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2024 INSC 880

R E P O R T A B L E

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10409-10410 OF 2014

M/S BHARTI AIRTEL LTD. …APPELLANTS (S)

VERSUS

THE COMMISSIONER OF CENTRAL EXCISE, PUNE …RESPONDENT(S)

WITH

CIVIL APPEAL NO. 5832 OF 2018
CIVIL APPEAL NOs. 5032-5035 OF 2021
CIVIL APPEAL NOs. 5039-5040 OF 2021
CIVIL APPEAL NO. 5038 OF 2021
CIVIL APPEAL NO. 5056 OF 2021
CIVIL APPEAL NOs. 5036-5037 OF 2021
CIVIL APPEAL NO. 7119 OF 2015
CIVIL APPEAL NO. 7179 OF 2015
CIVIL APPEAL NO. 1077 OF 2016
CIVIL APPEAL NO. 1078 OF 2016
CIVIL APPEAL NO. 5112 OF 2021
CIVIL APPEAL NO. 1201 OF 2018
CIVIL APPEAL NO. 1205 OF 2018
CIVIL APPEAL NO. 1203 OF 2018
CIVIL APPEAL NO. 1204 OF 2018
CIVIL APPEAL NO. 1202 OF 2018
And
CIVIL APPEAL NO.62 OF 2022

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J U D G M E N T

NONGMEIKAPAM KOTISWAR SINGH, J.

1. The core issue involved in this set of appeals is whether the mobile service providers (MSPs) who pay excise duties on various items for setting up their business more particularly for erection of mobile towers and peripherals like pre-fabricated buildings (PFBs) etc. can take the benefit of CENVAT Credit under the CENVAT Credit Rules, 2004 (hereinafter referred to as the "CENVAT Rules") for the purpose of payment of service tax on the output services rendered by them. With respect to the same, conflicting views have been given by two High Courts, namely the High Court of Bombay and High Court of Delhi. The Bombay High Court has ruled against the MSPs, favouring the Revenue, holding that MSPs are not entitled to CENVAT credit on mobile towers and prefabricated buildings. Whereas, the Delhi High Court has held to the contrary extending the benefit of CENVAT credit to the MSPs. The decisions of both the High Courts have been challenged before this Court by the respective aggrieved parties, by way of the present set of appeals.

1.1 In the lead judgment of the Bombay High Court which has been challenged before this Court in Civil Appeal No. 10409-10 of 2014, namely ***Bharti Airtel Limited v. The Commissioner of Central Excise, Pune*** (***Bharti Airtel***, for short) rendered on 26.08.2014 in Central Excise Appeal Nos.73 of 2012 and No. 119 of 2012, the Bombay High Court held that mobile towers and other components do not fall within the definition of "capital goods" as defined under Rule 2(a)(A) of the CENVAT Rules, nor are these "inputs" within the meaning of Rule 2(k)

and, hence, the MSP is not entitled to CENVAT credit on duty paid on these items.

1.2 The aforesaid decision of the Bombay High Court in ***Bharti Airtel*** (*supra*) has been reiterated in the following cases:

(i) Central Excise Appeal No.126 of 2015 and Central Excise Appeal No.127 of 2015 vide order dated 10.09.2015 which has been assailed before this Court in CA No.7119 of 2015 (***Vodafone India Limited v. Commissioner of Central Excise***) and CA No.7179 of 2015 (***Vodafone India Limited v. Commissioner of Central Excise***);

(ii) Central Excise Appeal No.191 of 2015 and Central Excise Appeal No.190 of 2015 vide order dated 12.10.2015 against which CA No.1077 of 2016 (***Tata Teleservices Ltd. vs. Commissioner of Central Service Tax***) and CA No.1078 of 2016 (***Tata Teleservices Maharashtra Ltd. v. Commissioner of Central Service Tax***) have been filed before this Court;

(iii) Central Excise Appeal No.159 of 2015, out of which CA No.5112 of 2021 (***Idea Cellular Ltd. vs. Commissioner of Service Tax***) has arisen;

(iv) Central Excise Appeal No.1 of 2016, Central Excise Appeal No.2 of 2016, Central Excise Appeal No.4 of 2016, Central Excise Appeal No.6 of 2016, Central Excise Appeal No.7 of 2016 which have been challenged in CA No.1201 of 2018 (***Reliance Communications v. Commissioner of Service Tax***), CA No.1205/2018 (***Reliance Communications v. Commissioner of Service Tax***), CA No.1203 of 2018 (***Reliance Communications v. Commissioner of Service Tax***), CA

No.1204 of 2018 (***Reliance Communications v. Commissioner of Service Tax***) and the CA No.1202 of 2018 (***Reliance Communications v. Commissioner of Service Tax***);

(v) Central Excise Appeal No.7 of 2017 rendered on 02.04.2018 which has been challenged in CA No.5832 of 2018 (***M/s Reliance Communication Infrastructure v. Commissioner of Service Tax, Mumbai***).

1.3 The Delhi High Court in the case of ***Vodafone Mobile Services Limited v. CST, Delhi 2019 [(27) G.S.T.L. 481 (Del.)]*** (***Vodafone***, for short) decided on 31.10.2018 arising out of C.E.A.C. Nos.12-13 of 2016, 6 of 2017 and 4 of 2018, SERTA Nos.14-20 of 2016, on the contrary, held that towers and other associated structures like prefabricated buildings (PFBs) are covered by the definition of "capital goods" and are "inputs" as defined under CENVAT Rules and hence, MSPs are entitled to input credit on excise duty paid towards installation of mobile towers and PFBs. This judgement of the Delhi High Court has been challenged before this Court in CA Nos. 5032-5035/2021***(Commissioner of Service Tax vs. Indus Towers Ltd.)***, CA No. 5039-5040/2021 ***(Commissioner of Service Tax vs. M/s Bharti Infratel Ltd.)***, CA No. 5038/2021 ***(Commissioner of Excise vs. Tower Vision India Pvt. Ltd.)*** and CA No. 5036-5037/2021 ***(Commissioner of Service Tax vs. Vodafone Mobile Services Ltd.)***.

1.4 Following the aforesaid decision of the Delhi High Court in the ***Vodafone*** (*supra*), CESTAT, Principal Bench, Delhi in SA Appeal No.52342 of 2015 allowed the CENVAT Credit to the MSPs. This decision of the CESTAT, Delhi has been challenged in CA No.62/2022

(Commissioner Central Excise and Service Tax LTU vs. Mahanagar Telephone Nigam Ltd.)

2. Most of the Assessees before us are mobile service providers (MSPs). The MSPs typically provide sim cards to the subscribers either in physical or electronic form, on activation of which the subscribers are able to enjoy wireless telecommunication service. For rendering these services, the service providers usually own and operate the infrastructure such as cell towers, Base Transceiver System (BTS) along with accompanying network equipment and structures like pre-fabricated building (PFBs), electricity generating sets (gensets), battery back-up and stabilisers for uninterrupted power supply to ensure seamless telecom service to the subscribers.

2.1 Some of the Assessees, on the other hand, are merely providing passive infrastructure support service to the mobile telecommunication companies at telecom sites which consists of towers and other accompanying ancillaries including PFBs as mentioned above.

3. The process of mobile telecommunication begins when a subscriber uses a wireless mobile handset which is also known as Mobile Station (MS) to make a call after activation of the sim card. The mobile handset, which is a radio equipment, performs the signal processing function of digitizing, encoding, error protecting, encrypting and modulating to transmitted signals. When it receives signals from other mobile stations, it performs the inverse functions. The mobile handset sends a signal, an electromagnetic wave, which is a modulated version of the user's voice or data. The signal emanating from the handset is received by the antenna mounted on the tower. Thereafter, the signal received by the antenna is sent through cables to the Base

Station Sub-system (BSS). BSS is a set of base station equipment like Base Transceiver Station (BTS) and Base Station Controller (BSC). BSC essentially controls one or more BTS or BS. Base Transceiver Station (BTS) housed at the base of the tower is kept in secured and safe conditions in the prefabricated house or building (PFB). The BTS then converts the electromagnetic signal into a digital format that can be processed by the network. The processed signal is then transmitted to the mobile switching centre (MSC). The MSC then routes the calls or data to the destination through another tower or series of towers and by a reverse process of conversion from digital mode to electromagnetic wave, the signal is received at the destination.

3.1 The said activities require constant electricity supply to the equipment to function. To prevent any interruption in the supply of electricity, the MSPs invariably keep electricity generator sets (gensets) and UPS Batteries along with stabilisers etc. which are kept near the base of the tower, usually housed in the portable PFBs to protect from damage.

3.2 From the above, what is evident is that to dispense wireless telecom service, the sim cards, antenna, BTS along with other equipment play a critical role. The antenna and BTS are intrinsically linked. Antenna, tower, BTS, generation set, PFBs typically constitute essential components for providing seamless mobile telecommunication service to the consumers/subscribers.

4. The mobile towers are bought and brought at the site either in completely knocked down condition (CKD) or semi-knocked down condition (SKD) by the service provider. The tower is installed at an appropriate site based on technological viability. It is on this mobile

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tower that the antenna which receives and transmits the electromagnetic signal is hoisted and fixed at an appropriate height as may be technically determined. The mobile tower, in turn, is fixed to the ground or on the top of a building to provide stability and make it wobble free as the antenna cannot function effectively if the same is not kept at a particular height and is not stable and prevented from shaking due to wind, rain or any other reason.

5. The MSPs or the infrastructure providers purchase these items from the manufacturers for installation at the appropriate locations. It is the excise duties paid on purchase of the mobile towers or parts thereof either in CKD or SKD condition and for erection of PFBs which are sought to be claimed by MSPs as CENVAT credit. This credit is thereafter utilised for payment as service tax for the output service provided by the MSPs to the consumers. This credit availed is the subject matter of dispute in these proceedings wherein the two High Courts have given contrary views.

6. In view of the conflicting decisions of the two High Courts, in order to ascertain which of the two views is the correct one, it would be appropriate to examine the findings and reasons assigned by each of these High Courts for coming to different conclusions.

7. Before we proceed to examine the decisions of the two High Courts, it may be apposite to refer to the relevant provisions of the CENVAT Rules as the issues dealt with by the two High Courts and before us are to be examined in the light of the provisions of the CENVAT Rules.

7.1 Rule 3(1) of the CENVAT Credit Rules, 2004 enables a provider of taxable service to claim CENVAT credit paid on any "capital goods"

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or "input" received in the premises of the service provider. As to what are "capital goods" and "input" have been defined under Rule 2(a)(A) and the Rule 2(k) of the CENVAT Rules. Consequently, if the mobile towers and prefabricated buildings, which are the items in issue here, qualify as "capital goods" or "inputs" received in the premises of the mobile service provider, the mobile service provider will be entitled to claim CENVAT credit which can be further used for paying service tax for the output services rendered by the mobile service provider.

7.2 While Rule 3(1) is the enabling provision for taking CENVAT credit, Rule (4) provides that the CENVAT credit in respect of "inputs" may be taken *immediately* on receipt of inputs in the factory of the manufacturer or *in the premises of the service provider.*

For better clarity, we reproduce the relevant provisions of the CENVAT Rules.

Rule 2(a) (A) defines "capital goods" and Rule 2(k) defines "input" which reads as below: -

Rule 2(a)(A)

"2. 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,

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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."

Rule 2(k)

"2(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;

Rule 3 is the enabling provision to take CENVAT credit, relevant portion of which reads as follows: -

Rule 3

"3.(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to the CENVAT credit) of –

(i) the duty of excise specified in the First Schedule to the Tarrif Act, leviable under the Excise Act:

……

paid on –

(i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of out service on or after the 10th day of September, 2004; and

(ii) any output service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004.

(2) …….

(3) …….

(4) ……..

(5) CENVAT credit may be utilized for payment of -

(a) any duty of excise of any final product; or

(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(d) an amount under sub-rule (2) of rule 16 of Central excise Rules, 2002; or

(e) service tax on any output service:

……

……"

Rule 4

"Condition for allowing CENVAT credit.

4. (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service:

Provided that……."

8. Since the Bombay High Court's decision was rendered on an earlier date i.e. on 26.08.2014, and the Delhi High Court rendered its decision subsequently on 31.10.2018, we will first deal with the decision of the Bombay High Court.

8.1 Shorn of unnecessary details, we will refer only to the relevant facts by referring to the lead case of each of the High Courts as the

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decisions arrived on examining these lead cases would cover other appeals before us.

Decision of the Bombay High Court

9. The proceeding in the lead case of ***Bharti Airtel*** (supra) was set into motion by a show cause notice dated 25.04.2006 issued by the Commissioner of Excise to M/s. Bharti Airtel Limited, an MSP (Assessee) alleging *inter alia,* that the Assessee had wrongly taken and utilised CENVAT Credit on certain goods which do not qualify as "*capital goods*" within the meaning of CENVAT Credit Rules, 2004 and thus, availing such credit was contrary to the definition under Rule 2(a)(A) and Rule 4 of the CENVAT Rules. The goods mentioned in the said show cause notice include amongst others: (i) towers and parts of towers; (ii) prefabricated building (PFB) used as a shelter for protecting transmission devices which are the primary concern of these proceedings.

9.1 In the said show cause notice, it was alleged that a tower, after erection, becomes immovable property having been fixed to the earth and thus, cannot be considered to be a "good" and hence was not "capital good" within the meaning of the CENVAT Rules. It was alleged that the tower even in CKD or SKD condition would fall under Chapter 7308 of the Central Excise Tariff Act, 1985 which does not find mention either in clause (i) or clause (ii) of Rule 2(a)(A) or in Rule 2(k) of the CENVAT Rules. It was also alleged that tower or parts of the tower cannot be claimed for CENVAT Credit as these are not components, spares or accessories of "capital goods" as specified in sub-clauses (i) and (ii) of Rule 2(a)(A) within the meaning of Rule 2(a)(A)(iii). Consequently, the Revenue sought not only the recovery of wrongfully

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claimed CENVAT credit but also imposed penalty and interests on account of misstatement of ineligible claim.

9.2 As regards prefabricated buildings (PFBs), it was alleged that these are used as shelter for protecting transmission devices etc. and not for providing output service i.e. telecommunication service and hence, cannot be considered "capital goods" within the meaning of Rule 2(a)(A).

Further, it was also alleged that these cannot be said to be "inputs" for providing mobile service within the meaning of Rule 2(k).

9.3 The response of the Assessee in respect of the said show cause notice was that towers and parts of towers are "capital goods" and "inputs" for which CENVAT credit is admissible for the output service rendered by the Assessee.

9.4 In regard to the prefabricated buildings (PFBs), the Assessee explained that these are also eligible for CENVAT credit as "capital goods" and in any case as "inputs" for providing mobile telecom service to the subscribers. It was contended that the aforesaid articles are covered within the meaning of *"capital goods"* under Rule 2(a)(A) and *"inputs*" under Rule 2(k).

9.5 It was also contended on behalf of the Assessee that credit in respect of *"inputs*" can be availed *immediately* on receipt of the goods in the premises of the service provider under Rule 4(1) of the CENVAT Rules. Thus, the Assessee was entitled to CENVAT credit the moment these articles were received in the premises of the service provider and the Assessee need not wait until these goods are actually installed for providing services to the consumers.

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9.6 It was contended by the Assessee that tower is a part of the "Base Transceiver Station" (BTS) and antenna, all of which form components of an integrated telecom system. It was further contended that the tower acts as an accessory of BTS and antenna and without the tower, antenna and BTS cannot function properly. Consequently, mobile service cannot be provided by the service provider without tower, antenna and BTS. It has been contended that BTS and antenna are covered by Chapter 85 under Rule 2(a)(A) and are "capital goods". Since BTS/antenna are "capital goods" under the CENVAT Rules, the tower, being a part of BTS/antenna will be also deemed as "capital good" by virtue of sub-clause (iii) of Rule (a)(A). Since these goods, namely tower, BTS and antenna are used for providing output telecom service to the subscribers/consumers, the mobile service provider will be entitled to claim CENVAT credit not only on BTS and antenna but also on tower, being an accessory to "capital goods" in the form of BTS and antenna.

9.7 The Assessee further contended that for effective and uninterrupted transmission and receipt of electromagnetic radio signals by the antenna which is installed on the mobile tower, additional peripheral equipment such as battery back-up, rectifier, UPS, gensets etc., are also necessary which are purchased by the service provider and brought at the site and installed and housed in the prefabricated shelters or buildings without which the antenna installed on the mobile tower and BTS will become inoperative. Thus, apart from mobile tower, the prefabricated building/shelter, where these ancillary items which are indispensable components of the mobile telephone system are securely housed, becomes an integral part of the mobile telephone system. It was also contended that since it is through these items including the

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prefabricated building that the mobile telephone service is provided as an output to the subscribers, these articles, including the prefabricated shelters/buildings will be eligible for CENVAT input credit.

9.8 The Revenue rejected the aforesaid pleas of the Assessee by holding that various goods/items like tower, antenna, prefabricated building (PFB) etc. have independent and definite functions and cannot be treated as a single integrated unit and accordingly, these items/goods cannot be treated as capital goods and CENVAT credit cannot be allowed. The Revenue held that only equipment like BTS, transmitter, antenna which are used in providing telecom service and which are covered under various Chapters under Rule 2(a)(A) are eligible for CENVAT credit vide order dated 19.12.2006 of the Commissioner of Excise/Revenue.

9.9 Being aggrieved by the aforesaid order of the Commissioner, the Assessee approached the Customs Excise and Service Tax Appellate Tribunal (CESTAT) by filing Appeal No. ST/49/2007 challenging the order dated 19.12.2006.

9.10 It may be noted that after the Commissioner, Excise/Revenue rejected the plea of the Assessee by order dated 19.12.2006, another proceeding was initiated for recovery of penalty which culminated in the passing of order dated 23.03.2009 by the Commissioner which was challenged before the Tribunal in Appeal No. ST/145/2009.

9.11 The aforesaid two orders passed in the above appeals namely ST/49/2007 and the ST/145/2009 were challenged before the CESTAT which were disposed of by a common order dated 06.01.2012 upholding the view of the Revenue, against which the Assessee preferred appeals before the Bombay High Court by filing Central

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Excise Appeal No. 73 of 2012 and Central Excise Appeal No. 119 of 2012 which were finally disposed of by the Bombay High Court on 26.08.2014 vide a common judgment upholding the findings recorded by the Tribunal in support of the Revenue to the effect that subject items are neither “capital goods” under Rule 2(a)(A) nor “inputs” under Rule 2(k) of the CENVAT Rules and hence duties paid on these items were not admissible to the Assessee for CENVAT credit. Against the aforesaid decision of the Bombay High Court, the present Appeal No. 73 of 2012 and Appeal No. 119 of 2012 have been preferred before this Court.

9.12 The Bombay High Court, while examining the aforesaid issues framed the following questions of law:-

> "1. Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in holding that the Appellant was not entitled to credit of duty paid on tower parts, green shelter, printers and office chairs?
>
> 2. Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in holding that the Appellant was not entitled to credit of duty paid on tower parts, green shelter on the ground that tower/green shelter is "immovable property" and hence, do not qualify as "capital goods" or "inputs" as defined under the CENVAT Credit Rules, 2004?
>
> 3. Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in holding that tower would not qualify as "part" or "component" or "accessory" of the capital goods i.e. antenna?"

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The Bombay High Court decided all the above questions of law against the Assessee and in favour of the Revenue.

9.13 In deciding the abovementioned issues, the Bombay High Court considered the following aspects:

(i) That the aforesaid goods are not "capital goods" within the meaning under Rule 2(a)(A) of the CENVAT Rules, since these are immovable property.

(ii) That these goods are not the components/accessories of antenna within the meaning of Rule 2(a)(A)(iii).

(iii) That these goods are not "inputs" within the meaning of Rule 2(k).

In considering the aforesaid aspects the Bombay High Court analysed the relevant provisions of CENVAT Rules, as to what amounts to "capital goods" and "input" and also the provisions of Rule 3 which provides for credit on excise duty paid in discharging liability towards service tax.

9.14 The Bombay High Court, after considering the definition clauses in the CENVAT Rules, took the view that the goods in question i.e. tower and parts thereof which are fastened and fixed to the earth after their erection become immovable properties and therefore, these cannot be goods and hence not "capital goods" within the meaning of the CENVAT Rules. The Bombay High Court also took the view that the tower and parts thereof in the CKD or SKD condition, would fall under Chapter Heading 7308 of the Central Excise Tariff Act, but the aforesaid heading is not specified either in clause (i) or clause (ii) of Rule 2(a)(A) of the CENVAT Rules to be treated as "capital goods".

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The Bombay High Court further opined that since these 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 Rule 2(a)(A)(i), the goods in question would not be "capital goods" for the purpose of CENVAT credit.

9.15 The Bombay High Court also did not find favour with the contention of the Assessee that tower is an accessory of antenna since, without tower, antenna cannot be installed, and consequently, antenna cannot function and hence tower should be treated as part or component of antenna.

9.16 In coming to the above stated conclusions, the Bombay High Court considered various decisions, cited by both the contesting parties, some of which we will advert to briefly.

9.16.1 Before the Bombay High Court, the Assessee in support of the contention that the tower and parts thereof and PFBs are not immoveable properties, relied upon the following, inter alia, decisions:

(i) ***CCE V. SLR Steels Ltd., 2011 SCC Online Kar 4345, (2012) 280 ELT 176 (Kant).***

(ii) ***CCE v. ICL Sugars Ltd., 2011 SCC Online Kar 4254, (2011) 271 ELT 360 (Kant).***

(iii) ***CCE v. Sai Sahmita Storage Ltd., (2011) SCC OnLine AP 956, (2011) 23 STR 341 (AP).***

(iv) ***Bannari Amman Sugars Ltd. v. CCE, 2009 SCC OnLine Kar 814, (2010) 250 ELT 326 (Kant)***.

(v) ***CCE v Hindustan Sanitaryware & Industries, (2002) 7 SCC 515.***

(vi) ***CCE v. N.R.C. Ltd., 2008 SCC OnLine Bom 1894.***

(vii) ***Commr. of Customs v. Rupa and Co. Ltd., (2004) 6 SCC 408.***

(viii) ***Deepak Fertilizers & Petrochemicals Corpn. Ltd. v. C.C.E., Belapur, 2012 SCC OnLine CESTAT 3055.***

(ix) ***Commr. of C.Ex., Jaipur v. Rajasthan Spinning & Weaving Mills Ltd., (2010) 12 SCC 186.***

9.16.2 The Bombay High Court, however, held that the aforesaid decisions are not applicable to the present case and proceeded to examine the plea of the Assessee that since the antenna is fitted onto the tower and shelter is used for providing telecommunication services, they would qualify as "inputs" under Rule 2(k) of the CENVAT Credit Rules. In support of this contention, the Assessee had placed reliance on the following decisions:-

(i) Industrial Machinery Manufacturers (P) Ltd. v. State of Gujarat, 1963 SCC Online Guj 84:(1965) 16 STC 380 (Guj).

(ii) Board of Revenue v. Phelps & Co. (P) Ltd., (1972) 4 SCC 121.

(iii) J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO, AIR 1965 SC 1310.

(iv) Indus Towers Ltd. v. CTO, 2012 SCC Online AP 628: (2012) 52 VST 447 (AP).

(v) Collector of C.E. v. Jay Engineering Works Ltd., 1989 Supp (1) SCC 128.

(vi) Banco Products (India) Ltd. v. Commissioner of C. Ex., Vadodara-I, 2009 SCC OnLine CESTAT 1043.

(vii) Singh Alloys and Steel Ltd. v. Assistant Collector of Central Excise, 1993 SCC OnLine Cal 441

The Bombay High Court, however, did not find the aforesaid decisions applicable to the present case.

9.16.3 The Bombay High Court then proceeded to examine the alternate plea of the Assessee that the tower is an accessory of antenna and without towers, antenna cannot be installed and hence it cannot function, and therefore, tower should be treated as a part or component or accessory of the antenna. The contention of the Assessee was that the antenna falls under Chapter 85 of the Schedule to the Central Excise Tariff Act and is thus "capital good" within the meaning of Rule

2(a)(A)(i) and (ii), therefore, tower being an accessory of antenna, will be eligible for availing CENVAT credit under Rule 2(a)(A)(iii).

Some more cases relied upon by the Assessee were as follows.

(i) M/s. Annapurna Carbon Industries Co. v. State of Andhra Pradesh, (1976) 2 SCC 273.

(ii) Commissioner of Sales Tax, Maharashtra State, Bombay v. L.D. Bhave & Sons, 1981 SCC OnLine Bom 438.

(ii) Mehra Brothers v. Joint Commercial Officer, (1991) 1 SCC 514.

The Bombay High Court on examination held these decisions not to be applicable to the present case.

9.17 The Bombay High Court then considered the contentions advanced on behalf of the Revenue which were as follows :-

i) Since towers and parts thereof are fixed to the earth, thus, after being installed become immovable property and hence, cannot be considered as "goods" and consequently cannot be "capital goods".

ii) The tower in CKD/SKD condition would be classifiable under Chapter Heading 7308 of the Central Excise Tariff Act. However, Chapter Heading 7308 is not specified either in Clause (i) or Clause (ii) of Rule 2(a)(A) of the CENVAT Rules. Consequently, since tower is not one of the items specified in the Rules as "capital goods", duties paid for parts of the tower cannot be claimed as CENVAT Credit.

iii) Even if it is assumed that CENVAT credit on the parts of the towers would be admissible under Clause (iii) of Rule 2(a)(A), there is an explicit condition that the said goods should be components, spares and accessories of the goods specified in

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Clauses (i) and (ii) of Rule 2(a)(A). As tower is not a "capital good" under the aforesaid clauses, duty paid on its parts, therefore, is not admissible for availing CENVAT credit.

iv) Only those articles which go into composition of another article can be considered as components or parts of the latter. Though GSM and the network antenna are specified under Tariff Chapter Heading 8517, tower on which the antenna is placed is not classified as such under the said Tariff chapter Heading 8517. Thus, tower cannot be considered to be a component to the antenna within the meaning of Rule 2(a)(A)(iii) as it does not enter into the composition of the antenna.

(v) As regards, availing the CENVAT credit in respect of "input", it was submitted by the Revenue that only a manufacturer can avail such credit and not a service provider.

9.17.1 In support of the contentions, the Revenue cited a number of judgments before the Bombay High Court, some of which are referred as below:

(i) Vandana Global Ltd. v. Commissioner of Central Excise, Raipur, 2010 (253) E.L.T. 440 (Tri.-LB).

(ii) Quality Steel Tubes (P) Ltd. v. Collector of Central Excise, (1995) 2 SCC 372.

(iii) Triveni Engineering & Industries Ltd. & Anr v. Commissioner of Central Excise, (2000) 7 SCC 29.

(iv) Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut (1997) 1 SCC 203.

(v) Commissioner of Central Excise, Indore v. Cethar Vessels Ltd. & Ors., (2009) 17 SCC 551.

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(vi) Municipal Corporation of Greater Bombay v. Indian Oil Corporation, 1991 Supp (2) SCC 18.

(vii) Cellular Operators Association of India & Ors. V. Municipal Corporation of Delhi etc., 2011 SCC OnLine Del 2003.

(viii) Collector of Central Excise v. Hutchison Max Telecom P. Ltd., 2007 SCC OnLine Bom 702.

(xi) Saraswati Sugar Mills v. Commissioner of central Excise, Delhi-III, (2014) 15 SCC 625).

9.18. The Bombay High Court after analysing the facts of the present case, in the light of the case laws cited by the contesting parties and relevant provisions of the CENVAT Rules, rejected the contention of the Assessees that they were entitled to credit of the duties paid on these items since BTS is a single integrated system consisting of tower, GSM or Microwave Antennas, PFB, isolation transformers, electrical equipments, generator sets, feeder cables etc., and these are to be treated as "composite system" classified under Chapter Heading 85.25 of the Tariff Act and hence be treated as "capital goods" and credit be allowed. The Bombay High Court held that each of the components had independent functions and, hence, these cannot be treated and classified together as a single composite unit.

9.19 The Bombay High Court held that all capital goods are not eligible for credit and only those "capital goods" which fall under Rule 2(a)(A)(i) and (ii) relatable to the output services and mentioned in the CENVAT Rules will be available for credit. The goods in question namely, the tower and parts thereof and PFB cannot be considered to be "capital goods" for the purpose of CENVAT credit as they are neither mentioned nor are components, spares or accessories of goods falling under any of the Chapters or Headings of the Central Excise Tariff Schedule as specified in Rule 2(a)(A). In the CKD or SKD condition,

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the tower and parts thereof would fall under Chapter Heading 7308 of the Central Excise Tariff Act and the said Heading is not specified in sub-clause (i) or sub-clause (ii) of Rule 2(a)(A) of CENVAT Rules so as to be capital goods.

9.20 The Bombay High Court held that admittedly, the goods in question do not fall within the definition of "capital goods", since towers and parts thereof, once fastened and fixed to the earth, post their erection, become immovable and therefore cannot be classified as goods. Consequently, they cannot be considered capital goods as defined under Rule 2(a)(A). Hence, the Assessee cannot claim the credit of duty paid on these items. The Court further clarified that only items specified as capital goods under Rule 2(a)(A) would be eligible for CENVAT credit.

9.21 The Bombay High Court further held that the goods in question would not be capital goods for the purpose of CENVAT Credit as they are neither components, spares or 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". Thus they are not covered by sub-clause (iii) of Rule 2(a)(A).

9.22 The Bombay High Court repelled the contention of the Assessee that tower is an accessory of antenna and without tower, antenna cannot be installed and as such the antenna cannot function and that the tower should be treated as a part of antenna.

The Bombay High Court held that towers are structures fastened to the earth on which antennas are installed and, hence, cannot be considered to be an accessory or part of the antenna.

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9.23 The Bombay High Court also held that these items cannot be considered to be "inputs" within the meaning of Rule 2(k) of the CENVAT Rules as the Assessee is a service provider and not a manufacturer of capital goods.

Further since tower and PFBs are in the nature of immovable, non-marketable and non-excisable goods, these cannot be classified as "inputs" to fall within the definition Rule 2(k) of the CENVAT Rules.

9.24 In view of the aforesaid conclusions arrived by the Bombay High Court, it was held that the subject items are neither "capital goods" under Rule 2(a)(A) nor "inputs" under Rule 2(k) of the CENVAT Rules and hence CENVAT credit of the duty paid thereon was not admissible to the Assessee.

Decision of the Delhi High Court

10. The proceedings before the Delhi High Court arose out of the decision rendered by the CESTAT, New Delhi against an Appeal preferred under Section 35E of the Central Excise Act, 1944 and Section 83 of the Finance Act, 1944.

10.1. The Assessee, ***Vodafone***, provided cellular telecommunication services and paid service tax as applicable. It availed CENVAT credit on excise duty paid on towers, parts thereof and prefabricated shelter/building purchased by it for providing the output services. The credit so availed was utilized to pay service tax on the output services i.e. cellular mobile services to the customers.

10.2. A show cause notice was issued by the Revenue to the Assessee alleging, *inter alia,* that Vodafone had wrongly claimed and utilized CENVAT Credit in contravention of provisions of Rule 2(a)(A) of the

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CENVAT Rules, and was liable for penalty recoverable from it under the provisions of Rule 14 of the CENVAT Rules read with Section 73 of the Central Excise Act. According to the Revenue, the Assessee had claimed and used credit in respect of goods which do not qualify as "capital goods" within the meaning of CENVAT Rules. The plea of the Assessee was that these were capital goods within the meaning of Rule 2(a)(A)(i) and (ii) of the CENVAT Rules. Moreover, these were "inputs" used for providing output service, hence the benefit of Rule 3 should be available to the Assessee.

10.3 It was also the plea of the Assessee that the credit in respect of "inputs" can be availed *immediately* on receipt of the goods in the premises of the service provider under Rule 4(1).

10.4 Further, the plea of the Assessee was that BTS constitutes an integrated system for the purpose of providing the benefits of mobile service and is classified under Heading 85.25 of Central Excise Tariff Act, 1985 (CETA) which also comprises of the tower as one of its parts, without which the output service cannot be provided. Hence, it was contended that the tower and parts thereof are parts of eligible "capital good", i.e. BTS which are used for providing output services. Hence, excise duty paid on tower and its parts were eligible for the credit.

10.5 On similar lines, it was contended that a PFB is purchased for housing electrical equipment i.e. transformers/batteries/stabilizers, rectifiers etc. which are necessary to enable the antenna to provide uninterrupted signals. The aforesaid configuration is supported by a Diesel Generating Set (Genset) to be used as a backup source of electricity supply in case of failure of the main power supply. It was contended that since BTS as a whole is to be treated as a single

integrated system which is classified under Chapter Heading 85.25 of CETA, and thus, BTS being an eligible "capital good", the parts thereof i.e., the towers and other accessories are also eligible for credit under Rule 2(a)(A)(iii).

10.6 The Commissioner, however, did not agree with the aforesaid contention that these items form a composite integrated system classifiable under Chapter 85.25 of CETA and held that these goods had independent functions and could not be classified as a single unit. It was the view of the Revenue that all capital goods are not eligible for credit but only those which are used for providing output service would be eligible for credit. Thus, only telecom equipment like BTS, transmitters which are used for providing telecom services alone would be eligible for input credit and the not the other goods as insisted by the Assessee.

10.7 The Assessee appealed to the CESTAT, by which time the Bombay High Court had already rendered its decision in ***Bharti Airtel*** *(supra),* in view of which two members of the Bench of the CESTAT rendered two different opinions, hence, it was referred to a larger bench of the CESTAT, which, however, accepted the contentions of Revenue by holding that goods in question were neither "capital goods" and nor "inputs", leading to the filing of the appeal before the Delhi High Court wherein the Delhi High Court decided in favour of the Assessee.

10.8 In deciding the said appeal, the Delhi High Court framed the following questions of law:-

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

ii) Whether the Appellants are entitled to claim CENVAT credit on the towers, shelter as 'accessories' either as capital goods or input goods in terms of Rule 2(a) or 2(k) of the CENVAT Rules?

iii) Whether the CESTAT erred in applying nexus test with reference to MS Angles and Channels, whereas according to the Appellants what was brought to the site were towers, shelter and accessories for providing services?

iv) Whether the Appellants were justified, in terms of Rule 4 (1) of the CENVAT Rules, in claiming CENVAT credit of excise duty paid by the manufacturer of towers and shelters after receipt of such towers and shelters at their premises (i.e. tower sites)?

v) Whether the emergence of immovable structure at an intermediate stage (assuming without admitting) is a criterion for denial of CENVAT credit?

10.9 The Delhi High Court examined the aforesaid issues framed, in the following manner:

10.9.1 As regards the first issue as to whether towers, shelters and accessories used by the Assessee for providing business support services were immovable property or not, the Delhi High Court, after examining the relevant statutory provisions under Section 3(36) of the General Clauses Act, 1897 and Section 3 of the Transfer of Property Act, 1882, elaborately discussed the concept of immovable property, referring to a number of decisions including in ***Commissioner of Central Excise, Ahmedabad v. Solid and Correct Engineering Works & Ors (2010) 5 SCC 122; Sirpur Paper Mills Ltd. v. Collector of***

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Central Excise, Hyderabad, (1998) 1 SCC 400; Narne Tulaman Manufacturers Pvt. Ltd. Hyderabad v. Collector of Central Excise, Hyderabad, 1989 (1) SCC 172; Quality Steel Tubes (P) Ltd. v. Collector of Central Excise, U.P. (1995) 2 SCC 372 1995 and ***Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut, (1997) 1 SCC 203; Triveni Engineering & Indus Ltd. v Commissioner of Central Excise, (2000) 7 SCC 29*** and other decisions rendered by the Delhi High Court, and applied the permanency test to come to the definitive finding that the entire tower and shelter are fabricated in the factories of the respective manufacturers and thereafter, are supplied in CKD condition to the mobile service providers. It was held that these are merely fastened to the civil foundation to make these wobble free and stable. It was also held that tower and PFB can be unbolted and reassembled without any damage and relocated to a new site. These are thus not permanently annexed to the earth for the beneficial enjoyment of the land of the owner as observed in para 37 of the decision of the Delhi High Court which is reproduced below:

> *"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."*

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It was thus held that these are not immovable properties as held by the Tribunal.

10.9.2 Having held that these are not immovable but moveable, the Delhi High Court went on to examine the second issue as to whether the Assessee is entitled to claim CENVAT Credit on the tower and PFB either as "capital goods" or as "inputs" in terms of Rule 2(a)(A)(i) or Rule 2(k) of the CENVAT Rules, and whether these would qualify as accessories within the meaning of Rule 2(a)(A)(iii).

10.9.3 After analysing the provisions of Rule 2(a)(A) of the CENVAT Rules, the Delhi High Court held that for goods to be termed as "capital goods", the following conditions must be fulfilled:

> ***(i)*** they must fall, *inter alia*, under Chapter 85 of the first Schedule to the Central Excise Tariff Act (CET) or must be components, parts or spares of such goods falling under Chapter 85 of the first Schedule to the CET; and
>
> ***(ii)*** must be used for providing output service.

10.9.4 The Delhi High Court noted that all components, spares and accessories of such capital goods under Chapter 85, would also be treated as capital goods since CENVAT credit is available to accessories of capital goods.

10.9.5 As to what amounts to an accessory, the Delhi High Court, after analysis of the relevant rules and case laws, took the view that an accessory is an article or device that adds to the convenience or effectiveness but is not essential to the main machinery. It was held that tower has to be considered as an essential component/part of the "capital good" being BTS and the antenna. The Antenna which receives

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and transmits signals and used for providing output mobile service cannot be installed high above the ground without the tower.

10.9.6 It was also held that BTS is an integrated system which includes antenna, and each component in the BTS has to work in tandem to provide cellular connectivity to phone users to provide efficient services.

10.9.7 Further, it was held that the tower is part of the active infrastructure as the antenna cannot be placed at the appropriate altitude to generate uninterrupted frequency without the support of the tower and the PFBs are accessories for the placement of various BTS equipment and other items for these to remain in a dust-free environment with ambient temperature.

10.9.8 The Delhi High Court then concluded that tower and PFB/Shelter support the BTS for effective transmission of mobile signals and therefore, enhance the efficiency of BTS and antenna. The towers and shelters, therefore, act as components and parts and in alternative as accessories to the BTS and antenna and thus are covered by the definition of "capital goods".

10.9.9 The Delhi High Court accordingly found fault with the Tribunal in interpreting the definition of "capital goods" and observed that the Tribunal merely adopted the ratio laid down in the case of ***Bharti Airtel*** (*supra*) of the Bombay High Court without proper analysis. The Delhi High Court was of the opinion that the view of the Bombay High Court in the aforesaid case of ***Bharti Airtel*** (*supra*) and subsequent decisions was contrary to the settled judicial precedents including in ***Solid and Correct Engineering*** (supra).

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10.9.10 The Delhi High Court further examined as to whether towers and PFBs/shelters would qualify as "inputs" under Rule 2(k) of the CENVAT Rules.

10.9.11 After examining the principles laid down in ***Godfrey Phillips India Ltd. vs. Union of India, 1985 SCC OnLine Bom 345***; ***Indian Chamber of Commerce vs. Commissioner of Income Tax, WB, AIR 1976 SC 348***; ***Union Carbide India Ltd. vs. CCE, Calcutta-1, 1996 SCC OnLine CEGAT 1355***; ***Oblum Electrical Industries Pvt. Ltd. vs. Collector of Customs, 1997 (7) SCC 581***; ***J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. Sales Tax Officer, Kanpur, (1965) 1 SCR 900***, the Court came to the conclusion that the term "all goods" mentioned under Rule 2(k) of the CENVAT Rules would cover all the goods used for providing output services except those which are specifically excluded in the Rules. It held that the definition is wide enough to bring all goods which are used for providing any output service.

10.9.12 Applying the functional utility test, the Delhi High Court held that if an item is required for providing output service by the service provider on a commercial scale, the test would be satisfied. It was held that in the present case, the BTS is an integrated system and each of its components have to work in tandem with one another in order to provide the required connectivity to the cellular phone users and for efficient telecommunication services and because of these utility and functions, these items would be considered to be "inputs" within the ambit of Rule 2(k) of the CENVAT Rules.

10.9.13 As regards the question as to whether the CESTAT erred in applying the nexus test with reference to MS angles and channels, the

Delhi High Court found fault with the finding of the CESTAT that there was no nexus between the input and output service and held that CESTAT had erroneously ignored the decision of the Andhra Pradesh High Court in the case of ***M/s Indus Towers Ltd. vs. CTU, Hyderabad, 2012 SCC OnLine AP 628*** which held that towers and shelters are indeed used and are integrally connected to the rendition of telecommunication services. The channels, which according to the Assessee, were in fact towers, shelters and accessories, were bought and brought to the site in CKD/SKD condition and put to use for mounting/installing telecommunication antenna and other equipment for providing output telecom services. However, the Revenue contended that these goods were used for assembling towers and shelters and do not fall within the definition of Rule 2(a)(A) i.e. "capital goods" and that these are items falling under Chapter 73 and the same is not included in Rule 2(a)(A) of the CENVAT Rules.

10.9.14 The Delhi High Court accepted the plea of the Assessee by invoking the nexus test as enunciated in ***Collector of Central Excise vs. Hyundai Unitech Electrical Transmission Ltd. (2015) 17 SCC 181*** and took the view that MS angles and channels have gone into making towers and shelters which in turn are used for providing infra-support services/telecom services and hence are amenable to CENVAT credit.

10.9.15 Coming to the fourth question framed by the Delhi High Court as to whether the Assessee could claim CENVAT credit on receipt of such towers and shelters at their premises, which the CESTAT had denied on the ground that upon installation, towers and shelters become immovable property and hence are not eligible for CENVAT credit as "inputs". The Delhi High Court, however, accepted the plea of the

Assessee that Rule 4(1) of the CENVAT Rules allows credit on inputs on receipt in the premises of the output service provider.

10.9.16 The Delhi High Court ruled in favour of the Assessee that it is entitled to the credit *immediately* on receiving the inputs irrespective of the subsequent treatment i.e. by way of fastening, bolting etc. whether or not it results into an immovable property, by holding that the subsequent treatment of capital goods or inputs after receipt by the provider of output service is not relevant for the purpose of availing credit in terms of Rule 3(1) of the CENVAT Rules. According to the Delhi High Court, the only condition which is required to be satisfied is that the said goods must be used for providing the output services, which was not in dispute.

10.9.17 The Delhi High Court accepted the plea of the Assessee that there was no break in the chain linking availability and actual availing of CENVAT credit. The towers and shelters were purchased in CKD condition and not as mere angles, channels, beams or bars and there is neither loss of identity of goods, nor emergence of a new entity with fresh identity with a distinct character, name or use and thus, there is no transformation to or new value addition to the parts assembled as towers and shelters. The identity of the inputs received (as parts of tower) and the inputs installed (as tower on assembling the parts thereof) are one and the same and in the absence of any manufacturing operation, there is no breakage of the credit chain.

10.9.18 The Delhi High Court on analysis of the case laws cited on behalf of the respective parties held that the definition of "input" does not contain any condition relating to emergence of immovable property rendering it ineligible for taking credit and eligibility of credit must be

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determined at the time of receipt of goods in terms of Rule 4(1) of the CENVAT Rules and as such credit cannot be denied.

10.9.19 The Delhi High Court held that denial of CENVAT credit to the Assessee on the premise that the towers, on erection, resulted in an immovable property is erroneous and contrary to the judgment of this Court in the case of ***Solid and Correct Engineering*** (supra). The towers which are received in CKD condition are re-assembled and erected at the site, subsequently giving rise to a structure that remains immovable so long it is used for the reason of safety, stability and commercial reasons of use.

10.9.20 The Delhi High Court clarified that entitlement of CENVAT credit is determined at the time of receipt of the goods and the fact that such goods are later on fixed/fastened to the earth for use would not make them non-excisable commodities when received.

10.9.21 As regards the fifth question as to whether emergence of immovable structure at an intermediate stage will be a ground for denial of CENVAT credit, the Delhi High Court held that in view of the decision in ***Solid and Correct Engineering*** (supra), even if, in the intermediate stage, an immovable structure emerges, it is of no consequence in as much as entitlement of CENVAT credit is to be determined at the time of the receipt of goods and not at a later stage. It was held that 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.

10.9.22 The Delhi High Court also held that in the present case the tower and PFB shelters are not immovable property for in the event of

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requirement of relocation, these towers and PFB shelters can be removed and shifted to another location.

10.9.23 In the light of the aforesaid findings, the Delhi High Court held that the Assessees are entitled to seek CENVAT credit on the towers and pre-fabricated buildings (PFBs) and such other accessories.

10.10 What emerges from the above discussion is that the Bombay High Court and Delhi High Court differed fundamentally on the issue as to whether towers, parts thereof and pre-fabricated buildings, with which we are primarily concerned in the present proceedings, are "capital goods" within the meaning of CENVAT Credit Rules, 2004 so as to enable the Assessees to claim CENVAT credit on the duty paid on the purchase of these.

10.10.1 The other area of disagreement is that even if these items themselves may not qualify as "capital goods", but if they are found to be accessories or components of "capital goods", they would be covered by the deeming provision of "capital goods" under Rule 2(a)(A)(iii).

10.10.2 Further, another aspect where the two High Courts differed is whether these goods can be considered as "inputs" for the "output" of services rendered by the service providers for if these are treated as "inputs", the mobile service providers can claim CENVAT credit for the output services i.e. telecom services provided by them.

10.10.3 While the Bombay High Court held that towers and the parts thereof and prefabricated buildings are not "capital goods" since these are immovable property and also cannot be said to be "inputs", thus, the Assessee is not entitled to claim CENVAT credit, whereas, the Delhi High Court took the contrary view that towers, parts thereof and pre-fabricated buildings are not immovable property and these can be

considered as "capital goods" as defined under the CENVAT Rules. Since these are "capital goods", these are liable to excise duty, of which the service provider can take CENVAT credit. The Delhi High Court also held that these goods can be said to be "inputs" for providing output service and hence eligible for CENVAT credit.

Analysis by this Court :

11. From the above discussion, what is evident is that the entire controversy revolves around the core issue as to whether the mobile service providers (MSPs) are entitled to claim CENVAT credit on excise duties paid on mobile tower, its parts thereof and prefabricated buildings (PFBs) in terms of the Rule 3 of the CENVAT Rules and whether the credit so claimed can be used to pay service tax for the output services rendered by the MSPs.

11.1 As discussed above, Rule 3(1) of the CENVAT Rules enables a provider of taxable service to claim CENVAT credit on duties paid on any "capital goods" or "input" received in the premises of the service provider. Thus, if the mobile towers and prefabricated buildings, which are the items in issue here, qualify as "capital goods" or "inputs" received in the premises of the mobile service provider, the mobile service provider will be entitled to claim CENVAT credit which can be further used for paying service tax for the output services rendered by the mobile service provider.

11.2 In the light of the provisions of the CENVAT Rules, if it is held that towers and/or parts thereof and prefabricated buildings (PFBs) are "capital goods" or "inputs" used for providing output service within the meaning of the aforesaid CENVAT Rules, then CENVAT credit can be claimed on these items.

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11.2.1 For this we will first examine the attributes of "capital goods" for if these items are to be considered "capital goods", these must first have the traits of "goods".

11.2.2 We, therefore, now focus our attention in understanding what is meant by "goods", for if these items do not qualify as goods then these obviously cannot be "capital goods" and the benefit of CENVAT credit under the Rules will not be available, since such credit is available only in respect of "goods".

11.2.3 The word "goods" has not been defined in the CENVAT Rules. Hence, we will refer to other statutes to understand its meaning. The term "goods" has been defined in an expansive manner, in the widest amplitude, under Article 366 (12) of the Constitution of India so as to include all materials, commodities and articles.

11.2.4 However, since this definition is too broad in nature, it may not help us in our enquiry to determine whether the items in consideration are "goods" or not, for the purpose of CENVAT Rules.

11.2.5 "Goods" has not been defined in the Central Excise Act, 1944. We, therefore, look into other statutes. The term "goods" has been defined under various statutes some of which may be mentioned as below.

(i) Sale of Goods Act, 1930

Section 2(7):

"goods" means every kind of movable property other than actionable claim and money; and includes stocks, shares, growing crops, grass, and things attached to forming part of the land which are agreed to be severed before sale or under contract of sale.

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(ii) The Central Goods And Services Tax Act, 2017

Section 2(52):

"goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

(iii) The Central Sales Tax Act, 1956

Section 2(d):

"goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include [newspapers] actionable claims, stocks, shares and securities.

(iv) The Customs Act, 1962

Section 2(22):

goods includes—(a) vessels, aircrafts and vehicles; (b) stores; (c) baggage; (d) currency and negotiable instruments; and (e) any other kind of movable property.

(v) Competition Act, 2002

Section 2(i):

"goods" means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes— (A) products manufactured, processed or mined; (B) debentures, stocks and shares after allotment; (C) in relation to goods supplied, distributed or controlled in India, goods imported into India.

(vi) The Motor Vehicles Act, 1988

Section 2(13):

"goods" includes live-stock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried

in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle.

(vii) <u>The Micro, Small And Medium Enterprises Development Act, 2006</u>

<u>Section 2(f)</u>:

"goods" means every kind of movable property other than actionable claims and money.

(viii) <u>The Bureau of Indian Standards Act, 2016</u>

<u>Section 2(14)</u>:

"goods" includes all kinds of movable properties under the Sale of Goods Act, 1930, other than actionable claims, money, stocks and shares;

(ix) <u>Consumer Protection Act, 2019</u>

<u>Section 2(21)</u>:

"goods" means every kind of movable property and includes "food" as defined in clause (j) of sub-section (1) of section 3 of the Food Safety and Standards Act, 2006 (34 of 2006).

11.2.6 From the above, it appears that the definition of "goods" under the Sales of Goods Act, 1930 seems to be the basis of the term "goods" in other Statutes. Hence, we would primarily rely on the definition given in the Sale of Goods Act.

11.2.7 The items in consideration viz., towers and prefabricated buildings are neither actionable claim nor money, nor do they come within the inclusive clause of the definition, viz., stocks, shares, growing crops, grass, and things attached to forming part of the land which are agreed to be severed before sale or under contract of sale.

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11.2.8 If these items are movable properties, these will be "goods", in which case our further enquiry will be to examine whether these belong to the category of "capital goods" as enumerated in Rule 2(a)(A) only under which the Assessees will be entitled to claim CENVAT credit under the Rules.

11.2.9 On the other hand, if these are held to be immovable property, as the Revenue insists and also as has been held by the Bombay High Court, we may not be required to proceed further in the enquiry with reference to Rule 2(a)(A) for claim of CENVAT credit on "capital goods".

11.3 Thus, the focus of our inquiry now will be to ascertain whether these items namely, towers, its parts thereof and prefabricated buildings are movable or immovable properties.

11.3.1 As to what is a movable property has been defined and can be understood from the expansive meaning assigned to it under Section 3(36) of the General Clauses Act, 1897 which states that,

> "*movable property shall mean property of every description except immovable property*".

11.3.2 The aforesaid definition categorically indicates that movable and immovable properties are mutually exclusive. Thus, if it is found that these items are not immovable properties, these invariably can be treated as movable properties under Section 3(36) of the General Clause Act and thus will be "goods" within the meaning of Section 2(7) of the Sale of Goods Act, 1930 and hence may qualify as "capital goods" within the meaning of Rule 2(a)(A) subject to fulfilling other conditions mentioned therein.

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11.3.3 As to what is immovable property has been explained under Section 3 of the Transfer of Property Act, 1882 which specifies that "*immovable property does not include standing timber, growing crops or grass"*.

11.3.4 It has been also defined under Section 3(26) of the General Clauses Act, though not exhaustively, but in an inclusive manner by providing 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*".

11.3.5 Therefore, we have to consider whether these items are attached to the earth or are permanently fastened to anything attached to the earth, for if these are found to be so, these will be immovable properties and hence cannot be "goods" and consequently, cannot be "capital goods" within the scope of the CENVAT Rules.

11.4 As to what amounts to "attached to earth" as mentioned under Section 3(26) of the General Clauses Act, has been explained under Section 3 of the Transfer of Property Act, 1882 to mean as rooted in the earth, as in the case of trees and shrubs; imbedded in the earth, as in the case of walls or buildings; or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

11.5 For easy reference, the aforesaid definition clauses of the Transfer of Property Act, 1882 and the General Clauses Act, 1897 as may be relevant are reproduced below.

> ***Section 3(36) of the General Clauses Act.***
>
> *"movable property" shall mean property of every description, except immovable property;*

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Section 3(26) of the General Clauses Act.

"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.

Section 3 of the Transfer of Property Act.

"immovable property" does not include standing timber, growing crops or grass.

Under ***Section 3 of the Transfer of Properties Act,***

"attached to the earth" means:

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

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

11.6 From the above, it is now clear that if these items, namely towers and parts thereof and prefabricated buildings/shelters are considered to be "goods", these cannot be immovable properties. Conversely, if these are not rooted in the earth, nor imbedded in the earth nor attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, these cannot be immovable properties and can qualify to be movable properties and hence, "goods".

11.6.1 Since, towers and parts thereof and prefabricated buildings/shelters apparently appear to be fixed on the earth or building, these seem to be immovable properties at the first blush. However, the first appearance may not be decisive to indicate the real character of these items, whether these are immovable or movable properties, as demonstrated by the conflicting views of the two High Courts on this issue. Hence, we need to delve further to arrive at the correct position in law on this issue.

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11.7 In order to determine whether any property is movable or immovable, this Court, in the light of the statutory provisions has applied certain principles. It has also been noted that such determination may be done not based on a single test but after applying several criteria on the facts of each case.

We will now refer to some of the decisions relied upon by the contesting parts.

11.7.1 This Court, in ***Solid and Correct Engineering*** *(supra)*, applied the intendment and functionality test to determine whether any article is movable or immovable. The issue in the said case was whether the asphalt drum/hot mix plant, though apparently appearing to be immovable and fixed to the structure embedded to the earth, can be considered to be movable. After examining the expression "attached to the earth" as mentioned in Section 3 of the Transfer of Property Act, the observations of this Court were as follows:

> **"*25.*** *It is evident from the above that the expression "attached to the earth" has three distinct dimensions viz. (a) rooted in the earth as in the case of trees and shrubs, (b) imbedded in the earth as in the case of walls or buildings, or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1½ ft deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in 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 also in no way comparable to attachment of a plant 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 the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of*

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that to which the plant is attached. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded."

11.7.2 This Court found that the machine was fixed and attached to the earth primarily for the purpose of providing wobble-free operation of the machine and held that there was no necessary intent to make the same permanent, thus, it does not amount to permanently fixing, embedding as attachment in the sense that would make the machine a part and parcel of the earth permanently, and held as follows:

"*43. 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.*

44. 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."

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11.7.3 While deciding the said issue, the Court referred to ***Triveni Engineering*** *(supra),* ***Sirpur Paper Mills Ltd.*** *(supra),* ***Quality Steel Tubes (P) Ltd.*** *(supra)*, ***Mittal Engg. Works (P) Ptd.*** *(supra)*, ***T.T.G Industries Ltd. Vs. CCE (2004) 4 SCC 751*** and examined various characteristics of the property including marketability and lack of permanency to determine whether the property in issue was movable or immovable.

11.7.4 In ***Triveni Engineering*** *(supra),* this Court applied the marketability test, in which it took the view that if the goods in question are capable of being taken into the market and sold, the same cannot be treated to be as immovable but movable property.

This Court observed that "marketability" itself indicates movability of the property in issue.

11.7.5 This Court was of the view and thus held that if the goods that were fixed to the earth were capable of being dismantled without doing any damage or change in the nature of goods, it would indicate the "absence of permanency" and such a good cannot be deemed to be immovable property, as held in the following paragraph:

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

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recorded do not justify the conclusion of the Tribunal inasmuch as on removal, a turbo alternator gets dismantled into its components - steam turbine and alternator. It appears that the Tribunal did not keep in mind the distinction between a turbo alternator and its components. Thus, in our view, the test of permanency fails."

As regards marketability it was held as follows: -

"21. The marketability test requires that the goods as such should be in a position to be taken to the market and sold and from the above findings it follows that to take it to the market the turbo alternator has to be separated into its components — turbine and the other alternator — but then it would not remain turbo alternator, therefore, the test is incorrectly applied. Though, there is no finding that without fixing to the platform such turbo alternator would not be functional, it is obvious that when without fixing, it does not come into being, it can hardly be functional."

11.7.6 In the case of ***Sirpur Paper Mills Ltd.*** *(supra),* this Court again applied the test of marketability. The issue which arose for consideration in the said case was whether paper machines assembled at site were liable for duties under the Excise Act. It was the plea of the Assessee that since the machine was embedded in concrete base, it became an immovable property though embedding was for providing a wobble-free operation of the machine. This Court rejected the plea and held that merely because the machine was attached to the earth for efficient working and wobble- free operation, it did not *per se* render the said property immovable since the said machine can be sold in the market. It was then observed 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 house-holder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the component of water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine

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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."

11.7.7 In ***Quality Steel Tubes (P) Ltd.*** *(supra),* this Court was examining whether "the tube mill and welding head" erected and installed by the Assessee for manufacture of tubes and pipes out of duty-paid raw material were exigible to duty. By applying the marketability test, this Court rejected the plea of the Assessee by holding that these were erected and installed in the premises and embedded in the earth and these are no longer movable goods that could be brought to market for sale since these ceased to be goods within the meaning of Section 3 of the General Clauses Act. It was thus held that,

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

11.7.8 The test of marketability was also applied in the case of ***Mittal Engg. Works (P) Ptd.*** (supra).

11.7.9 Much reliance was placed by the Revenue on the ***T.T.G. Industries Ltd.*** *(supra)* in which this Court, by relying on the permanency test as also applied in the ***Municipal Corporation of Greater Bombay*** *(supra)* held that if the article cannot be shifted without first being dismantled and thereafter re-erected at another site, it cannot be considered to be a movable property but an immovable property.

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In the aforesaid case, the machinery was erected at the site on a specially made concrete floor at a very high level of 25 feet from the ground level and the sheer weight, even without being fastened by nuts and bolts, rendered it incapable of being shifted to another site without dismantling and re-erecting. Given these facts, this Court held that it can be said to be immovable property.

In ***Municipal Corporation of Greater Bombay*** *(supra)* this Court observed as follows:

> *"32. The tanks, though, are resting on earth on their own weight without being fixed with nuts and bolts, they have permanently been erected without being shifted from placed to place. Permanency is the test. The chattel whether is movable to another place of use in the same position or liable to be dismantled and re-erected at the latter place? If the answer is yes to the former it must be a movable property and thereby it must be held that it is not attached to the earth. If the answer is yes to the latter it is attached to the earth."*

11.7.10 In ***T.T.G. Industries Ltd.*** *(supra),* this Court also placed reliance on ***Quality Steel Tubes and Mittal Engineering works Ltd.*** *(supra).*

This Court in ***T.T.G. Industries Ltd.*** *(supra)* held as follows:

> *"27. Keeping in view the principles laid down in the judgments noticed above, and having regard to the facts of this case, we have no doubt in our mind that the mudguns and the drilling machines erected at site by the appellant on a specially made concrete platform at a level of 25 feet above the ground on a base plate secured to the concrete platform, brought into existence not excisable goods but immovable property which could not be shifted without first dismantling it and then re-erecting it at another site. We have earlier noticed the processes involved and the manner in which the equipments were assembled and erected. We have also noticed the volume of the machines concerned and their weight. Taking all these facts into consideration and having regard to the nature of structure erected for basing these machines, we are satisfied that the judicial member of the CEGAT was right in reaching the conclusion that what ultimately emerged as a result of processes undertaken and erections done cannot be described as "goods" within the meaning of the Excise Act and exigible to excise duty. We find considerable similarity of facts of the case in hand and the facts in Mittal Engineering and Quality Steel Tubes (supra) and the principles underlying those decisions must apply to the facts of the case*

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in hand. It cannot be disputed that such drilling machines and mudguns are not equipments which are usually shifted from one place to another, nor it is practicable to shift them frequently. Counsel for the appellant submitted before us that once they are erected and assembled they continue to operate from where they are positioned till such time as they are worn out or discarded. According to him they really become a component of the plant and machinery because without their aid a blast furnace cannot operate. It is not necessary for us to express any opinion as to whether the mudgun and the drilling machines are really a component of the plant and machinery of the steel plant, but we are satisfied that having regard to the manner in which these machines are erected and installed upon concrete structures, they do not answer the description of "goods" within the meaning of the term in the Excise Act."

It may be noted that while this Court invoked permanency test in ***T.T.G. Industries Ltd.*** *(supra),* what was also observed was that if the machinery cannot be shifted and re-erected without dismantling, it would show that it is an immovable property.

11.7.11 In the present case, while mobile tower cannot be shifted to another location without dismantling it, it is to be noted that mobile tower itself was bought and brought in a completely knocked-down (CKD) or semi-knocked-down (SKD) condition and it was erected and installed at the site after assembling the parts. If the said mobile tower is to be shifted to another location, it obviously has to be dismantled and restored to its SKD or CKD condition and thereafter re-erected, which however, would not entail any damage to it. Thus, the present case of the mobile towers differs from the factual matrix of ***T.T.G. Industries Ltd.*** *(supra)*.

11.7.12 Before us, the Revenue has also placed reliance on the ***Commissioner of Central Excise Versus Virdi Brothers and Ors., (2007) 15 SCC 24*** and ***CCE Versus Globus Store Pvt. Ltd., (2011) 15 SCC 200***, in which this Court relied on a Circular issued by the Central Board of Excise and Custom, Department of Revenue, Ministry of

Finance, Government of India under No. 58/1/2002-CX dated 15.01.2002 in which it was mentioned under Clause (e) that,

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

11.7.13 In the present case, as discussed above, the tower has been bought and brought to the site in a semi or completely knocked-down condition and assembled and if the same is required to be re-located to another location it can be dismantled in its original semi-knocked-down or completely knocked down condition without causing any damage to the tower itself and as such the Clause (e) of the Circular referred to the above cannot be applied.

11.7.14 It may be also noted that the CESTAT, in its order observed that the Revenue does not contest or dispute the fact that wherever BTS/ BSC site has to be relocated, all the equipment like BTS/BSC, microwave, UPS, tower, antenna etc., are required to be dismantled as individual components and then they are required to be moved from the existing site and reassembled at a new site. The CESTAT, however, observed that this involves damage to certain parts like cable trays etc. which are embedded/fixed to the civil structure as also the BTS microwave equipment itself. Thus, all the components of the newly set up structure cannot be shifted as an illustration to the room housing the equipment. Apart from it, the CESTAT was of the opinion that the goods cannot be re-erected as in the previous place as requirement of each place is different. The structures cannot be shifted without damage. Apart from that various items and components are embedded in the earth. Therefore, the structure would not be considered as movable.

11.7.15 Therefore, the finding of the CESTAT is that even though the tower can be relocated to another site, it would entail damages to it.

11.7.16 There can no dispute that if the newly set up BTS/BSC is relocated to another site it may entail certain damages. However, what is important to be noted is that the damage is *qua* the BTS/BSC or cables connecting the various components, but not the tower itself or PFB with which we are concerned. If the tower or the PFB can be dismantled and relocated in another site without causing any damage to either the tower or PFB, the mobility or the marketability of these items is retained. Thus, as far as the tower and PFBs are concerned, these exhibit the character of a movable property.

11.8 In view of the above decisions, we are of the opinion that merely because certain articles are attached to the earth, it does not *ipso facto* render these immovable properties. If such attachment to earth is not intended to be permanent but for providing support to the goods concerned and make their functioning more effective, and if such items can still be dismantled without any damage or without bringing any change in the nature of the goods and can be moved to market and sold, such goods cannot be considered immovable.

11.8.1 We may summarise some of the principles applied by the Courts in the decisions referred to above to determine the nature of the property as follows:

> **1. Nature of annexation:** This test ascertains how firmly a property is attached to the earth. If the property is so attached that it cannot be removed or relocated without causing damage to it, it is an indication that it is immovable.

2. Object of annexation: If the attachment is for the permanent beneficial enjoyment of the land, the property is to be classified as immovable. Conversely, if the attachment is merely to facilitate the use of the item itself, it is to be treated as movable, even if the attachment is to an immovable property.

3. Intendment of the parties: The intention behind the attachment, whether express or implied, can be determinative of the nature of the property. If the parties intend that the property in issue is for permanent addition to the immovable property, it will be treated as immovable. If the attachment is not meant to be permanent, it indicates that it is movable.

4. Functionality Test: If the article is fixed to the ground to enhance the operational efficacy of the article and for making it stable and wobble free, it is an indication that such fixation is for the benefit of the article, such the property is movable.

5. Permanency Test: If the property can be dismantled and relocated without any damage, the attachment cannot be said to be permanent but temporary and it can be considered to be movable.

6. Marketability Test: If the property, even if attached to the earth or to an immovable property, can be removed and sold in the market, it can be said to be movable.

11.9 The plea of the Revenue is that the items in issue are attached to the earth, fixed permanently and not marketable, hence immovable, as also accepted by the Bombay High Court.

11.9.1 What is "attached to the earth" to make it an immovable property would have to possess any of the three attributes as specified under Section 3 of the Transfer of Property of Act, namely,

> (a) rooted in the earth, as in the case of trees and shrubs;
>
> (b) imbedded in the earth, as in the case of walls or buildings; or
>
> (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

11.9.2 The present items in issue are not the ones which are rooted in the earth as in the case of trees and shrubs [sub-clause (a)]. Therefore, the next consideration will be whether these are embedded in the earth, as in the case of walls or buildings [sub-clause (b)], or whether these are attached to what is so embedded for the permanent beneficial enjoyment of that to which these are attached to the earth [sub-clause (c)]. The attachment of tower to the earth/building, however, does not partake of the character of walls or buildings imbedded in the earth.

11.9.3 It is on the tower that the antennas are mounted and affixed at proper height, to make these stable. Since the antennas are used for receiving and sending radio signals, these need to be attached at a certain height, and these are required to be stable and wobble-free. It is not in dispute that the mobile tower is attached and fastened to the earth or building to provide stability to the same and to make antennas unshakable due to wind, rain or any other external force(s).

11.9.4 The mobile tower is bought and brought in the CKD or SKD form from the manufacturers and same is installed at the site by

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assembling the parts which also consists of MS angles and channels. The tower, after being assembled and fixed to the earth or a building can be dismantled without any change in the nature of the tower, and the tower can be removed and shifted to any other location as per the needs and requirements of the service provider and also can be re-sold in the market in the same form and hence both, the functionality and marketability tests as applied in the aforesaid cases of ***Solid and Correct Engineering*** *(supra),* ***Triveni Engineering*** *(supra)* and ***Sirpur Paper Mills Ltd.*** *(supra)* can be said to be fulfilled in the present case.

11.9.5 The tower is brought to the site in CKD or SKD form and assembled at the site. If it is to be dismantled, it only involves unbolting of the nuts and bolts. Dismantling the tower may entail some damages, but such damages will be on the cables which may be required to be stripped of but no damage is caused to the tower. If one says that there may be some damage caused, it will be with reference to the BTS which consists of the antenna, connected by cables and other electrical equipment. But there is no damage to the tower per se. Similarly, in case of PFB, there is no damage to it, though damage may be caused to the wiring or cables connecting the various parts of the Base Transceiver System (BTS) or the Base Station Sub-System (BSS).

11.9.6 The tower which is affixed to the earth and thus appears to be immovable, can be dismantled from the existing site and re-assembled without causing any change in its character. It can be moved to any other place and also sold in the market. These attributes negate the permanency test, which is a characteristic of immovable property. The tower when fixed to the earth or the building or the civil foundation by nuts and bolts does not get assimilated with the earth or building permanently. Such affixing is only for the purpose of maintaining

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stability of the tower and keep it wobble free so that the antenna which is hoisted on it can receive and transmit the electromagnetic signals effectively and without any disturbance. Affixing of the tower to the earth or building is not for the permanent beneficial enjoyment of the land or building, but to make it stable for effective functioning of the antenna for seamless rendering of mobile services by the service provider to the consumers/subscribers. Same is the case with pre-fabricated buildings (PFB).

11.9.7 If we thus apply the functionality test, it can be stated that the attachment of tower to the earth /building is not for the benefit of the land or the building but for better functioning of the antenna which is fixed on the tower. Thus, based on functionality test it can be said that tower is a movable property, as also held in ***Municipal Corporation of Greater Bombay*** *(supra)***.**

11.9.8 These items are not embedded in the earth as in the case of walls or buildings so as to fall under clause (b) of the definition of "attached to the earth" as provided under Section 3 of the Transfer of Property of Act.

Neither do these items fall under clause (c) of the definition of "attached to the earth" and nor are these intended to be for permanent beneficial enjoyment of the building or land to which these are attached.

In this regard, it may be apposite herein to mention what was stated in ***Solid & Correct Engg. Works*** *(supra)* as follows:-

> ***"25.*** *It is evident from the above that the expression "attached to the earth" has three distinct dimensions viz. (a) rooted in the earth as in the case of trees and shrubs, (b) imbedded in the earth as in the case of walls or buildings, or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a*

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foundation not more than 1½ ft deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in 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 also in no way comparable to attachment of a plant 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 the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded."

11.9.9 Applying the tests of ***permanency***, ***intendment, functionality*** and ***marketability***, it is quite clearly evident that these items are not immovable but movable within the meaning of Section 3 of the Transfer of Property Act, read with Section 3 (36) of the General Clause Act.

If we consider the nature of annexation of the tower to the earth, it is seen that the annexation is not for permanent annexation to the land or the building as the tower can be removed or relocated without causing damage to it.

It is also to be noted that the attachment of the tower to the building or the land is not for the permanent enjoyment of the building or the land.

Further, the tower is fixed to the land or building for enhancing the operational efficacy and proper functioning of the antenna which is fixed on the tower by making it stable and wobble free.

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The fact that the tower, if required can be removed, dismantled in the CKD and SKD and sold in the market is not disputed.

Application of the tests evolved and discussed above on these items clearly points to the movability as opposed to immovability of these items. We are, thus, of the view that mobile towers and PFBs are movable properties and hence, "goods".

11.9.10 What we have also noticed is that the Bombay High Court has held that since the towers and parts thereof are fastened and fixed to the earth and after their erection, they become immovable, and therefore, these cannot be classified as goods. While this conclusion is based on the classic definition of immovable property based on one criterion, as noticed earlier, that may not be the sole consideration to determine whether a property is immovable or movable. Even if the property is embedded to the earth and appears ex-facie immovable, if there are other indicators which show the characteristics of a movable property, as for instance, susceptibility to removal of the property from the fixture without causing any damage to its basic structure and change in character, ability of relocation to a new location and if the same can be sold thereby showing marketability, and lack of intention to make it a permanent fixture, in spite of the said property being embedded to the earth by way of fixing, the property may still be considered to be movable as has been held in many of the cases referred to above including in ***Solid and Correct Engineering*** *(supra)*.

11.9.11 It also appears that the decision of this Court in ***Solid and Correct Engineering*** *(supra)* was not brought to the notice of the Bombay High Court and thus escaped consideration. The Bombay High Court without considering above-mentioned aspects proceeded on the

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premise that these items namely tower, its parts thereof and PFBs are immovable properties. In paragraph no. 52 of the impugned judgment, while dealing with the case of ***CCE Vs. Sai Samhita Storages (P) Ltd.,*** *(supra)* rendered by the Division Bench of the Andhra Pradesh High Court, the Bombay High Court observed that,

> *"The towers are admittedly immovable structures and non-marketable and non-excisable. We, therefore, are of the clear opinion that this judgment of the Division Bench of the Andhra Pradesh High Court is inapplicable in the facts of the present case."*

11.9.12 We are of the opinion that the aforesaid finding was erroneous for the reason that there was no admission on the part of the Assessee that towers are immovable structures and in fact, that was the disputed issue before the Court which was required to be determined.

11.9.13 The Revenue, however, relied on ***Triveni Engineering & Industries Ltd.*** (*supra*) to contend that there is neither mobility nor marketability in the tower but it is permanently fastened to the earth or building. In this regard, para 13 and 14 of the judgment in ***Triveni Engineering & Industries Ltd.*** (*supra*) may be referred to

> *"13. A perusal of the entry shows that a turbo alternator does not find a place therein eo nomine. The question then will be whether a "turbo alternator" falls within the meaning of "electric-generating set". To bring a "turbo alternator" under that heading it must be shown to have the attributes of excisable "goods" as understood in the excise law. They are mobility and marketability. The article in question should be capable of being brought and sold in the market — a test which is too well established by a series of decisions of this Court to be elaborated here.*
>
> *14. 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*

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fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case."

11.9.14 Hence, it is to be noted that the tower, though appears to be fastened to the earth, cannot be said to be permanently fastened to the earth or a building for the beneficial enjoyment of the land or the building. The tower possesses the characteristics of mobility as the same can be dismantled and relocated to another place or site.

Therefore, in our opinion, the decision in ***Triveni Engineering & Industries Ltd.*** (*supra*) cannot be applied in the present case, considering the factum and intention behind fastening of the tower for purpose of keeping the antenna stable and wobble free and that it can be relocated.

11.9.15 Reliance has been also placed by the Revenue on ***Quality Steel Tubes (P) Ltd.*** *(supra)* by drawing our attention to para 5 and 6 of the judgment which read as follows:

"5. In several decisions rendered by this Court commencing from Union of India v. Delhi Cloth and General Mills Co. Ltd. [AIR 1963 SC 791 : 1977 ELT 199] to Indian Cable Co. Ltd. v. CCE [(1994) 6 SCC 610 : (1994) 74 ELT 22] the twin test of exigibility of an article to duty under Excise Act are that it must be goods mentioned either in the Schedule or under Item 68 and must be marketable. In Delhi Cloth Mills [AIR 1963 SC 791 : 1977 ELT 199] it having been held that the word 'goods' applies to those goods which can be brought to market for being bought and sold it is implied that it applies to such goods as are moveable. The requirement of the goods being brought to the market for being bought and sold has become known as the test of marketability which has been reiterated by this Court in CCE v. Ambalal Sarabhai Enterprises [(1989) 4 SCC 112 : 1989 SCC (Tax) 162 : (1989) 43 ELT 214] . The Court has held in Union Carbide India Ltd. v. Union of India [(1986) 2 SCC 547 : 1986 SCC (Tax) 443] that even if the goods was capable of being brought to the market, it would satisfy the test of marketability. The basic test, therefore, of levying duty under the Act is twofold. One, that any article must be goods and second, that it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become immovable and do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold.

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Therefore, both the tests, as explained by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been erected and installed in the premises and embedded to earth ceased to be goods within meaning of Section 3 of the Act.
6. Learned counsel for the Revenue urged that even if the goods were capable of being brought to the market it would attract levy. True, but erection and installation of a plant cannot be held to be excisable goods. If such wide meaning is assigned it would result in bringing in its ambit structures, erections and installations. That surely would not be in consonance with accepted meaning of excisable goods and its exigibility to duty.

11.9.16 The Revenue has also relied on the decision in ***Mittal Engineering Works (P) Ltd.*** *(supra)* by referring to paras 9 and 10 of the said judgment which are reproduced as below:

"9. Upon the material placed upon record and referred to above, we are in no doubt that the mono vertical crystalliser has to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory. It is not capable of being sold as it is, without anything more. As was stated by this Court in the case of Quality Steel Tubes (P) Ltd. [(1995) 2 SCC 372] the erection and installation of a plant is not excisable. To so hold would, impermissibly, bring into the net of excise duty all manner of plants and installations.

10. The Tribunal took an unreasonable view of the evidence. It was the case of the appellants, not disputed by the Revenue, that mono vertical crystallisers were delivered to the customers in a knocked-down condition and had to be assembled and erected at the customers' factory. Such assembly and erection was done either by the appellants or by the customer. Where it was done by the appellants, fabrication materials of the customer were used and the customer sent to the appellants debit notes in regard to their value. Where the assembly and erection was done by the customer, there was no occasion for it to send to the appellants a debit note. The fact that there was no debit note in respect of one customer could not reasonably have led the Tribunal to conclude that in the case of that customer a complete mono vertical crystalliser had left the appellants' factory and that, therefore, mono vertical crystallisers were marketable. The Tribunal ought to have remembered that the record showed that mono vertical crystallisers had, apart from assembly, to be erected and attached by foundations to the earth and, therefore, were not, in any event, marketable as they were."

11.9.17 Relying on the aforesaid decisions, it has been contended by the Revenue that the tower once assembled and fixed to the earth/building, ceases to be marketable and hence cannot be said to be moveable.

11.9.18 However, as discussed above, the tower and PFBs, after being dismantled without being damaged, can be relocated or sold, thereby possessing the character of marketability. As such these decisions would not be applicable in the present case.

For the same reason, the decision in ***T.T.G Industries Ltd.*** *(supra)* also relied upon by the Revenue will not help the cause of the Revenue.

11.9.19 The Revenue has also sought to rely upon a circular under F.No.137/315/2007-CX.4, dated 26.02.2008 issued by the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance specifying that angles, channels, beam of steel and prefabricated shelter, PUF panels are used by the cellular phone service providers for erecting towers and making housing/storage units and are used in making of products and cannot be called excisable goods, being attached to the earth and are not chargeable to excise duty. The circular further mentions that these inputs for civil structures are not used for providing taxable service and accordingly the circular clarified that credit of excise duty paid on such items is not available to the telecom service providers.

11.9.20 We are of the considered opinion that though the Revenue/ Department may issue any such circular based on their understanding of the matter and the Revenue authorities/officers are bound to follow it, yet, in view of the findings arrived at by us in these proceedings, the

said circular would be of no avail and to the extent the same is contrary to our findings in these proceedings would not be enforceable and would be liable to be withdrawn.

11.9.21 In ***Commissioner of Central Excise, Bolpur Vs. M/s Ratan Melting & Wire Industries, (2008) 14 SCR 653***, it was held that,

> *"6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law. (emphasis added)*

The aforesaid proposition of law was reiterated in ***Commissioner of Central Excise, Mumbai, Vs. Hindoostan Spinning and Weaving Mills Ltd. & anr, (2009) 14 SCC 221.***

11.9.22 In a recent judgment in ***Ranadey Micronutrients & Ors. v. Collector of Central Excise, (2022) 18 S.C.R. 28***, it was held that while the departmental circulars in operation are binding upon the officers of the Revenue, to the extent it is contrary to the statute must be withdrawn by holding as follows:

> *"15. There can be no doubt whatsoever, in the circumstances, that the earlier and later circulars were issued by the Board under the provisions of Section 37B, and the fact that they do not so recite does not mean that they do not bind Central Excise officers or become advisory in character. There can be no doubt whatsoever that after 21st November, 1994, Excise duty could be levied upon micronutrients only under the provisions of heading 31.05 as "other fertilisers". If the later*

circular is contrary to the terms of the statute, it must be withdrawn. While the later circular remains in operation the Revenue is bound by it and cannot be allowed to plead that it is not valid." (emphasis added)

11.10 We now proceed to the next stage of consideration. Even if it is held that the mobile towers and PFBs are movable properties and "goods", the question which still requires to be answered is whether these are "capital goods" within the meaning of Rule 2(a)(A) of the CENVAT Rules. As discussed above, every "good" is not "capital good" within the scope of the CENVAT Rules, but only such goods which come within meaning of sub-Clause (i) of Rule 2(a)(A) i.e. goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90 Heading no. 68.2 and the sub-Heading no. 6801, 6801.1 and 6801.10 of the First Schedule to the Central Excise Tariff Act, which are used for providing output service will be considered as "capital goods" and eligible for CENVAT credit. Sub-clause (ii) of Rule 2(a)(A) provides that pollution control equipment used for providing output service can also be capital goods with which we are not concerned.

11.10.1 However, it may be noted that neither tower nor prefabricated shelter/building (PFB) finds mention under any of the Chapters/Heading specified under sub-clause (i), nor these are pollution control equipment to fall within sub-clause (ii). Hence, these items on their own cannot be said to be "capital goods" within the meaning of sub-clause (i) and (ii) of Rule 2(a)(A).

11.11 However, it is to be noted that it has been provided under sub-clause (iii) that components, spares and accessories of goods specified in sub-clause (i) and sub-clause (ii) will also be treated as "capital goods" if used for providing output service within the meaning of CENVAT Rules. Therefore, we have to examine whether towers and

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PFBs which on their own are not "capital goods" within the scope of either of the sub-clauses (i) and (ii) can be considered to be "capital goods" under sub-clause (iii) by virtue of being accessories of any of the "capital goods" mentioned under sub-clauses (i) and (ii) of Rule 2(a)(A).

11.11.1 It is also not the case of the Assessees before us that mobile towers and PFBs are 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 Central Excise Tariff Act so as to be deemed as capital goods. It is the case of the Assessees that the mobile tower is an accessory of "antenna" which is part of "BTS" and since antenna and BTS fall under Chapter 85 which are "capital goods", mobile tower being accessory of antenna and BTS is to be treated as "capital good" by virtue of sub-clause (iii) of Rule 2(a)(A). Similar is the case with PFBs.

11.11.2 Since, we have already held that mobile towers and PFBs are not immovable properties and can be treated as "goods", we have to examine whether these are to be treated as accessories of antenna and BTS (which are "capital goods") as claimed by the Assessees and if so, being accessory of antenna/ BTS, all these are covered within the meaning of "capital goods" under Rule 2(a)(A) (iii) and since these accessories of capital goods are used for providing output service i.e. mobile service, whether the service providers would be entitled to take CENVAT credit by virtue of Rule 3(i) of the CENVAT Rules.

11.11.3 In this regard, it is to be noted that the stand of the Revenue is that the towers and PFBs have independent functions and existence and have specific utilities and thus these cannot form part of a

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composite system or a single unit and hence they cannot be considered to be accessories of the antenna or BTS in contra-distinction to the plea of the Assessees that these are accessories of antenna and BTS which are "capital goods" falling under Chapter 85 of the First Schedule to the Central Excise Tariff Act.

11.11.4 What is an accessory has been defined in ***Black's Law Dictionary, (Fifth Edition)*** 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 to subordinate importance. Aiding or contributing in secondary way of assisting in or contributing to as a subordinate."*

Similarly, ***Oxford Dictionary*** defines "accessory" as:

> *"an extra piece of equipment that is useful but not essential or that can be added to something else as a decoration."*

11.11.5 What comes out from the above dictionary meaning of "accessory" is that any such item which adds to the beauty, convenience or effectiveness of some other items can be said to be accessory of that other thing and it may or may not be essential for functioning of main machinery. Seen from the above perspective what is evident is that the tower is a structure fixed to the earth or building on which microwave antenna is fastened to provide the necessary height and stability to the antenna by making it steady and wobble free. The function of antenna as part of the BTS is to receive and transmit radio signal and is used for providing mobile telecom service to the subscribers. The tower itself is not an electrical component of microwave antenna per-se, yet it is necessary and helps in keeping the antenna at proper height and in a stable position so that the antenna can transmit signals for ensuring uninterrupted and seamless services to the subscribers. It is with the aid

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of the tower that the potential of the antenna is fully realised, making it function optimally. Without tower, antenna cannot effectively function for the purpose it is used. Hence, there can be no doubt that tower is to be considered as an accessory of antenna.

11.11.6 Similarly, the PFB houses other BTS equipment and alternative electricity source in the form of diesel generators and other equipment to provide alternative and uninterrupted power supply to the antenna so that in the event of failure of main power supply, the generator can instantly provide backup electricity supply to the antenna and BTS. The PFBs house electric cables, other equipment related to antenna, BTS and generator. Thus, PFBs enhance the efficacy and functioning of mobile antenna as well as BTS and accordingly, PFBs can also be considered as accessories to the antenna and BTS which are "capital goods" falling under Chapter 85 of the Schedule to the Central Excise Tariff.

11.11.7 That tower is to be treated as an accessory of antenna or BTS and their relationship has been highlighted by this Court in ***Tata Teleservices Ltd. Vs. Bharat Sanchar Nigam Ltd. & Ors. (2008) 10 SCC 556*** wherein the principles of cellular networks have been discussed showing the inter dependency of tower and antenna in the following words,

> *"xi) Principles of Cellular Networks:*
>
> *Mobile communications reached the market in 1980. Even at that time the major challenge was to implement advanced mobility features such as handover, roaming and localization of subscribers which required additional control channels between terminal and serving base station.*
>
> *A cellular network consists of a number of radio cells where the term "cell" refers to geographic coverage area of a BTS. The size of the coverage area depends on the signal strength of the base*

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station and the degree of attenuation. Each BTS is assigned a certain number of channels for transmitting and receiving data which is called as cell allocation ("CA"). To avoid interference between cells, it needs to be guaranteed that the neighbouring base stations are also assigned cell allocations of different channels. There are no sharp borders between neighbouring cells. Most of the time they overlap. In urban areas, a mobile device can hear a set of around 10 base stations simultaneously, and then it selects from this set of base station within the strongest signal. The number of cells a network is made up of is basically a function of the size of area to be covered and the user penetration. When building up a new network, operators first concentrate on establishing a coverage in congested urban areas before establishing base stations in rural areas. If a network runs the risk of becoming overloaded in a certain region, the operators can increase the capacity by increasing the base stations density.

A cellular network not only consists of base stations but also comprises a network infrastructure for interconnecting base stations, mobility support, service provisioning and connection to other networks like internet. Therefore, a cellular network consists of several access networks, which include the radio equipment which is necessary to interconnect a terminal to the network. The access networks are interconnected by the core network. For example, in GSM, the access network is referred to as Base Station Subsystem ("BSS") whereas the core network is denoted as Mobile Switching and Management Subsystem ("SMSS"). BSS is responsible for monitoring and controlling the air interface. BSS consists of two different components, namely Base Transceiver Station ("BTS") and Base Station Controller ("BSC"). BTS stands for "base station". It contains transmitter and receiver equipment as well as an antenna. The base station is equipped with very limited capabilities for signalling a protocol processing. The bulk of the work, for example, allocation and release of channels is done by the BSC. The BSC is mainly responsible for control and execution of handover, a function which is needed to keep a circuit-switched connection if the subscriber moves between base stations. Therefore, each BSC controls several base stations, which are connected to the BSC via fixed lines or radio link systems. On the other hand, mobile Switching and Management System is a fixed network of switching nods and databases for establishing connections from and to the mobile subscriber. HLR and VLR are two important databases which are the foundation of the Numbering Plan in MSC. The switching components are the Mobile Switching Centre ("MSC") and the Gateway MSC ("GMSC"). The MSC connects a number of BSCs. to the network for the purposes of localization and handover. Thus, it is the MSC which is responsible for serving a limited geographic region governed by all base stations connected to the MSC over their BSCs. In a mobile network, when a connection is to be established it is the MSC which determines another switch depending on the

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> *current location of the mobile subscriber. For this purpose, MSC is also connected to local network for each subscriber so as to implement the numbering plan. The area from which the call emanates, the identification of the nature of the call whether from mobile or fixed wireline is all done by the computer having the requisite software in MSC."*

11.11.8 In this regard, we may also note the finding given by the CESTAT which has not been disturbed by the Bombay High Court regarding the contention of the Assessee that towers are essential parts of the antennas and as such without tower, the antennas cannot be placed at appropriate and requisite height to receive and send signals and since towers are essential for the functioning of antennas, towers should be treated as accessories of antennas. The CESTAT did not find the said contention of Assessee acceptable on the ground that tower cannot be considered to be a part of antenna, since a component or part of any goods means something which is required to make such goods a finished item. The CESTAT held that only those articles which would go into the composition of another article can be considered to be component or part of the latter and that tower does not enter into the composition of the antenna and hence it is not a component/part of the antenna, relying on the decision of this Court in ***Saraswati Sugar Mills v. Commissioner of Central Excise, Delhi-III, (2014) 15 SCC 625).*** In the aforesaid case of ***Saraswati Sugar Mills*** (*supra*) it was held by this Court that anything required to make the goods a finished item can be described as component or part of the finished item. It was held that iron and steel structures would not go into the composition of vacuum pans, crystallizers etc. If an article is an element in the composition of another article made out of it, such an article may be described as a component of another article. Thus, structures in question in the said case did not satisfy the description of 'component'.

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11.11.9 While there can be no dispute about the aforesaid proposition, we are of the view that it cannot be the only criterion to determine what amounts to component of another article. In order for any article to be considered a component of another article, it does not necessarily mean that it has to be consumed or used up for producing the said another article as in the case of a manufacturing process. In our considered opinion, a component of any good would also mean to include those which make the good fully functional and make such a good more effective as observed in ***M/s. Annapurna Carbon Industries Co.****(supra)*, wherein this Court held that an accessory would mean an object or a device that is not essential in itself but that adds to the beauty or convenience or effectiveness of something else or is supplementary or secondary to something of greater or primary importance, which assists in operating or controlling the said good, and thus serves as its accessory.

It was thus held in ***Annapurna Carbon Industries Co.*** *(supra)* that**,**

> ***"10.*** *We find that the term "accessories" is used in the schedule to describe goods which may have been manufactured for use as an aid or addition. A sense in which the word accessory is used is given in Webster's Third New International Dictionary as follows:*
>
> > *"An object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else."*
>
> *Other meanings given there are: "supplementary or secondary to something of greater or primary importance", "additional", "any of several mechanical devices that assist in operating or controlling the tone resources of an organ". "Accessories" are not necessarily confined to particular machines for which they may serve as aids. The same item may be an accessory of more than one kind of instrument."*

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11.11.10 Thus, in our opinion, the restricted meaning of accessory given by the CESTAT and not differed from by the Bombay High Court is not wholly correct in as much as the meaning of accessory can have different ascribed meanings as observed in the aforesaid decision.

11.11.11 There is no dispute to the fact that BTS is a composite system consisting of the transmitter, receiver, antenna and other equipment, and antenna can be said to be an integral part of BTS. As discussed above, and not disputed by the Revenue, tower is needed to keep the antenna at an appropriate height and keep it stable. Without the tower, it is not possible to hoist the antenna at the requisite height and without it being securely fastened to the tower, antenna cannot be kept firm and steady for proper receipt and transmission of radio signals. Thus, there cannot be any doubt that a mobile tower can be treated to be an accessory of antenna and BTS. Accordingly, since in terms of sub-clause (iii) of Rule 2(a)(A), all components, spares and accessories of such capital goods falling under sub-clause (i) would also be treated as capital goods, a mobile tower can also be treated as "capital good".

11.11.12 We, therefore, agree with the conclusion arrived at by the Delhi High Court that towers and shelters (PFBs) support the BTS/antenna for effective transmission of mobile signals and thus enhance their efficiency and since these articles are components/accessories of BTS/antenna which are admittedly "capital goods" falling under Chapter 85 within sub-clause (i) of Rule 2(a)(A) of CENVAT Rules, these items consequently are covered by the definition of "capital goods" within the meaning of sub-clause (iii) read with sub-clause (i) of Rule 2(a)(A) of CENVAT Rules. Further, since these are used for providing output service, i.e., mobile telecommunication service, and since these are "capital goods" received

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in the premises of the provider of output service as contemplated under Rule 3(1)(i), the Assessees would be entitled to CENVAT credit on the excise duties paid on these goods.

11.12 The alternative plea taken by the Assessee is that these items, viz., mobile tower and the prefabricated buildings (PFBs) are "inputs' used for providing output service of telecommunication and hence, being "inputs" under Rule 2(k) which are used for providing output service i.e., mobile service, CENVAT credit will be available in terms of Rule 3(1) which provides that a provider of a taxable service shall be allowed to take credit on duties paid on any input received in the premises of that provider of output service on or after 10th September, 2004 and this may be utilised for payment of service tax on any output service under Rule 3(1) read with Rule 3(4) of the CENVAT Rules.

11.12.1 "Input" has been defined under Rule 2(k) to mean all goods used for providing any output service. We have already held that tower and the prefabricated buildings (PFBs) are not immovable property but are "goods"/ "capital goods" within the meaning of Rule 2(a)(A)(iii) and since these are used for providing output service, i.e. mobile service, these can be considered to be "inputs" within the meaning of Rule 2(k) and CENVAT credit can be availed in respect of these goods for payment of service tax.

The aforesaid definition clause under Rule 2(k) neither puts any condition on it nor any qualifying words have been added to the word "input", except to mean goods used for providing any output service. Hence, it would mean any "good" which is used as "input" for providing taxable output service. Thus, any item so long it qualifies as a "good" and is "used" for providing output service, would come

within the purview of "input" under Rule 2(k) and excise duty paid on such items can be claimed as CENVAT credit which may in turn be used for payment of service tax for the output service provided by the MSPs.

11.12.2 It may be also noted that there must be "use" of such goods to qualify as "inputs". Without stretching too much the meaning of the words "use" and "input", it can be said, without any doubt, that tower and PFBs are used for providing output service by way of inputs. The use of tower and PFB cannot be said to be so remotely connected with the output of service that these goods will go beyond the ordinary meaning of "use". Their usage in providing the output service is not remote but proximate. In fact, without the use of tower and PFB, it is inconceivable that the service provider can provide mobile services effectively. Rather, towers and PFBs are indispensable being accessories of antenna for providing mobile services. In this regard one may refer to the decision in ***Member, Board of Revenue, West Bengal Vs. M/s. Phelps & Co. (P) Ltd., (1972) 4 SCC 121*** wherein it was held that,

> "6. We have now to find out what exactly is the meaning of the expression "for use by him in the manufacture of goods for sale". Identical words are used in Section 8(b) of the Central Sales Tax Act 1956. This court was called upon to find out the scope of that expression in M/s. J.K. Cotton Spinning & Weaving Mills Co Ltd. Vs. Sales Tax Officer, Kanpur and Anr. (AIR 1965 SC 1310). Dealing with that expression this Court observed:
>
> > The expression "in the manufacture of goods" would normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression "in the manufacture of goods.

In the present case the assessee company has sold the goods in question to certain manufactures who were manufacturing iron steel materials. It is also clear from question no. (i) that those gloves were to be used by workmen who were engaged in hot jobs or in handling corrosive substances in the course of manufacture. That being so it cannot be denied that those gloves had to be used in the course of manufacture."

11.12.3 It may be noted that in the definition of "input" under Rule 2(k) when it relates to providing output service it has been simply defined as all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and the motor vehicles used for providing any output service. However, when the word "input" is defined relating to manufacture of product, it has been defined in a broad and expensive manner to mean all goods except light diesel oil, high speed diesel oil and motor vehicle spirit commonly as petrol,

(i) used in or in relation to the manufacture of final products,
(ii) whether directly or indirectly,
(iii) whether contained in the final product or not,
(iv) and includes lubricating oils, greases, cutting oils, coolants, accessories of the final product cleared along with the final products,
(v) 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,
(vi) or for any other purpose, within the factory of production.

Thus, "input" in relation to manufacturing of final product would mean not only those which are directly used but also indirectly used not only for manufacture of final product whether contained in the final

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product or not but also used *in relation* to manufacture of final product or for any of other purpose.

However, as mentioned above when "input" has been defined with reference to providing output service, the definition clauses does not explain it so elaborately but merely uses the simple expression i.e. "used for providing any output service".

In our view, even if the definition of "input" with reference to output service may not have been explained in an expansive manner as in the case of manufacture of final product under Rule 2(k)(i), the definition of "input" with reference to providing output service under Rule 2(k)(ii) need not be given a restrictive meaning as sought to be done by the CESTAT by holding that tower is not used directly for transmission of signal. In our view since the subject matter is same, i.e., what amounts to "input" though the end use is for two different products, one tangible, in the form of final manufactured product, and one intangible i.e., output service, applying similar tests to determine what amounts to "input" would not be impermissible.

11.12.4 We have also noted that the Bombay High Court had taken the view that it cannot be said that it is impossible to provide the service without the aid of the towers, thus showing non dependency of antenna on tower.

In our view, while theoretically antenna may receive and transmit signal without the tower, practically, the same is not feasible and tower is an essential accessory for keeping the antenna at an appropriate height and in a stable position so that there is no disturbance in receiving and transmission of signal and there can be wider coverage of signal. The link between antenna and tower is almost inseparable for the effective

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functioning of antenna for providing mobile telecommunication service and it cannot be said that the nexus between antenna and tower is remote. Rather, in our view, their relationship is quite proximate and inseparable for proper functioning of antenna.

In this regard, we have noted the decision of the Gujarat High Court in ***Industrial Machinery Manufacturers Pvt. Ltd. vs. State of Gujarat, (1965) 16 STC 380 (Guj)*** wherein the Gujarat High Court held that humidifiers which are used by the textile mills for improving the quality of the yarn produced in general, and even though humidifiers were essentially electric motors and not directly connected with the manufacturing process of yarns, yet these were considered to be machineries for use in the manufacture of yarn. The said finding by the Gujarat High Court was based on the essentiality of the humidifiers. By applying the same principle in the present case, towers and PFBs though themselves are not electrical equipment, are essential for proper functioning of antenna. Thus tower being essential to rendering of output service of mobile telephony, these items certainly can be considered to be "inputs" akin to antenna. Without the towers and the PFBs, there cannot be proper service of mobile telecommunication. Hence, these certainly would come within the definition of "input" under Rule 2(k)(ii).

11.12.5 What we have noted also is that the CESTAT rejected the plea of the Assessee that towers and parts thereof are inputs under Rule 2(k) by observing that the towers are admittedly immovable structures and hence *ipso facto* non-marketable and non-excisable and these do not lead to manufacture of goods and that towers and PFBs certainly are not used for providing mobile services. By relying on *Explanation-2* to Rule 2(k) which provides that input includes goods used in the

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manufacture of capital goods which are further used in the factory of the manufacturer, the CESTAT held that these items are not inputs. However, in our view, invoking Explanation-2 is neither appropriate nor necessary as sub-clause (ii) of Rule 2(k) itself clearly provides that "input" means 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. Even though tower and the PFBs are not electrical items/equipment in the sense that these do not transmit signals, yet these are indispensable for the effective functioning of antenna by which the radio signals are received and transmitted and accordingly, used for providing the mobile telephonic services to the subscribers. Thus, towers and PFBs, though are not electrical equipment for transmission of signals, yet these are used for transmission of signal by the antennas. Therefore, there can be no denying of the fact that there is a close proximity and nexus between their functioning and the ultimate transmission of radio signals which is the output service rendered by the MSPs. Hence, the view of the CESTAT which has not been disturbed by the Bombay High Court does not commend our acceptance.

11.12.6 Having held that the tower and pre-fabricated buildings (PFBs) are "goods" and not immovable property and since these goods are used for providing mobile telecommunication services, the inescapable conclusion is that they would also qualify as "inputs" under Rule 2(k) for the purpose of credit benefits under the CENVAT Rules.

11.13 For the foregoing reasons, we agree with the conclusions arrived at by the Delhi High Court and uphold the judgment rendered by it in ***Vodafone (supra)*** and dismiss the connected appeals being CA No.

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5032-5035 of 2021, CA No. 5039-5040 of 2021, CA No. 5038 of 2021, CA No. 5036-5037 of 2021, CA No. 62 of 2022.

11.14 For the same reasons, we are unable to agree with the view of the Bombay High Court and accordingly, set aside the judgment in ***Bharti Airtel (supra)*** rendered by it and allow the connected appeals, being CA No. 10409-10 of 2014, CA No. 7119 of 2015, CA No. 7179 of 2015, CA No. 1077 of 2016, CA No. 1078 of 2016, CA No. 5112 of 2021, CA No. 1201 of 2018, CA No. 1205 of 2018, CA No. 1203 of 2018, CA No. 1204 of 2018, CA No. 1202 of 2018, CA No. 5056 of 2021 and CA No. 5832 of 2018.

Consequently, all the appeals and connected applications are disposed of in terms of the above findings and conclusions.

…….J.
(B.V. NAGARATHNA)

…….J.
(NONGMEIKAPAM KOTISWAR SINGH)

New Delhi;
November 20, 2024.

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