e-Node B sites could be of one of the following four types depending on the type of poles/pipes used for fixing the transmission/ reception equipment and ancillary items on/inside the towers:

a. Towers located on vacant plots of land:

i. Ground Based Mast (GBM) – Monopole tower

ii. Ground Based Tower (GBT) – 3 or 4 legged angular/ tubular lattice tower of height from 30 meters onward.

b. Towers located on roof tops/ terraces of buildings:

i. Roof Top Pole (RTP) – single pole of height ranging from 3 metres to 9 metres.

ii. Roof Top Tower (RTT) – 3 or 4 legged tubular/angular lattice tower of height ranging from 6 metres to 18 metres.

(iv) Each of the aforesaid four towers are described below:

a. **GBM Mobile Towers** – In case of GBM (i.e., single mast), only one concrete foundation is made on the vacant plot of land by drilling four or six anchor bolts into the ground and grouted with cement slurry. Typically, the anchor bolts are of diameter of 52 mm and length ranging from 170 mm to 950 mm and the dimensions of the pile cap foundation range from 1.5 x 1.5 x 0.75 metres up to 2.8 x 2.8 x 1.5 metres, depending on soil conditions. The

tower/pole is attached to the cement concrete foundation with nuts and bolts;

b. **GBT Mobile Towers** – In case of GBT (i.e. three legged tower), for each leg of the tower, one concrete pedestal is made on the vacant plot of land, comprising of a raft type foundation and Cast In Parts made from pipes and flanges/foundation bolts. All the three legs of the tower are then fixed using nuts and bolts on the concrete pedestal. The size of such foundations depends on soil conditions and they may vary from 5 x 5 x 1.2 metres up to 10 x 10 x 3.5 metres;

c. **RTT/RTP Mobile Towers** – In case of RTT/RTP, three to six pedestals are required on the roof top of a building, comprising four bolts for each leg of the tower/pole attached to the cement concrete foundation. The dimensions of the pedestals ranges from 500 mm x 500 mm x 500 mm upto 700 mm x 700 mm x 700 mm, depending on the structural stability report and arrangement of the walls, columns, beams, floor etc. of the building.

(v) As the telecommunication services of the appellant use LTE 4G technology, the average height of the towers is lesser (3 to 18 metres for RTT/RTP and 30 to 60 metres for GBM/GBT) as compared to the towers of other telecom operators in India who used the old 2G/3G technology;

(vi) For efficient and smooth transmission and reception of telecommunication signals over maximum area around a tower, transmission and reception equipments of each e-Node B sites are fixed with nuts and bolts on the tower at a specified height in a specified direction and the other accessories are inside the

cabinets of the hollow portion of a mast. All such transmission and reception equipment and ancillary items are connected through cables and are powered continuously by electricity or diesel generator/battery bank placed at the e-Node B site. The primary function of the transmission and reception equipment is to transmit and receive wireless signals of the subscriber's equipment like mobile handsets, Jio-Fi devices (i.e. dongles), etc. Various e-Node B sites in a pre-defined geographical area are connected to an Aggregation Centre through Optical Fibre Cables, where the telecommunication signals from various e-Node B sites get aggregated;

(vii) All the towers, transmission and reception equipments, electrical utility items and ancillary items installed at an e-Node B site of the appellant continue to remain movable at all times;

(viii) Each tower of the appellant (whether set up on vacant land or on roof tops of buildings) is attached by nuts and bolts to a foundation of cement concrete. The design and specifications of such foundation are determined by structural engineers appointed by the appellant, keeping in view the height and weight of a mobile tower, type of soil of vacant land, structural stability survey of a building, climatic and other environmental factors;

(ix) Keeping in mind the possible necessity of relocating its e-Node B sites in future from one place to another place at minimum operational costs and disruption to the services being provided to the subscribers, new designs have been developed by appellant for the foundation, towers and ancillary items as compared to the older designs of other telecom players who had established their BTS/BSC/Cell sites (Base Transceiver Station) 15 to 20 years ago, when the telecom industry was still in its

nascent stage. Earlier BTS/BSC/Cell sites generally had cement concrete foundations in which the base portion of the towers and parts thereof were embedded/fixed in such a manner that if and when these towers were required to be relocated, there was a possibility of substantial damage to the material thereby making the towers non usable “as it is”. On the other hand, to avoid damage of the material used at the e-Node B site (including towers and ancillary items) and for quick, smooth removal and relocation thereof, the appellant makes a concrete foundation on vacant plots and all the four different types of towers are fixed to the foundation simply by bolting nuts to the pedestals or the foundation bolts. The said foundation bolts are already embedded to the foundation while such foundation is being laid;

(x) The transmission and reception equipment are classifiable under ETH 8517 and electrical utility items are classifiable under Chapters 84 and 85 of the Excise Tariff Act. Hence, they qualify as ‘capital goods’ as defined in the 2004 Rules;

(xi) The appellant has availed CENVAT credit on such equipment and there is no dispute raised by the department with regard to such CENVAT credit. The appellant has not availed CENVAT credit on materials like cement, sand , gravel, anchor plate, flange, CIP pipes, bolts etc. and services like construction services for making cement concrete foundations of the mobile towers; and

(xii) All the goods were used by the appellant for setting up e-Node B sites, including towers, which goods are being used by the appellant for the purpose of providing telecommunication services. It is impossible for the appellant to provide telecommunication services without using the aforesaid goods, as the telecommunication signals of millions of its subscribers

> cannot be received or transmitted without the use of the aforesaid goods. Thus, there is a clear and sufficient nexus between the aforesaid goods and the output telecommunication services of the appellant and, therefore, these goods qualify as capital goods/inputs as defined under the 2004 Rules.

19. The appellant claims that as the audit team had objected to availing CENVAT credit, it reversed the said CENVAT credit aggregating to Rs. 2,53,53,30,484/- during the period from June 29, 2017 to October 14, 2017 under protest so as to avoid interest liability. Thereafter, the appellant filed a refund claim in terms of section 142(3) of Central Goods and Services Tax Act, 2017. However, a show cause notice dated 17.10.2018 was issued to the appellant alleging therein that the goods on which CENVAT credit had been taken by the appellant did not qualify either as 'capital goods' or 'inputs' under the 2004 Rules since, "the telecom towers which comprises items like mast, poles, doors, rack, fall arrestor systems, insulation material, and outdoor cabinets are attached to the earth being immovable structure fixed to ground". The show cause notice also referred to the decision of the Bombay High Court in **Bharti Airtel**. The appellant filed a detailed reply pointing out that the towers of the appellant were movable, unlike the towers under consideration in **Bharti Airtel** which were immoveable. The explanation offered by the appellant was not accepted and the application filed for refund was rejected. The appeal filed by the appellant before the Commissioner (Appeals) was also dismissed.

20. In order to appreciate the contentions advanced on behalf of the appellant and the respondent, it would be useful to reproduce the

definition of 'capital goods' and 'input' under the rule 2(a) and rule 2(k), respectively, of the 2004 Rules.

21. 'Capital goods' have been defined in rule 2(a) and the relevant portion is as follows:

> "**2(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 and wagons of sub-heading 860692 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;
>
> (vii) storage tank, and
>
> (viii) motor vehicles other than those falling under tariff headings 8702, 8703, 8704, 8711 and their chassis but including dumpers and tippers.
>
> used -
>
> (1) in the factory of the manufacturer of the final products,; or
>
> (1A) xxxxxxxxxxx
>
> (2) for providing output service;
>
> (B) xxxxxxxxxxxxx
>
> (C) xxxxxxxxxxxxx
>
> (D) xxxxxxxxxxxxx"

22. 'Input' has been defined in rule 2(k) and the relevant portion is as follows:

> "**2(k)** "input" means –
>
> (i) all goods used in the factory by the manufacturer of the final product; or
>
> (ii) xxxxxxxxx
>
> (iii) xxxxxxxxx
>
> (iv) all goods used for providing any output service, or;
>
> (v) xxxxxxxxx
>
> but excludes -
>
> (A) xxxxxxxxxx

(B) xxxxxxxxxx

(C) xxxxxxxxxx

(D) xxxxxxxxxx

(E) xxxxxxxxxx

(F) any goods which have no relationship whatsoever with the manufacture of a final product.

Explanation. - xxxxxxxxxx"

23. Rule 3(1) of the 2004 Rules permits a provider of output service to take credit of the excise duties paid on any 'inputs' and 'capital goods'.

24. The first and fundamental issue that needs to be decided in the present appeal is as to whether towers are movable property or immovable property. This is for the reason that if they are immovable property, they would not be excisable goods.

25. The expression 'movable property' has been defined in section 3(36) of the General Clauses Act, 1897 to mean property of every description, except immovable property. Section 3 of the Transfer of Property Act, 1882, provides that unless there is something repugnant in the subject or context, 'immovable property' would not include standing timber, growing crops or grass. Section 3(26)of the General Clauses Act, 1897, provides that '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. The term 'attached to the earth' has not been defined in the General Clauses Act, 1897 but section 3 of the Transfer of Property Act defines the expression 'attached to the earth' to mean:

(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.

26. The 'permanency test' was examined at length by the Supreme Court in **Solid & Correct Engineering Works.** In this case the Supreme Court drew a distinction between machines which by their very nature are intended to be fixed permanently to the structures embedded in the earth and those machines which are fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because foundation was necessary to provide a wobble free operation to the machine. The relevant portion of the judgment is reproduced below:

> "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 movable 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 movable 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 movable 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."
>
> **(emphasis supplied)**

27. Earlier, the Supreme Court in **Triveni Engineering & Indus. Ltd.** vs. **Commissioner of Central Excise**[17] had also observed 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 have to be ascertained from the facts and circumstances of each case and the relevant portion of the judgment is reproduced below:

> "**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.**"
>
> **(emphasis supplied)**

28. It would also be relevant to refer to the decision of the Supreme Court in **Sirpur Paper Mills Ltd.** vs. **Collector of Central Excise, Hyderabad**[18] wherein the Supreme Court observed that merely because a machine is attached to earth for more efficient working and

---

17 **2000 (120) E.L.T. 273 (S.C.)**
18 **1998 (97) E.L.T. 3 (S.C.)**

operations it would not per se become immovable property. The observations are as follows:

> "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.**"
>
> **(emphasis supplied)**

29. In **Mallur Siddeswara Spinning Mills (P) Ltd.**, the Supreme Court held that mere bolting of machine to a frame from which it can be unbolted and then shifted would not render the machine to be an immoveable property. The observations of the Supreme Court, in this connection, are reproduced below:

> "2. Briefly stated the facts are as follows :-
>
> The Appellants are in the business of spinning cotton yarn. It is claimed that in Salem there is acute power shortage. Thus two generator sets were installed in their factory one on 13th March, 1991 and the second on 15th January, 1992. Show Cause Notice dated 2nd July, 1993 was issued to them claiming duty on manufacture of generating sets. The Collector confirmed the demand for duty holding that there was deliberate suppression of the fact of manufacture of generating sets. The Appeal preferred by the Appellants has been dismissed by the Tribunal by the impugned Judgment.
>
> 3…….

> 4.....
>
> 5.....
>
> 6. It was next submitted that in any event the generating set was immovable property and thus no excise duty was payable on it. We are unable to accept this submission also. It is admitted position that the generating sets have been bolted on a frame. **If the generating set is only bolted on a frame it is capable of being unbolted and being shifted from that place.** It is then capable of being sold. **Under these circumstances it could not be said that the generating sets manufactured by the Appellants are immovable property."**
>
> **(emphasis supplied)**

30. To appreciate the issue involved, it would be necessary to examine the manner of installation of the towers by the appellant. The telecom towers housing the telecom reception and transmission apparatus and other equipments of the appellant are merely fastened on a foundation, above the ground, using 'nuts and bolts'. The foundation is designed by structural engineers keeping in view the height, weight, type of soil, climatic and other environmental factors. No part of these towers are embedded in the earth, as was the case with the telecom towers which were pre-2014 period set up by other telecom operators. The present telecom towers are also architecturally different from the traditional telecom towers. Moreover, as the traditional telecom towers were partly embedded in the earth, any relocation of said towers used to result in some damage, at least to portions of the towers which were embedded in the earth. Such traditional towers were thus not usable 'as such' on being dismantled from the existing sites.

31. A perusal of judgment of the Bombay High Court in **Bharti Airtel** shows that it was an **admitted and undisputed** position taken by the appellant before the High Court that the towers were embedded

in the earth and thus, were immovable structures, non-marketable and non-excisable. In fact, the towers were similar to those towers in **Commissioner** vs. **Hutchison Max Telecom Private Limited**[19] and **State of Andhra Pradesh** vs. **BSNL**[20], wherein the towers were embedded in the earth and relocation of the same involved damage to parts like cable tray, etc. which were embedded/ fixed to civil structure as also to the BTS microwave equipment.

32. The appellant had repeatedly emphasized that the towers of the appellant were neither embedded nor "permanently" fixed or fastened to the earth/foundation and in fact, were merely attached to the foundation above the ground using nuts and bolts so that no damage was caused to any part of the tower on re-location. The show cause notice does not dispute that the towers were fastened on a foundation above the ground using nuts and bolts, nor does the order passed by the Assistant Commissioner or the Commissioner (Appeals) dispute this factual position.

33. The judgment of the Bombay High Court in **Bharti Airtel**, it needs to be again noted, proceeded on a footing that the towers in issue were immovable structure and in this connection the relevant paragraphs of the judgment are reproduced below:

> "25……..However, in the present case the facts are distinct. **The towers are admittedly immovable structures and non-marketable and nonexcisable.** We therefore, of the clear opinion that this judgment of the
> Division Bench of Andhra Pradesh High Court is inapplicable in the facts of the present case……."
>
> 35……..."Again, the cited judgment does not improve the appellant's case inasmuch as the tower being **an admittedly**

---

19 **2008 (224) ELT 191**
20 **2012 (25) S.T.R. 321 (A.P.)**

> **immovable** structure cannot be accessory of any kind of instrument. **The appellant's admission of the immovable nature of the towers is found in para** (J.3) of Grounds of Appeal No. ST/145/2009."
>
> "38……..The first requirement in this case is not met by the towers **which are admittedly immovable structures and ipso facto nonmarketable** and non-excisable……"
>
> **(emphasis supplied)**

34. Learned authorized representative appearing for the department also placed reliance upon the subsequent judgment of the Bombay High Court in **Vodafone India**. In this case also the towers were admittedly embedded in the earth, which fact is evident from the substantial questions of law that were framed by the High Court for its determination and the relevant extract is reproduced below:

> "2. According to the appellant, these appeals give rise to the following substantial questions of law :
>
> (a) Whether in the facts and circumstances of the case the Tribunal has erred in law by adding an additional condition through interpretation in Rule 2(k) of the Cenvat Credit Rules, 2004 being that the goods that are used for providing output services should not be embedded in earth?
>
> …….
>
> (k) Whether the Tribunal erred in law to appreciate that the identity of towers and pre-fabricated buildings/shelters are not lost merely when they are embedded in the earth prior to use and continue to qualify as 'inputs' under Rule 2(k) of the Cenvat Credit Rules, 2004?
>
> …….
>
> (n) Whether the Tribunal failed to appreciate that the process of embedding the Towers and pre-fabricated buildings/shelters is not a permanent process and the same can be removed and reinstalled at another location and they are merely embedded for proper functioning
>
> and, therefore, are not immovable property?"

35. As noticed above, there is neither any allegation nor finding that the towers of the appellant are embedded in the earth. In fact, the towers of the appellant are erected above the ground on a foundation using nuts and bolts. This aspect is crucial for deciding whether the telecom towers are immovable property or moveable property as was observed by the Supreme Court in **Solid** and **Correct Engineering Works**. The towers of the appellant do not satisfy any of the stipulations laid down by the Supreme Court for being regarded as immovable property. The towers are neither land nor benefits arising out of land nor are the same attached to the earth or permanently fastened to anything attached to earth. The towers are merely fastened above the ground to a foundation using nuts and bolts. The fastening is, therefore, not **permanent**, since the towers can be easily unfastened and in fact, according to the appellant, have been moved on a number of occasions without any damage from one location to another.

36. It also needs to be noticed that in **Bharti Airtel**, the Bombay High Court specifically mentioned that it was not deciding the wider question with respect to eligibility of tower per se but was restricting its conclusions to the facts and circumstances which fell for consideration in the appeal before it. The relevant observations are as follows:

> "33. ..... 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."

37. In **Vodafone India**, the Bombay High Court based its judgment on **Bharti Airtel**. The judgments of the Bombay High Court in **Bharti**

Airtel and **Vodafone India** were rendered in the context of the admitted factual position that the towers therein were embedded in the earth. However, there is enough evidence in this appeal to conclude that the towers are not embedded in the earth and in fact, the towers are merely bolted to a foundation that is above the ground using nuts and bolts, and can be and have been moved without any damage from one location to another. Thus, the judgments of the Bombay High Court in **Bharti Airtel** and **Vodafone India** cannot be said to be an authority for the proposition that CENVAT credit would not be available in respect of **any** telecom tower. The Delhi High Court in **Vodafone Mobile Services** had also taken note of the fact that the assessee in **Bharti Airtel** had admitted before the Bombay High Court that the towers on which credit had been availed were immoveable property and consequently, the said judgment could not be applied as a binding precedent, since the facts were different. The Delhi High Court also observed that attachment of towers with the help of nuts and bolts to a foundation to provide stability to the working of the towers and prevent vibration and ensure wobble free operation would not per se qualify as 'attached to the earth' under any of the three clauses of section 3 of the Transfer of Property Act, 1872. The relevant observations of the Delhi High Court are reproduced below:

> "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 inasmuch 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 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.

****

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)**

38. What also needs to be remembered is that the Supreme Court in **Solid & Correct Engineering Works** particularly dealt with a machine that was bolted to a foundation with nuts and bolts and could be moved. This is precisely the situation in the present appeal, unlike the matters before the Bombay High Court in **Bharti Airtel** and **Vodafone India** wherein it was in admitted position that the towers were embedded in the earth.

39. The contention of the revenue is that the towers may not per se be immovable property but they become immovable property once they are permanently embedded in the earth in the sense that they are fixed to a foundation embedded in earth.

40. It is settled law that eligibility to credit is required to be determined on the date of receipt of such goods by the assessee and in the form and manner in which the goods are received and not after they have been installed for effective functioning. The question whether the goods are immovable or movable is, therefore, required to be determined when the goods are received by the assessee and not after they are installed. This is what was held by the Delhi High Court in **Vodafone Mobile Services** and the relevant observations are as follows:

> "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……."

41. According to the appellant, it had started providing telecommunication services from September 2016, but the process of setting up the telecommunication network had started around 2014, for which purpose the appellant purchased capital equipment, including monopoles, masts, poles, doors, racks, fall arrester systems, insulation material, outdoor cabinets. These would, for the sake of convenience, be referred to as telecom towers.

42. It clearly transpires from the material on record that the telecom towers that the appellant procured on payment of central excise duty

were designed differently from the traditional telecom towers that the other telecom operators used for providing the 3G/2G telecom services. The towers of the appellant are smaller in height, lighter in weight and have a provision for housing within the hollow of the poles/mast most of the telecommunication equipments such as radio transmission and reception equipments, electrical utility items like SMPS battery, which earlier in the traditional telecom towers were erected and installed externally on the towers. The telecom towers and the equipments together constitute the Base Transmission Systems[21], which is known in 4G technology as 'e-Node B' site. An e-Node B site comprises transmission/reception equipments, electrical utility items, towers and ancillary items. The towers at such e-Node B sites could either be located on vacant plots of land or on roof tops of buildings for efficient and smooth transmission and reception of telecommunication signals over a maximum area around towers. Transmission and reception equipments of each e-Node B sites are fixed with nuts and bolts on the tower at a specified height in a specified direction and the other accessories are placed inside the cabinets of the hollow portion of the mast. The LTE 4G technology deployed by the appellant and the spectrum of 2200 Ghz, which the appellant was allotted for the purpose of providing telecommunication services, also required a much higher density of telecom towers within a geographical area. The architecture of e-Node B sites was accordingly designed by the engineers of the appellant by reducing the weight, height and dimensions of telecom towers to enable quick and smooth removal for

---

21 **BTS**

the purpose of relocation thereof, as and when required, without any damage either to the tower or to any of its components.

43. Since these equipments and goods had suffered central excise duties, the appellant availed CENVAT credit on such goods, either as 'inputs' or as 'capital goods' from March 2014. The description of the goods installed at e-Node B sites, on which credit was availed either as 'inputs' or as 'capital goods', is provided below:

Serial No.	Description of goods installed at e-Node B sites	Tariff Chapter Heading	CENVAT Credit claimed in Rs.	Primary Function
	Part I (Inputs)			
1.	Ground Base Mast (GBM)	7308	1,41,30,75,486	To place telecom transmission/ reception equipment, battery bank, power source equipment
2.	Pole/Pipe/RTT	7308	44,91,88,951	To place telecom transmission/ reception equipment
3.	Pole Mount	7308	18,60,45,332	To mount antennas
4.	Ground Base Tower (GBT)	4008	18,43,66,801	To place telecom transmission/ reception equipment
5.	Cabinet	7326	7,67,76,717	To house utilities & telecom electronic equipment like battery bank, power source equipments
6.	Clamp	7308	7,41,03,807	To secure water ingress in GBM the GBM Door
7.	Cabinet	9406	1,66,01,901	To house utilities & telecom electronic equipment like battery bank, power source equipments
8.	GBM Door	7308	1,43,06,508	To provide secure access door for equipment inside GBM
9.	Fall Protection System	7308	1,14,62,844	To provide safe work environment to the rigger who climbs on towers/ masts
10.	Canopy	7308	60,75,907	To provide water ingress protection from top of the GBM

11.	Rack	9403	50,34,207	To house/ stack utilities, electronics & other equipment like SMPS, Routers, battery banks etc. in firm condition
12.	Insulation Material	7308	20,47,961	To maintain internal temperature of GBM lesser than Ambient temperature
13.	Bolts	7318	12,74,411	To securely assemble/fasten mating parts of mast/poles/pipes
	Sub-total of inputs		**2,44,03,60,834**	
Serial No.	**Description of Goods installed at e-Node B sites**	**Tariff Chapter Heading**	**CENVAT Credit initially claimed Rs.**	**Primary Function**
	Part-II (Capital Goods)			
1.	Cabinet	8517	4,19,98,921	To house utilities & telecom electronic equipment like battery bank, power source, equipments
2.	Antenna Mount	8529	4,16,49,926	To mount antennas
3.	Bus Bar	8503	1,03,54,279	For termination of cables & wires
4.	Rack	8473	9,25,474	To house/stack utilities, electronics & other equipment like SMPS, Routers, battery banks etc. in firm condition
5.	Arrestor	8538	41,051	For lightening protection
	Sub-total of Capital Goods		**9,49,69,651**	
	Grand Total		**2,53,53,30,484**	

44. It transpires from the aforesaid details that an amount of Rs. 2,44,03,60,834/- pertains to CENVAT credit availed as inputs and the remaining amount of Rs. 9,49,69,651/- relates to CENVAT credit on items which were claimed to be capital goods. The description of the goods on which CENVAT credit was availed as inputs are mainly

Ground Base Mast, Pole/Pipe, Pole Mount, Ground Base Tower, etc. The items on which credit was taken as capital goods are Cabinet falling under heading 8517, Antenna Mount falling under heading 8529, Bus Bar falling under heading 8503, Rack falling under heading 8473, and Arrestor falling under heading 8538.

45. A perusal of the show cause notice indicates that the eligibility to avail credit as inputs was disputed by the department only on the ground that items like “telecom tower which comprises of items like masts, poles, doors, racks, fall arrestor systems, insulation material and outdoor cabinets are attached to earth being immoveable structure fixed to ground.” In order to rebut the alternative claim made by the appellant, the show cause notice also alleged that the aforesaid items are not capital goods for the reason that these goods fall under Chapters 72 and 73 of the Excise Tariff Act which is not one of the specified heading in rule 2(a)(A) of the 2004 Rules. Insofar as the CENVAT credit of Rs. 9,49,69,651/- availed by the appellant as capital goods is concerned, the only ground urged in the show cause notice for denying credit is that these goods are immovable in nature, as was held by the Bombay High Court in **Bharti Airtel**. In respect of these goods, the show cause notice does not dispute that the same are classifiable under specific headings for which CENVAT credit could be availed as capital goods in terms of rule 2(a)(A) of the 2004 Rules.

46. On a perusal of the allegations made in the show cause notice as also the findings of the Commissioner (Appeals), it is evident that there is no dispute that the goods on which credit had been availed, either as inputs or as capital goods have been used for providing output service, which is a pre-requisite for being eligible to avail

CENVAT credit. Thus, it would not be necessary to examine this aspect of nexus with the provision of output service.

47. Insofar as credit to the tune of Rs. 9,49,69,651/- availed as capital goods is concerned, there is no dispute that the said goods are classifiable under Chapters 84 and 85 of the Excise Tariff Act and that the same are specified headings in the definition of capital goods under rule 2(a)(A)(i) of the 2004 Rules. There is absolutely no ground for denying credit in respect of these goods, save and except for the allegation and findings that these goods became immoveable property. It has already been held that these goods, on which the appellant availed credit, even after fixing them to a foundation do not acquire the character of an immoveable property. There is, therefore, no basis for denying credit as capital goods in respect of the goods classifiable under Chapters 84 and 85 of the Excise Tariff Act.

48. Insofar as the balance credit availed as inputs is concerned, the learned authorized representatives of the department urged a new ground, which was not even part of the allegations contained in the show cause notice nor part of the findings of the Commissioner (Appeals), that the definition of input contains an exclusion clause which excludes from the ambit of inputs all goods "used for making structures for support of capital goods". The contention, therefore, is that credit cannot be taken for towers.

49. It is not possible to accept this contention. The telecom towers cannot be regarded as "goods used for making structures for support of capital goods", when they are themselves structures for support of capital goods. The words "used for making" appearing in the exclusion clause cannot be ignored while construing and interpreting the said

exclusion clause. Clearly, the exclusion clause seeks to cover steel items of general use such as angles, channels, bars CTD/TMT bars, which are raw materials used for making structures. Explanation 2 under the definition of 'input', which was inserted on 07.07.2009, specifically refers to these steel items of general use. The said Explanation reads as under:

> "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."

50. Thus, as the telecom towers in the present case are not immoveable property, and since immovability of such towers was the only ground for rejection of the refund claim, it has to be held that all such items on which CENVAT credit was taken as 'inputs' are eligible for credit as inputs.

51. This being the case, there is no need to examine the alternative claim of the appellant that these items could also be covered under the definition of capital goods.

52. Learned authorized representatives of the department also pointed out that the show cause notice had sought to reject the claim for refund on the ground that the issue of admissibility to credit on towers and part thereof had been decided by the Bombay High Court in **Bharti Airtel** and **Vodafone India,** but an appeal against the same is pending before the Supreme Court where the appellant had filed an Intervention Application. The contention advanced is that since the issue as to whether the appellant is entitled to avail credit on merits is

pending determination in the show cause notice dated 12.3.2019 issued by the Commissioner to the appellant, the Tribunal should not decide the matter on merits.

53. A show cause notice had been issued seeking to reject the claim for refund alleging that the appellant was not entitled to avail credit on the telecom towers. The Assistant Commissioner as also the Commissioner (Appeals) adjudicated upon the claim of the appellant for entitlement to avail credit on the telecom towers. These orders have not been reviewed and no appeals have been preferred by the department on the ground that the said orders could not have examined the aspect of eligibility to credit. It is, therefore, not open to the learned authorized representatives to contend that this aspect of admissibility to credit cannot be examined by the Tribunal. This issue has been decided by the Assistant Commissioner and the Commissioner (Appeals) by elaborate findings.

54. Learned authorized representatives of the department also contended that the refund claim filed by the appellant is premature as the show cause notice dated 12.03.2019 issued under rule 14 of the 2004 Rules has not been decided.

55. It is seen that CENVAT credit was reversed by the appellant under protest without there being determination of the liability. After the credit was reversed, the appellant was advised that such a reversal was not warranted. It accordingly, applied for refund of the credit reversed by it which was a method by which such a credit that had been reversed could have been restored. This is what was observed by the Tribunal in **Usha International** vs. **Commissioner of Customs,**

Mumbai[22]. The Tribunal held that where an assessee has reversed credit under protest, without there being any determination, such an assessee can seek restoration of such reversal by filing a claim for refund and it is impermissible for the authorities dealing with the refund claim to reject the same as being premature. For coming to this conclusion, the Tribunal relied upon the judgment of the Punjab and Haryana High Court in **Century Metal Re-cycling** vs. **Union of India**[23], wherein it was held that irrespective of whether or not the amount deposited during the course of investigation was voluntary or otherwise, there is no justification in retaining the amount unless there is an assessment and that in all such cases, the assessee is entitled to claim refund. The relevant observations of the Tribunal are reproduced below:

> "9. Shri Vipin Jain, ld. Counsel appearing for the appellant has assailed this view by citing a plethora of judgments and decisions of which two judgments, one of the Punjab & Haryana High Court and other of the Madras High Court are directly on the point. The judgment of the Punjab & Haryana High Court in the case of Century Metal Recycling Pvt. Ltd. v. Union of India - 2009 (234) E.L.T. 234 was dealing with a situation where refund was claimed of the amounts deposited in the course of investigation and there was a dispute, as in the present case between the two parties on the question whether such payments had been made voluntarily or under duress. The High Court held that the question whether the payment was voluntary or under coercion was irrelevant and that as long as there was an assessment and demand, the amount deposited could not be appropriated. The relevant paragraph of this judgment is extracted below:
>
> > "13. As far as the amount deposited by the petitioners is concerned, case of the petitioners is that the same was deposited under coercion. Case of the respondents was that the same was

---

22 **2017 (357) E.L.T. 532**
23 **2009 (234) E.L.T. 234**

> deposited voluntarily. Whatever be the position, unless there is assessment and demand, the amount deposited by the petitioners cannot be appropriated. No justification has been shown for retaining the amount deposited, except saying that since it was voluntarily deposited. In view of this admitted position, the petitioners are entitled to be returned the amount paid."

A division bench of the Madras High Court in the case of Sanmar Foundaries Ltd. v. Commissioner reported in 2015 (325) E.L.T. 854 held that the revenue had no right to retain amounts deposited in the course of an investigation, unless such amounts had been paid either towards a confirmed demand or if such payments were being made in terms of Section 11A(6) of the Central Excise Act, 1944, which corresponds to Section 28(2) of the Customs Act. Various judgments, including the judgment of the Punjab & Haryana High Court were taken note of in this order. We therefore hold that the findings of the lower authorities that the claim for refund was premature is untenable.

10. Even otherwise, we find that once an application of refund has been filed before the refund sanctioning authority, the said authority is duty bound to decide the refund application one way or the other. The refund application can either be rejected or allowed in part or in full. The provisions of Section 27 do not entitle the refund sanctioning authority to return the refund application by terming the same to be premature. Therefore, the action of the Asstt. Commissioner in terming the application as premature is really an act of refusal to exercise a statutory duty to decide upon the refund application one way or the other. For this reason also, the order of the lower authorities is untenable."

56. Learned authorized representatives of the department relied on the decision of the Karnataka High Court in **Primacy Industries Ltd.**[24], to support the contention that the determination of eligibility to refund should be kept in abeyance till the notice deciding the issue on merits is adjudicated.

---

24 2020 (374) E.L.T. 578 (Kar)

57. This judgment does not help the department as the notice that was issued to reject the refund had not questioned the eligibility of the assessee to the benefit of MEIS and the assessee had challenged the notice issued seeking to reject the refund claim. In the instant case, the notice has questioned the eligibility of the appellant to avail credit on merits and consequently, there is no reason to keep the refund proceedings pending.

58. The learned authorized representatives of the department also placed reliance on the judgment of the Jharkhand High Court in **Gyan Enterprises Trade Division** vs. **Coal India Ltd.**[25]. The said judgment was rendered in the context of a dispute between entities bidding for coal vis-à-vis coal manufacturers, who were claiming that excise duty was required to be paid on the value including Royalty and Stowing. The buyers of coal challenged this action of the manufacturer on the ground that the issue as to whether Royalty was a tax was pending decision before the Supreme Court and consequently, it was not permissible for the manufacturer to recover excise duty on the amount of Royalty and Stowing. It is in these facts that the High Court directed the buyers to reimburse the manufacturers of the excise duty component.

59. The aforesaid discussion would lead to the inevitable conclusion that the appellant was justified in availing CENVAT credit of central excise duty, as 'inputs', on items indicated in Part-I of the chart contained in the paragraph 43 of this decision and as 'capital goods' on the items contained in Part-II of the said chart. The appellant would,

---

25 2017 (347) E.L.T. 65 (Jhar.)

therefore, be entitled to refund of the said CENVAT credit which was reversed by it ‘under protest’.

60. The impugned order dated 30.08.2019 passed by the Commissioner is, accordingly, set aside and the appeal is allowed with consequential relief, if any.

(Order Pronounced on **18.04.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

ARCHANA /JB/SHREYA