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DELHI HIGH COURT DIFFERS WITH BOMBAY HIGH COURT TO ALLOW CENVAT CREDIT ON TRANSMISSION TOWERS

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The Delhi High Court, *vide* its judgment in the case of *Vodafone Mobile Services Limited v Commissioner of Service Tax, Delhi (2018-VIL-506-DEL-CE)*, dated 31 October 2018 has allowed CENVAT credit on telecom towers and related shelters, accessories, etc., thereby taking a contradictory position to that of the Bombay High Court's judgment in *Bharti Airtel Limited v Commissioner of Central Excise (2014 (35) STR 865 (Bom))* (*Bharti Airtel*).

BACKGROUND

The petitioners are telecom operators. They availed CENVAT credit of central excise duty paid on telecom towers, parts thereof, and shelters / pre-fabricated buildings which house transmission equipment used for providing cellular telephone services.

The revenue authorities disputed the availment of the credit on the ground that the telecom towers and shelters were immovable in nature and consequently did not qualify as 'input', as defined under the CENVAT Credit Rules, 2004 (CCR). Further, the said goods did not fall within the specified tariff heading and therefore did not qualify as 'capital goods', as defined under CCR. Consequently, the revenue authorities contended that the said goods were neither inputs nor capital goods and hence, no CENVAT credit could be allowed in such cases.

In *Bharti Airtel*, Bombay High Court had disallowed credit on telecom towers, holding them to be immovable property. In the case of *Tower Vision India Pvt Ltd v Commissioner of Central Excise (Adj), New Delhi & Ors (2016 (42) STR 249 (Tri.-LB))*, the Customs, Excise and Service Tax Appellate Tribunal relied on *Bharti Airtel* when it disallowed credit on telecom towers to telecom infrastructure companies renting out such towers to telecom companies.

OBSERVATIONS OF DELHI HIGH COURT

On the question of telecom tower as immovable property:

- The 'permanency test', as established by the Supreme Court in the case of *Commissioner of Central Excise, Ahmedabad v Solid and Correct Engineering Works & Ors (2010 (5) SCC 122)* (*Solid and Engineering Works*), is to be used to determine whether the equipment qualifies as immovable property or not. If the machinery or equipment is permanently fastened or embedded to the earth, it qualifies as immovable property. However, if the machine is fastened

merely to provide a 'wobble free operation', it would not qualify as immoveable property

- In the present case, the entire tower and shelter is fabricated in the factory of the manufacturer and is supplied in a Completely Knocked Down (CKD) form. The equipment is fastened to the civil foundation for a 'wobble free operation' and to provide greater stability. A fixation which does not involve assimilation of the property and is necessary for a 'wobble free operation' cannot be considered as an immovable property by applying 'permanency test'.
- The tower / shelter may be unbolted and reassembled without any damage to any other location. There is no intent to annex the equipment to the earth permanently for the beneficial enjoyment of the land owner.

On the question of the tower as capital goods:

- 'Capital goods' are the goods under specified Tariff headings or parts, components, spares or accessories thereof. 'Base Transmission System' (BTS), which enables the telecom company to transmit mobile signals and thereby render telecom services, falls under Chapter 85 of the Tariff and therefore qualifies as capital goods.
- Telecom towers and shelters support the BTS in effective transmission of mobile signals and enhance their efficiency. Hence, such equipment qualifies as an accessory of BTS and consequently qualifies as capital goods.

Nexus with output service

- The term 'used for' has to be understood in a wider sense to include active as well as passive use. Mild Steel (MS) angles and channels are used to make towers which are in turn used for providing infrastructure support service / telecom service, thus the nexus test is satisfied.

COMMENT

The Bombay High Court decision in the case of *Bharti Airtel* is based on the same set of facts and law. The Delhi High Court noted that the said Bombay High Court decision, which is pending appeal before the Supreme Court, is contrary to the Supreme Court's decision in the case of *Solid and Engineering Works*). In view of the contradictory decisions it appears, that dispute will be finally resolved by the Supreme Court when it decides the appeal against Bharati Airtel

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