CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. I

SERVICE TAX APPEAL NO. 52881 OF 2016

(Arising out of Order–in-Original No. F.No. DZU/Adj/Indus/73/2015/5585 dated 29.07.2016 passed by the Additional Director Genera, Director General of Central Excise Intelligence (Adjudication Cell), West Block-VIII, Wing No. 6, 2nd Floor, R.K. Puram, New Delhi -110066)

M/s Bharti Infratel Limited **...Appellant**
Formerly known as Indus Towers Limited

versus

Additional Director General, **...Respondent**
Of Central Intelligence (Adjudication Cell)

APPEARANCE

Shri B.L. Narasimhan and Ms. Poorvi Asati, Advocates for the appellant.
Shri Harshvardhan, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Decision: 26.09.2022

FINAL ORDER NO. 50932/2022

JUSTICE DILIP GUPTA:

The order dated 29.07.2016 passed by the Additional Director General (Adjudication) in the Directorate General of Central Excise, Intelligence[1] has been assailed in this appeal. The said order seeks to confirm the demand of Rs. 83,00,29,670/- for the period from 01.03.2011 to 16.03.2012 and 27.09.2013 to 31.03.2015 with interest and penalty. The order also appropriates an amount of Rs. 12 crores earlier paid by the appellant.

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1. **the Additional Director**

2. The appellant is engaged in the provision of telecom infrastructural support services to various telecom companies and discharges service tax on the same under the category of 'support service of business or commerce[2].

3. For providing the output service of BSS, the appellant purchased various capital goods namely lead acid batteries, air conditioners, transmission racks, fire alarms, smoke detectors. and availed CENVAT credit thereon. The credit availed on capital goods were utilized by the appellant in discharging the output service tax liability.

4. The appellant, thereafter, removed certain capital goods after their usage which were waste/scrap. At the time of removal, neither credit was reversed, nor any amount was paid as the appellant believed that there was no requirement of payment/reversal by an output service provider under rule 3(5A) of the CENVAT Credit Rules 2004[3] during the relevant period. However, with respect to capital goods which were removed as used capital goods, the appellant paid the amount in terms of rule 3(5A) of Credit Rules.

5. For the purpose of determination of nature of capital goods as 'used capital goods' or 'waste/scrap', the appellant followed the following procedure:

(i) When capital goods become unworkable after continuous usage, appellant undertakes internal checks or tests for the purpose or not;

(ii) Thereafter, these goods are inspected by the Original

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2. BSS
3. the Credit Rules

Equipment Manufacturer[4] and a certificate to this effect is issue by those OEM;

(iii) These goods are further inspected by a Chartered Engineer and a certificate is issued as to whether the goods are required to be scrapped off or the same can be re-used after repair;

(iv) Basis the above certificates, the goods are either sent for repair to vendors or are decided to be cleared as scrap;

(v) If the goods are decided to be cleared as scrap, then the goods are sold to various scrap management companies, having registration under Hazardous Waste Management Rules.

6. The appellant has further stated that the purchasers of the goods are all scrap management companies and, in this respect, certificates have been issued to the purchasers by the Principal Environment Commissioner, Rajasthan State Pollution Control Board, for procurement and recycling of scrap under the Hazardous Waste Management Rules.

7. However, proceedings were initiated by the Department with respect to the capital goods which were removed as scrap without payment or reversal of amount. Investigation was initiated by way of issuance of summons, examination of documents submitted by the appellant and recording of statements of Vice President (Finance) of the appellant. During the course of investigation, the appellant also deposited an amount of Rs. 12,00,00,000/- under protest. Thereafter, a show

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4. OEM

cause notice dated 27.10.2015 proposing recovery of amount in terms of rule 3(5A) of Credit Rules along with interest and penalty was issued to the appellant. The show cause notice mentions:

(i) That the capital goods cleared by the appellant as scrap were not actually in the nature of scrap and hence, the appellant has contravened the provisions of rule 3(5A) of Credit Rules by not paying the amount equipment to the CENVAT credit availed after factoring in depreciation;

(ii) That the appellant has deliberately changed the description of goods in their invoices by describing the same as scrap so as to evade the payment of amount under rule 3(5A) of Credit Rules;

(iii) That from the product brochure of telecom batteries manufactured by M/s HBL Power System Ltd., the active life of a telecom battery is 20 years, however, the appellant has cleared the batteries after 3-4 years of use as 'scrap battery cell' where in fact such battery were actually 'used battery cells'; and

(iv) That the appellant has cleared these batteries even before the useful life of these batteries, as per the industry standards.

8. The appellant submitted a reply dated 29.01.2016 to the show cause notice and asserted that it was not required to pay any amount in terms of rule 3(5A) of Credit Rules on clearance of capital goods as scraps, and therefore, the show cause notice was liable to be dropped.

9. However, the Additional Director passed the order dated 29.07.2016 confirming the proposed demand of Rs. 83,00,29,670/-, with interest and penalty.

10. Shri B.L. Narasimhan learned counsel for the appellant assisted by Ms. Poorvi Asati, submitted that the issues in the present case are squarely covered by the decision of this Tribunal in **M/s Bharti Infratel Limited** v/s **Additional Director General, DGCEI, New Delhi**[5]

11. Learned counsel also submitted that the extended period of limitation for the period 01.03.2011 to 16.3.2012 and 27.09.2013 to 31.03.2014 could not have been invoked in the facts and circumstances of the case.

12. Shri Harshvardhan, learned authorized representative appearing for the Department, however supported the impugned order and submitted that it does not call for any interference.

13. The issue that arises for consideration in this appeal is regarding the demand made on the amount required to be paid in terms of rule 3(5A) of the Credit Rules for **capital goods cleared as scrap**.

14. It would, therefore, be necessary to examine whether rule 3(5A) of the Credit Rules could have been invoked in the present case and for this purpose the scope of this rule as it stood prior to 27.09.2013 and post 27.09.2013 is required to be considered. The relevant portions of rule 3(5) and rule 3(5A) of the Credit Rules are contained in the following tabular form:

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<table>
<tr><th>Sl.No.</th><th>Period</th><th>Rule 3(5) and Rule 3(5A) of Credit Rules</th></tr>
<tr><td>1.</td><td>Prior to 27.02.2010</td><td>Rule 3(5)- ...

Provided also that if the capital goods, on which CENVAT credit has been taken, are removed after being used, the manufacturer or provider of output service shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the CENVAT credit.

Rule 3(5A)- If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value.</td></tr>
<tr><td>2.</td><td>Between 27.02.2010 to 16.03.2012</td><td>Rule 3(5)

Provided further that if the capital goods, on which CENVAT credit has been taken, are removed after being used, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CEVAT Credit, namely:-

(a) for computers and computer peripherals:

<table><tr><td>for each quarter in the first year @ 10%</td></tr><tr><td>for each quarter in the second year @ 8%</td></tr><tr><td>for each quarter in the third year @ 5%</td></tr><tr><td>for each quarter in the fourth and fifth year @ 1%</td></tr></table>
(b) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter:

Rule 3(5A): If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value.</td></tr>
<tr><td>3.</td><td>Between 17.03.2012 to 26.09.2013</td><td>Rule (5A): If the capital goods, on which CENVAT credit has been taken, are removed after being used, whether as capital goods or as scrap or waste, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely:-

(a) for computers and computer peripherals:

<table><tr><td>for each quarter in the first year @ 10%</td></tr><tr><td>for each quarter in the second year @ 8%</td></tr><tr><td>for each quarter in the third year @ 5%</td></tr><tr><td>for each quarter in the fourth and fifth year @ 1%</td></tr></table>
(b) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter:</td></tr>
</table>

		Provided that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value.
4.	From 27.09.2013	**Rule (5A)** (a) If the capital goods, on which CENVAT credit has been taken, **are removed after being used**, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely:- (i) for computers and computer peripherals: for each quarter in the first year @ 10% for each quarter in the second year @ 8% for each quarter in the third year @ 5% for each quarter in the fourth and fifth year @ 1% (ii) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter: Provided that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value. (b) If **the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value.**

(emphasis supplied)

15. Though the tabular chart depicts the correct position, but the burden of payment under rule 3(5A) in terms of clearance of used capital goods and clearance of capital goods as scrap in the light of the aforesaid amendments would be more clear from the following tabular chart:

Period	**Who is required to pay the amount in terms of Rule 5(3A) in case of**	
	Clearance of used capital goods	**Clearance of capital goods as scrap**
Pre 27.02.2010	Manufacturer and output service provider	Manufacturer
27.02.2010 to 16.03.2012	Manufacturer and output service provider	Manufacturer
17.03.2012	Manufacturer and output	Manufacturer and output

to 26.09.2013	service provider	service provider
Post 27.09.2013	Manufacturer and output service provider	Manufacturer

16. The period of dispute in the present case is from 1.3.2011 to 16.3.2012 and 27.09.2013 to 31.03.2015. It is evident from the aforesaid tabular chart that in terms of payment of the amount under rule 3(5A) of the Credit Rules during the said relevant period, only a 'manufacturer' was required to pay the amount in case of clearance of capital goods as scrap and not an output service provider. The appellant, being an output service provider, was not required to pay any amount in terms of rule 3(5A) of the Credit Rules during the period involved in the present appeal for clearance of capital goods as scrap.

17. This position has also been accepted by the Additional Director in the impugned order as would be evident from paragraphs A.3.7, A.3.11, A.4.3 and A.5.1. and they are reproduced:

> " **A.3.7.** On going through the provisions of CCR, 2004, I find that there is no provision for payment of any 'amount' on clearance of capital goods as 'waste and scrap' by a service provider during the two periods in question here i.e. during 27.02.2010 to 16.03.2012 and during the period from 27.09.2013 and onwards. But which capital goods can be considered as 'waste and scrap' is an important aspect here, which needs consideration.
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> **A.3.11.** In find from the said provisions that during the 1st period in question here i.e. from 27.02.2010 to 16.03.2012 and during the third or last period in question here i.e. with effect from 27.09.2013, payment of amount on removal of 'waste and scrap' capital goods by a service provider has been omitted.
>
> **A.4.3.** I fully agree with the above contention of the Noticee, that in the situation of clearance of Capital goods as 'waste and scrap' by a service provider, there is no provision either under Rule 3(5A) of CCR, 2004 during the period 01.03.2011 to 16.03.2012 and during the period during 27.09.2013 to 31.03.2015 to pay any amount. However, the burden of proving that the capital goods cleared by any assessee are in the nature of 'waste and scrap' lies on the assessee, to clear the capital goods without payment of an 'amount' as per the provisions of CCR, 2004.

> **A.5.1.** In this regard I fully agree with the Noticee's contention that in case of service providers for clearance of Capital goods as 'waste and scrap' no 'amount' was payable by them in absence of the provisions of payment of 'amount'. "

18. The issue that now needs to be decided is whether the capital goods involved in the present case which were cleared by the appellant without payment of any amount under rule 3(5A) of the Credit Rules can be considered as **used** capital goods or **waste and scrap**. The contention of the learned counsel for the appellant is that the capital goods removed by the appellant are **'scrap',** while the contention of the Department is that they are **used** capital goods.

19. This issue was considered at length by the Division Bench of Tribunal in **Bharti Infratel Ltd.** and the relevant portion of the order is reproduced below:-

> "
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> 34. What needs to be noticed is that the goods declared as scrap have been sold by the appellant to companies engaged in scrap management which have a certificate issued to them by the Principal Environment Commissioner, Rajasthan State Pollution Control Board, for procurement and recycling of scrap under the Hazardous Waste Management Rules. Further, the invoices through which these goods were sold to these companies also describe the good as scrap only. The copies of these certificates and sale invoices were brought on record by the appellant but the Additional Director failed to take notice of the said evidence and observed that no evidence of the goods being 'scrap' was brought on record by the appellant.
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> 35. This finding of the Additional Director that the goods cannot be considered as waste or scrap since no evidence was brought on record to establish that the goods could be used even after repairs for any similar purpose is also perverse as the appellant had brought on record third party reports submitted by the venders who had, after inspection, given an opinion as to whether the said goods could be repaired or not. The appellant has stated that if the goods could be repaired they were removed as used capital goods and payment in terms of rule 3(5A) of the Credit Rules was made but if the capital goods could not be repaired and were declared as scrap, the appellant had decided to clear them as scrap.

36. The Additional Director also relied upon the definition of scrap as given in Explanation (b) of section 206C of the Income Tax Act, 1961, wherein scrap has been defined as a waste generated out of manufacture or mechanical working of materials and is not usable as such due to breakage, cutting, wear and other reasons.

37. The definition of 'scrap' in the Income Tax Act could not have been resorted to by the Additional Director as it was defined in a different context. The term 'scrap' has been used in the Income Tax in the sense of a waste by-product generated during the manufacturing, but the Credit Rules envisage clearance of capital goods in the form of 'scrap' when the same can no longer be used.

38. This apart, in case a term has not been defined in a particular Statue, reference can always been made to the definition of the said term in dictionaries. For this purpose reliance can be placed on the decision of the Supreme Court in **MSCO Pvt. Ltd.**, wherein the following observations have been made:

> "The expression 'industry' has many meanings. It means 'skill', 'ingenuity', 'dexterity', 'diligence', 'systematic work or labour', 'habitual employment in the productive arts', 'manufacturing establishment' etc., But while construing a word which occurs in a statute or a statutory instrument in the absence of any definition in that very document it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject matter of the statute or statutory instrument understand it. **It is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute** or statutory instrument is not dealing with any cognate subject. Craies on Statute Law (6th Edn.) says thus and page 164:
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> > "In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts." It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone. "Macbeth v. Chislett (1910) A.C. 220, 223."

39. The dictionary meaning of the terms 'scrap' and 'used' have been reproduced in paragraph 21 of the order and the meaning assigned to the terms 'scrap' by the Supreme Court in **Valji Khimji** has also been reproduced in the paragraph 23 of the order.

40. In any view of the matter, the capital goods cleared as scrap by the appellant undergo an extensive procedure, after which based on the evaluation of a third-party vendor, the goods are declared scrap and

> sold to scrap management companies who have taken certificates for recycling the said scrap under the Hazardous E-waste Management Rules.
>
> 41. Much emphasis has been placed by the Additional Director and the learned authorized representative appearing for the Department on the fact that some of the items were declared as scrap even before the usual shelf life of such claims and without even breaking the items. It may be true that a particular item was declared a scrap before the usual prescribed shelf life of that item, but that would not mean, in view of the detailed procedure undertaken by the appellant for declaring a particular item as scrap, that a particular item cannot be considered as scrap. What has actually to be determined is whether that item can be treated as scrap and it is not material whether the particular item still has a shelf life. The items which were declared as scrap were sold to companies specializing in scrap management and these companies have also been granted a certificate for procurement and recycling of scrap under the Hazardous Waste Management Rues. The appellant, therefore, could not have undertaken the process of breaking the items and it cannot be urged that these items would not be scrap merely because they have not been broken before disposal.
>
> 42. The inevitable conclusion that follows from the above discussion is that the capital goods cleared as 'scrap' by the appellant are scrap and, therefore, the appellant, being an output service provider, was not required to pay any amount in terms of rule 3(5A) of the Credit Rules. "

20. In the present case the appellant has also undertaken an internal procedure for determination of the nature of the capital goods to be cleared by it. The goods are thereafter sent to OEM and Chartered Engineer for further verification as to whether the goods qualify as scrap. Only when the goods have been certified that they were sold as to scrap management companies having registration under Hazardous Waste Management Rules.

21. It is, therefore, clear that the capital goods cleared by the appellant would qualify as scrap and no amount was required to be paid while clearance of the same by the appellant.

22. In this view of the matter, it is not necessary to examine

the contention advanced by learned counsel for the appellant that the extended period of limitation could not have been invoked in the facts and circumstances of the present case.

23. The impugned order dated 29.07.2016 passed by the Additional Director, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed. The amount earlier paid by the appellant and which has been appropriated in the impugned order shall be refunded to the appellant with applicable rate of interest.

(Order dictated and pronounced on the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Rekha