CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 50093 OF 2017

(Arising out of Order-in-Original No. DLISVTAX002COM0171617 dated 28.09.2016 passed by Commissioner, Service Tax, Delhi-II)

M/s. ATC Telecom Infrastructure Private Limited (Formerly known as M/s. ATC Telecom Tower Corporation Pvt. Ltd.) **...Appellant**

versus

Commissioner, Service Tax, Delhi-II **...Respondent**

APPEARANCE:

Shri B.L. Narasimhan and Ms. Poorvi Asati, Advocates for the Appellant
Shri Rajeev Kapoor, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 13.02.2023
Date of Decision: 21.02.2023

FINAL ORDER NO. 50153/2023

JUSTICE DILIP GUPTA:

This appeal has been filed by M/s. ATC Telecom Infrastructure Private Limited[1] (earlier known as M/s. ATC Telecom Tower Corporation Pvt. Ltd.) for setting aside the order dated 28.09.2016 passed by the Commissioner adjudicating the four show cause notices. The Commissioner denied CENVAT credit availed on inputs and capital goods and utilised by the appellant for payment of service

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1. **the appellant**

tax. The Commissioner also ordered for recovery of interest and imposed penalty.

2. The appellant is engaged in setting up of passive infrastructure and provision of such passive infrastructure to various telecom companies. For this purpose, the appellant entered into 'Passive Infrastructure Sharing Agreement' with various telecom operators for setting up towers, shelter, diesel generator sets, air conditioner and electrical works, DC power plant, Battery Bank etc. and leasing of the same to these telecom operators. The appellant also provided operation and maintenance services with respect to infrastructure assets to the telecom operators. The appellant availed CENVAT credit of excise duty paid in respect of capital goods and inputs used in setting up such passive infrastructure.

3. During investigation, it was observed that the appellant had availed ineligible CENVAT credit. Accordingly, the following four show cause notices were issued to the appellant, seeking to deny CENVAT credit availed and utilised by the appellant in respect of inputs and capital goods used in providing output services.

S. No.	Show Cause Notice	Period
1	28.8.2012	2011-12
2	26.6.2013	2012-13
3	20.4.2015	2013-14
4	12.4.2016	2014-15

4. The above four said show cause notices were adjudicated upon by the Commissioner of Service Tax, Delhi[2] by order dated 28.9.2016. The demand of CENVAT credit availed by the appellant on towers, shelter and parts thereof, was confirmed on the ground that

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2. the Commissioner

the subject goods were used for fabrication/erection of towers and shelters, which being attached to earth, were immovable in nature and thus, not used for providing output services in terms of the Circular dated 26.02.2008.

5. The issue involved in this appeal is about denial of CENVAT credit availed and utilized on inputs and capital goods used for setting up of passive infrastructure for provision of 'Business Support Services'[3].

6. Shri B.L. Narasimhan, learned counsel for the appellant assisted by Ms. Purvi Asati submitted that the items in question are movable goods received in CKD condition by the appellant and its eligibility to avail CENVAT credit thereon is determined at the time of receipt of these items. It is for the reason of movability of these items only that excise duty was paid by the suppliers, whose credit was availed by the appellant.

7. Shri Rajeev Kapoor, learned authorised representative for the department, however, supported the impugned order and submitted that it does not call for any interference in this appeal.

8. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

9. The issue involved in this appeal stands decided in favour of the appellant by the Delhi High Court in **Vodafone Mobile Services Limited** vs. **CST, Delhi**[4]**,** which decision was affirmed by the

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3. BSS
4. 2018-TIOL-2409-HC-DEL-ST

Supreme Court in **Commissioner of Service Tax Delhi** vs. **Vodafone Mobile Services Limited**[5].

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

11. Learned counsel for the appellant submitted that towers are not immovable structures and can be moved around from one place to another as per the needs of the appellant, since the mode of their installation is completely different from that of construction of a civil structure. The only activity of civil construction nature, if at all, is laying of the foundation for the tower. The main legs, which are also called as L-angled metal pieces, are fixed to the foundation stubs/anchor bolts and joined with bracing members to form the structure. The tower is formed by connecting all the L-angled metal pieces, which are tightened with nuts and bolts. These nuts and bolts can be unfastened and the dismantled tower can be transported to and reassembled at another location. The attachment of tower with the help of nuts and bolts to a foundation to provide stability and functionality does not qualify as 'attached to the earth'.

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

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5. 2019-TIOL-309-SC-ST

General Clauses Act, 1897, provides that 'immovable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. The term 'attached to the earth' has not been defined in the General Clauses Act, 1897 but section 3 of the Transfer of Property Act defines the expression 'attached to the earth' to mean:

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

13. The "permanency test" was examined at length by the Supreme Court in **Commissioner of Central Excise, Ahmedabad** vs. **Solid & Correct Engineering Works**[6]. In this case the Supreme Court drew a distinction between machines which by their very nature are intended to be fixed permanently to the structures embedded in the earth and those machines which are fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because foundation was necessary to provide a wobble free operation to the machine. The relevant portion of the judgment is reproduced below:

> "33. It is noteworthy that in none of the cases relied upon by the assessee referred to above was there any element of installation of the machine for a given period of time as is the position in the instant case. **The machines in question were by their very nature intended to be fixed permanently to the structures which were embedded in the earth.** The

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6. 2010 (252) E.L.T. 481 (S.C.)

structures were also custom made for the fixing of such machines without which the same could not become functional. **The machines thus becoming a part and parcel of the structures in which they were fitted were no longer movable goods. It was in those peculiar circumstances that the installation and erection of machines at site were held to be by this Court, to be immovable property that ceased to remain movable or marketable as they were at the time of their purchase.** Once such a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. The same cannot thereafter be treated as movable so as to be dutiable under the Excise Act. **But cases in which there is no assimilation of the machine with the structure permanently, would stand on a different footing. In the instant case all that has been said by the assessee is that the machine is fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine. An attachment of this kind without the necessary intent of making the same permanent cannot, in our opinion, constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently.** In that view of the matter we see no difficulty in holding that the plants in question were not immovable property so as to be immune from the levy of excise duty."

(emphasis supplied)

14. Earlier, the Supreme Court in **Triveni Engineering & Indus. Ltd.** vs. **Commissioner of Central Excise**[7] had also observed that while determining whether an article is permanently fastened to anything attached to the earth, both the intention as well as the factum of fastening have to be ascertained from the facts and

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7. 2000 (120) E.L.T. 273 (S.C.)

circumstances of each case and the relevant portion of the judgment is reproduced below:

> "**There can be no doubt that if an article is an immovable property, it cannot be termed as "excisable goods" for purposes of the Act.** From a combined reading of the definition of "immovable property" in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the excise law. **Whether an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case."**
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> **(emphasis supplied)**

15. It would also be relevant to refer to the decision of the Supreme Court in **Sirpur Paper Mills Ltd.** vs. **Collector of Central Excise, Hyderabad**[8] wherein the Supreme Court observed that merely because a machine is attached to earth for more efficient working and operations it would not per se become immovable property. The observations are as follows:

> "**5. Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound.** For example, a factory owner or a householder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of the water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper-making machine can be sold in the market. The Tribunal has found as a fact that it can be

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8. 1998 (97) E.L.T. 3 (S.C.)

> sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the Company. **Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property."**
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> **(emphasis supplied)**

16. In **Mallur Siddeswara Spinning Mills (P) Ltd.** vs. **CCE, Coimbatore**[9], the Supreme Court held that mere bolting of machine to a frame from which it can be unbolted and then shifted would not render the machine to be an immoveable property. The observations of the Supreme Court, in this connection, are reproduced below:

> "2. Briefly stated the facts are as follows:- The Appellants are in the business of spinning cotton yarn. It is claimed that in Salem there is acute power shortage. Thus two generator sets were installed in their factory one on 13th March, 1991 and the second on 15th January, 1992. Show Cause Notice dated 2nd July, 1993 was issued to them claiming duty on manufacture of generating sets. The Collector confirmed the demand for duty holding that there was deliberate suppression of the fact of manufacture of generating sets. The Appeal preferred by the Appellants has been dismissed by the Tribunal by the impugned Judgment.
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> 3…….
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> 4…….
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> 6. It was next submitted that in any event the generating set was immovable property and thus no excise duty was payable on it. We are unable to accept this submission also. It is admitted position that the generating sets have been bolted on a frame. **If the generating set is only bolted on a frame it is capable of being unbolted and being shifted from that place.** It is then capable of being sold. **Under these circumstances it could not be said that the**

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9. 2004 (166) ELT 154 (SC)

generating sets manufactured by the Appellants are immovable property."

(emphasis supplied)

17. The Delhi High Court in **Vodafone Mobile Services** had examined whether the towers, shelters and accessories used by the appellant were immovable property and in this connection, after referring to the decision of the Bombay High Court in **Bharti Airtel Ltd.**, on which reliance was placed by the Department, observed as follows:

"36. In view of this Court, in the facts of the present case, the permanency test has to be applied, in the context of various objective factors and cannot be confined or pigeonholed to one single test. **In the present case, the entire tower and shelter is fabricated in the factories of the respective manufacturers and these are supplied in CKD condition. They are merely fastened to the civil foundation to make it wobble free and ensure stability. They can be unbolted and reassembled without any damage in a new location.** The detailed affidavit filed by the assessees demonstrate that installation or assembly of towers and shelters is based on a rudimentary "screwdriver" technology. They can be bolted and unbolted, assembled and re-assembled, located and re-located without any damage and the fastening to the earth is only to provide stability and make them wobble and vibration free; devoid of intent to annex it to the earth permanently for the beneficial enjoyment of the land of the owner. The assessees have also placed on record the copies of the leave and license agreements, making it clear that the licensee has the right to add or remove the aforesaid appliances, apparatus, equipment etc.

37. **On an application of the above tests to the cases at hand, this Court sees no difficulty in holding that the manufacture of the plants in question do not constitute annexation and hence**

cannot be termed as immovable property for the following reasons:

(i) The plants in question are not per se immovable property.

(ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.

(iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.

(iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.

38. **A machine or apparatus annexed to the earth without its assimilation by fixing with nuts and bolts on a foundation to provide for stability and wobble free operation cannot be said to be one permanently attached to the earth and therefore, would not constitute an immovable property. Thus, the Tribunal erred in relying on the Bombay High Court in Bharti Airtel Ltd. (supra). It is also important to understand that when the matter was carried out in the Bombay High Court and the judgment was delivered, the whole case proceeded on the presumption that these are immovable properties.** The Tribunal failed to appreciate the „permanency test" as laid down by the Supreme Court in Solid and Correct Engineering (supra)."

(emphasis supplied)

18. This issue was also examined at length by a Division Bench of the Tribunal in **Reliance Jio Infocomm Ltd.** vs. **Assistant Commissioner, CGST & Central Excise, Belapur-IV Division**[10]

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10. Service Tax Appeal No. 86623 of 2021 decided on 18.04.2022

and it was held that towers and shelters would not be immovable property.

19. In this connection, reliance can also be placed on the following decisions:

(i) **M/s. Vodafone Mobile Services Limited** vs. **Commissioner of Central Excise, Jodhpur-(Raj.)**[11];

(ii) **M/s. Bharti Airtel Limited.** vs. **CCE & ST-Gurgaon-II**[12];

(iii) **M/s. Bharti Infratel Ltd.** vs. **Commissioner of Service Tax, Delhi-IV**[13]**;**

(iv) **Commissioner of Central Excise and Service Tax-Gurgaon** vs. **Bharti Infratel Ltd.**[14];

(v) **Bharti Airtel Ltd.** vs. **Commissioner of Central Excise and Service Tax, Gurgaon-II**[15];

(vi) **M/s. Indus Towers Ltd.** vs. **Commissioner of Central Excise & Service Tax, Delhi-IV**[16];

(vii) **Bharti Hexacom Limited** vs. **Commissioner of Central Excise and Customs, Central Goods and Service Tax, Jaipur-I**[17];

(viii) **M/s. Bharti Airtel Limited** vs. **Commissioner of Central Excise, Customs & Service Tax, Cochin**[18]; and

(ix) **Essar Telecom Infrastructure Pvt. Ltd., Reliance Communication Infrastructure Ltd.** vs. **Commissioner of Service Tax, Mumbai-I**[19]**.**

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11. 2022 (10) TMI 581 - Cestat New Delhi
12. 2019 (11) TMI 1162-Cestat Chandigarh
13. 2019-TIOL-3338-CESTAT-CHD
14. 2019 (2) TMI 1736 – Cestat Chandigarh
15. 2019-TIOL-3355-CESTAT-CHD
16. 2020-TIOL-886-CESTAT-CHD
17. 2021 (52) GSTL 62 (Tri.- Del.)
18. 2021-VIL-443-CESTAT-BLR-ST
19. 2015 (6) TMI 544 – CESTAT MUMBAI

20. Thus, in view of the factual position and the decisions referred to above, the towers and shelters would not be immovable property.

21. The alternative argument of learned counsel for the appellant that towers and shelters would also qualify as "inputs" under rule 2(k) of the 2004 Rules was also examined by the Delhi High Court in **Vodafone Mobile Services** and it was held that:

> "53. On examination of the definition and the decisions, the Court is of the considered opinion that the term "all goods" mentioned in Rule 2(k) of the Credit Rules would cover all the goods used for providing output services, except those which are specifically excluded in the said Rule. **Therefore, the definition is wide enough to bring all goods which are used for providing any output service.** Further, from the decisions of the Supreme Court and other judgments referred to previously, the test applicable for determining whether inputs are used in the manufacture of goods is the "functional utility" test. If an item is required for providing out the output services of the service provider on a commercial scale, it satisfies the functional utility test. In the facts of the present case, what emerges is that, BTS is an integrated system and each of its components have to work in tandem with each other in order to provide the required connectivity for cellular phone users and for efficient telecommunication services. **The towers and pre-fabricated shelters form an essential in the provision of telecommunication service. The CESTAT - in the opinion of this Court - failed to appreciate that it is well settled that the word "used" should be understood in a wide sense, so as to include passive as well as active use.** The towers in CKD condition are used for the purpose of supplying the service and therefore, would qualify as "inputs". There is actual use of the tower and shelters in conjunction with the Antenna and the BTS equipment in providing the output service, which also includes provision of the Business Support Service. The CESTAT has failed to appreciate that the towers and the parts thereon and the prefabricated shelters are inputs, in

> accordance with the provisions of Rule 2(k) of the Credit Rules. The CESTAT has erred in holding that there is no nexus between the inputs and the output service. The CESTAT also failed to consider the decision of the AP High Court in case of M/s. Indus Towers Ltd. v. CTO, Hyderabad - (2012) 52 VSR 447, which clearly ruled that the towers and shelters are indeed used and are integrally connected to the rendition of the telecommunication services."
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> **(emphasis supplied)**

22. Another alternative submission advanced by the learned Counsel for the appellant that the items in dispute are 'capital goods' and, therefore, credit was correctly taken as 'capital goods' also deserves to be accepted.

23. The Delhi High Court in **Vodafone Mobile Services** had also examined this issue and the observations are as follows:

> "44. From the above definition, clearly for goods to be termed "capital goods", in the present set of facts, should fulfil the following conditions :
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> 1. They must fall, inter alia, under Chapter 85 of the first schedule to the CET or must be component, parts or spares of such goods falling under Chapter 85 of the first schedule to the Central Excise Tariff Act (CET); and
> 2. Must be used for providing output service.
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> 45. **Accordingly, all components, spares and accessories of such capital goods falling under Chapter 85, would also be treated as capital goods. Now, given that Cenvat credit is available to accessories, it is important to address whether towers and shelters would qualify as "accessories".** Black's Law dictionary, (fifth edition), defines "accessory" as:
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> "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 of subordinate importance. Aiding or contributing in secondary way of assisting in or contributing to as a subordinate. ''

46. **On the basis of the above analysis, it is apparent that the primary test to qualify as an accessory is whether does the item in question adds to the beauty, convenience or effectiveness of something else.** An accessory is an article or device that adds to the convenience or effectiveness of but is not essential to the main machinery. It was highlighted during the hearing of the appeals that the towers are structures installed to support GSM and microwave antennae. These antennae receive and transmit signals and are used for providing output service. Without them, the antennae cannot be installed high above the ground and cannot receive or transmit signals. **Therefore, the towers too have to be considered as essential component/part of the capital goods, namely BST and antennae. Further, BTS is an integrated system and each component in the BTS, have to work in tandem to provide cellular connectivity to phone users and to provide efficient services. In the facts of the present case, it is evident that the towers form part of the active infrastructure as the antennae cannot be placed at that altitude to generate uninterrupted frequency. Further, these shelters are accessories for the placement of various BTS equipment and other items for it to remain in a dust-free, ambient temperature.**

47. **From the foregoing discussion, clearly towers and shelters support the BTS in effective transmission of the mobile signals and therefore, enhance their efficiency. The towers and shelters plainly act as components/parts and in alternative as accessory to the BTS and would are covered by the definition of "capital goods".**

48. **In the present cases, the Tribunal, in this Court's view erred in interpreting the definition of "capital goods". It merely adopted the ratio laid down by the Bombay High Court in the case of the Bharti Airtel (supra) and Vodafone India (supra).**

> **Both those are subject matter of appeals before the Supreme Court. This Court is of the opinion, with due respect to the Bombay High Court that those two judgments are contrary to settled judicial precedents, including the later view of the Supreme Court in Solid and Correct Engineering (supra).** In this conclusion, it is held that the Tribunal clearly erred in concluding that the towers and parts thereof and the prefabricated shelters are not capital goods with the meaning of Rule 2(a) of the Credit Rules. This question is answered in favour of the assessee and against the Revenue."
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> **(emphasis supplied)**

24. Thus also, the appellant was also entitled to take CENVAT credit since the items in dispute are 'capital goods'.

25. In this view of the matter, it would not be necessary to examine the other contentions raised by the learned counsel for the appellant.

26. The order dated 28.09.2016, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced in Open Court on **21.02.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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