

Supreme Court holds mobile towers and pre-fabricated buildings are eligible for CENVAT credit

Bharti Airtel Ltd. v. The Commissioner of Central Excise, Pune¹

The Supreme Court ('the Apex Court'/ 'the Court'), overturned the Bombay High Court's judgement in the case of ***Bharti Airtel Ltd.***² and upheld the Delhi High Court's ruling in the case of ***Vodafone Mobile Services Ltd.***³ The Apex Court held that mobile towers and pre-fabricated buildings (PFBs) are eligible "goods" for claiming CENVAT credit and should not be considered as immovable property.

Since they are used in providing mobile telecommunication services, they can be construed as capital goods or inputs under the CENVAT Credit Rules, 2004 ('CENVAT Credit Rules').

Brief background

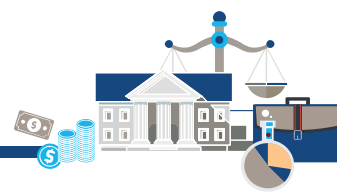
- Assessee operates as mobile service providers (MSPs), supplying SIM cards for providing wireless telecom services. For rendering these services, they usually own and operate infrastructure such as cell towers, Base Transceiver Systems (BTS), along with accompanying network equipment and structures like PFBs, electricity generating sets, battery back-up and stabilizers.

- A different segment of assessee offers passive infrastructure support services, including towers and ancillary equipment to telecom companies, facilitating the physical framework required for telecom services at various sites.
- CENVAT credit availed on mobile towers and PFBs were the subject matter of dispute since the Bombay High Court and Delhi High Court had given contrary rulings.
- The Bombay High Court in the *Bharti Airtel* (supra) denied CENVAT credit on the following grounds:
 - Towers and the parts thereof and PFBs are not "capital goods" as they are neither mentioned in Rule 2(a)(A) nor are components, spares or accessories of goods falling under any of the Chapters or Headings of the first Schedule of the Central Excise Tariff Act, 1985 ('Tariff Act') as specified in Rule 2(a)(A).
 - Also, these items become immovable once they are fastened and fixed to the earth.
 - Similarly, the said items cannot be construed as "inputs" since these items are immovable, non-marketable and non-excisable goods.

¹ 2024 (11) TMI 1042- Supreme Court

² 2014 (9) TMI 38- Bombay High Court

³ 2018 (11) TMI 713- Delhi High Court



- Contrarily, the Delhi High Court in the **Vodafone Mobile Services (Supra)** allowed CENVAT credit on the following grounds:

- Towers, PFB, shelters and accessories are not immovable property since they are merely fastened to the civil foundation to make them wobble free and stable. Further, the same can be unbolted and reassembled without any damage and relocated to a new site.
- Tower is part of the active infrastructure which facilitate placing of the antenna at the appropriate altitude to generate uninterrupted frequency. PFBs are accessories for the placement of various BTS equipment and other items so that these items remain in a dust free environment with ambient temperature.
- The towers and shelters act as components and parts. In the alternative, they act as accessories to the BTS and antenna. Thus, they are covered by the definition of "capital goods".
- The definition of "input" under CENVAT Credit Rules is broad, covering all goods used to provide output services unless explicitly excluded.
- Applying the functional utility test, towers and shelters are considered integral to telecommunication services, qualifying them as "inputs".

- The decisions of both High Courts were challenged by the aggrieved parties before the Supreme Court.

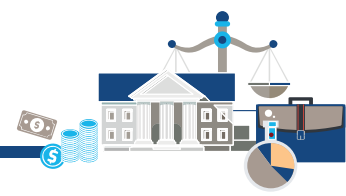
Analysis

- Rule 3(1) of the CENVAT Credit Rules permits availment of CENVAT credit on duties paid for "capital goods" or "inputs." To qualify under the said

definitions, the items must first fall under the definition of "goods".

- The term "goods" is not defined under the CENVAT Credit Rules. As per the Sales of Goods Act, 1930 and other statutes, the term "goods" means movable property except actionable claims and money.
- To determine whether towers and PFBs are movable or immovable, reference is made to the definitions contained in the General Clauses Act, 1897 and Transfer of Property Act, 1882.
- As per various definitions and judicial precedents, the nature of property, whether movable or immovable, gets determined depending upon the nature of annexation, object of annexation, intendment of the parties, functionality test, permanency test and marketability test.
- Mobile towers and PFBs do not become immovable property merely because they are fixed to the ground for stability. Their primary function is to provide telecommunication services.
- The said items can be dismantled, relocated, or resold in the same form. Applying tests of marketability, permanency and functionality, mobile towers and PFBs are considered as movable properties.
- The decision in the case of **Solid and Correct Engineering⁴** which had laid down the principles for determining the nature of property was not brought to the notice of the Bombay High Court, thus it escaped their consideration.
- Rule 2(a)(A)(i) of the CENVAT Credit Rules defines "capital goods" as items classified, inter-alia, under Chapter 85 of the Tariff Act'. Rule 2(a)(A)(ii) includes pollution control equipment and 2(a)(A)(iii) includes accessories related to goods listed, inter-alia, under Chapter 85.
- Mobile towers and PFBs are not explicitly covered under sub-clauses (i) and (ii) of Rule 2(a)(A). Thus,

⁴ (2010) 5 SCC 122



the question arises whether they can be treated as accessories to antennas and BTS under sub-clause (iii) where antenna and BTS are capital goods classified under Chapter 85.

- An “accessory” means any such item which adds to the beauty, convenience or effectiveness of some other items. It may or may not be essential for the functioning of the main machinery.
- Tower helps in keeping the antenna at a proper height and in a stable position so that the antenna can transmit signals for ensuring uninterrupted and seamless services to the subscribers.
- In the case of **Tata Teleservices Ltd. v. BSNL & Ors.**⁵, the Apex Court had ruled that towers are essential to antennas and, by extension, to the provision of telecommunication services.
- Therefore, mobile tower can be construed as an accessory to antenna and BTS.
- PFBs enhance the efficacy and functioning of mobile antenna as well as BTS. Thus, it can be considered as an accessory to antenna and BTS.
- Alternatively, towers and PFBs can be classified as “inputs” under Rule 2(k) of the CENVAT Credit Rules, as the definition of inputs includes all goods used in or in relation to the provision of output services. There are no restrictions preventing mobile towers and PFBs from being considered as inputs.

Conclusion

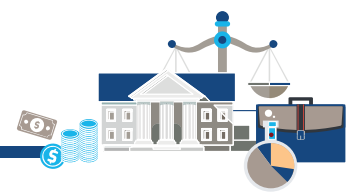
- Based on the above, the Apex Court ruled that mobile towers and PFBs are “goods” and not immovable property. The same can be construed as capital goods and / or inputs. Thus, the assesses are entitled to claim CENVAT credit of the excise duties paid for mobile towers and PFBs.
- Consequently, the Court upheld the Delhi High Court's decision and overturned the Bombay High Court's judgment.

Dhruva Comments

Resolving a decade long tax dispute, the Supreme Court has given significant tax relief to the telecom industry by allowing CENVAT credit of excise duties paid on mobile towers, pre-fabricated buildings and their components.

Under GST, Section 17(c) and (d) restrict Input Tax Credit on the construction of immovable property, except for plant and machinery. Although the definition of “plant and machinery” excludes telecommunication towers, it will be interesting to see whether the benefit of the ruling given by the Apex Court in the case of *Safari Retreats* will be available under the GST laws.

⁵ 2008 (4) TMI 723- Supreme Court





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