

Service Tax – Credit availed on telecom towers, shelter and accessories are admissible under the CENVAT Credit Rules – Delhi High Court

Background

High Court of Delhi¹ has recently held that denial of CENVAT credit on the premise that the towers erected result in immovable property, is erroneous and contrary to the ratio laid by Hon'ble Supreme Court in Solid and Correct Engineering² case.

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

Facts of the case

For the purpose of providing telecommunication services, telecom infrastructure companies³ (appellant) are required to setup infrastructure consisting of public switching equipment, transmission equipment, base transceiver station (BTS), antennae, towers, pre-fabricated building, shelter, etc. The applicant had availed CENVAT credit on the excise duty paid on such towers, equipment, parts, and accessories thereon which were received in CKD/SKD form.

The CENVAT credit availed was denied to the appellant, by the revenue, on the grounds that towers, shelter, and accessories used for providing telecommunication services are immovable property.

The appellant, however, was of the view that to qualify such goods as immovable property, the said goods should be attached to the earth for the permanent beneficial enjoyment of the land. These goods are received in CKD/SKD form and are thereafter merely fastened to the civil foundation to make it wobble free and ensure stability. They can be unbolted and reassembled without any damage in a new location.

However, the contention of the appellant was not accepted by The Customs Excise and Service Tax Appellate Tribunal (CESTAT), and thus the matter was appealed before the Delhi High Court.

High Court order

After considering the submission of all the parties, the Court answered all the questions framed in favour of the appellant, the key observations in the order are as under:

- **Permanency test** has to be applied in the context of various objective factors and cannot be confined to one single test. The entire tower and shelter are fabricated in the factories of the respective manufacturers, and these are supplied in CKD condition. They can be bolted and unbolted, assembled and re-assembled, located and re-located without any damage and the fastening to the earth is only to provide stability and make them wobble and vibration free.

¹ 2018-VIL-506-DEL-CE

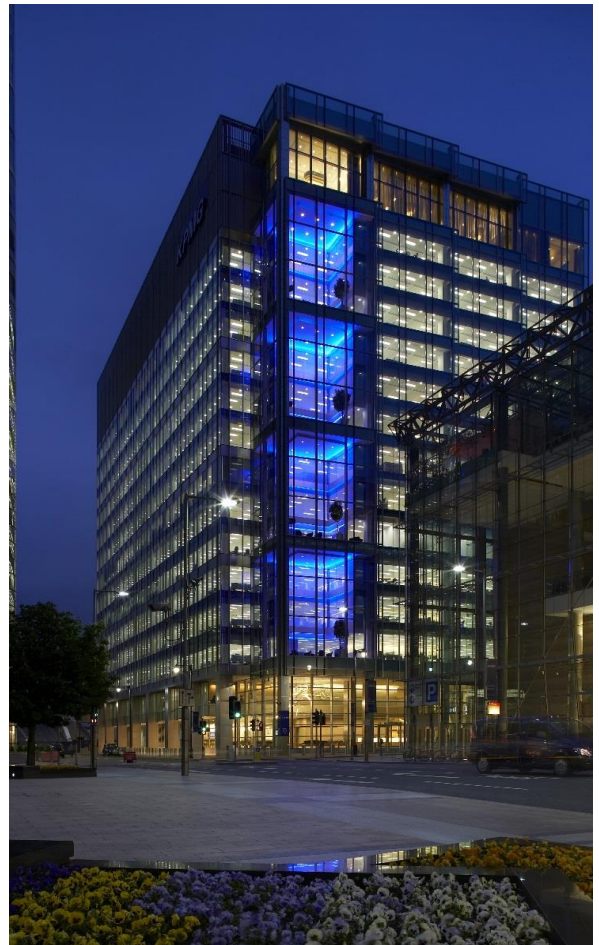
² 2010-TIOL-25-SC-CX

³ Vodafone Mobile Services Limited, Indus Towers Limited, and Bharti Infratel Limited

- On question with respect to the emergence of the immovable structure at an intermediate stage, whether CENVAT credit can be denied, the court pronounced that denial of credit on the premises that the towers erected result in the immovable property at an intermediate stage, is erroneous and plainly contrary to Solid and Correct Engineering. The towers are received in CKD condition, are erected at the site, subsequently, giving rise to a structure that remains, safe and stable. It is a settled principle of law that entitlement of CENVAT Credit is to be determined at the time of receipt of the goods. If the goods that are received qualify as inputs or capital goods, the fact that they are later fixed/fastened to the earth for use would not make them a non-excisable commodity when received.

Our comments

Denial of credit on towers and shelters have been a major point of litigation for the telecom sector. While Bombay High Court⁴ had previously pronounced exactly opposite order by denying CENVAT credit, the Delhi High Court has allowed the credit. As the matter is already before the Supreme Court, would have to wait for the final outcome. Further, this would also have an impact in under the GST regime.



⁴ 2014-VIL-242-BOM-CE

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