

# EY Tax Alert

SC holds CENVAT credit is eligible on mobile towers and pre-fabricated buildings

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## Executive summary

This Tax Alert summarizes a recent ruling of the Supreme Court (SC)<sup>1</sup> on availability of CENVAT Credit on mobile towers and pre-fabricated buildings (PFBs) owned by mobile service providers (MSPs) and passive infrastructure support service providers.

Earlier, Bombay High Court (HC)<sup>2</sup> disallowed credit on the above items on the premise that the items do not qualify as "capital goods" or "inputs". Subsequently, Delhi HC<sup>3</sup> rendered a divergent ruling and allowed credit on the same. The matter reached SC.

The key observations of the SC are:

- ▶ Mobile towers are an essential part of the "Base Transceiver Station" (BTS) and antenna forming an integrated telecom system. It provides necessary stability for antennas and is crucial for the transmission and reception of radio signals.
- ▶ The attachment of towers to Earth does not inherently classify them as immovable property. If the attachment is temporary, and the items can be dismantled without damage, they are treated as movable and hence, "goods".
- ▶ Further, mobile towers and PFBs serve as accessories to antennas and BTS, which fall under "capital goods". Hence, such towers and PFBs are also to be treated as "capital goods".
- ▶ Alternatively, under Rule 2(k) of CENVAT Credit Rules, 2004, "input" includes any "good" used to provide a taxable output service, with no additional conditions. Thus, items like towers and PFBs used in providing telecom services are "inputs".

Basis above, SC set aside the ruling of Bombay HC and upheld the decision of Delhi HC, confirming that MSPs and other passive infrastructure support service providers are entitled to claim CENVAT Credit on mobile towers and PFBs.

<sup>1</sup> TS-551-SC-2024

<sup>2</sup> 2014 (35) S.T.R. 865 (Bom.)

<sup>3</sup> 2019 (27) G.S.T.L. 481 (Del.)



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# Background

- ▶ Assessee in the present case operate 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 pre-fabricated building (PFBs), electricity generating sets (gensets), 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.
- ▶ The credit availed on items such as mobile towers and PFBs were the subject matter of dispute wherein the two High Courts (HC) had given contrary views.
- ▶ Bombay HC<sup>4</sup> denied CENVAT credit on these items, stating they do not qualify as "capital goods" or "inputs" under the CENVAT Credit Rules, 2004 (CENVAT Credit Rules).
- ▶ Conversely, the Delhi HC<sup>5</sup> allowed credit, holding that these items are not immovable property and can be classified as "capital goods" and "inputs" as defined under the CENVAT Credit Rules.
- ▶ The decisions rendered by both the HCs were contested before the Supreme Court (SC)<sup>6</sup>, by the parties aggrieved in the above decisions.

## Assessee's Contention

- ▶ Towers/ shelters, fabricated in factories and supplied in CKD condition, are not permanently affixed to the Earth but are instead fastened to foundations for stability. They can be unbolted, moved, and reassembled without damage.

Consequently, they do not constitute immovable property, as they are not intended for permanent annexation or for the land's beneficial enjoyment.

- ▶ The mobile tower is an integral part of BTS and antenna, which together form the components of an integrated telecom system. The tower serves as an accessory to BTS and antenna, and without it, they cannot function properly, making it essential for providing mobile service.
- ▶ Since BTS and antenna are classified as "capital goods" under Rule 2(a)(A) of the CENVAT Credit Rules, the tower, by association, should also be considered as "capital goods".

This classification entitles the MSPs to claim credit not only on the BTS and antenna, but also on the tower.

- ▶ Further, additional peripheral equipment like battery backups, rectifiers, UPS, and gensets, necessary for uninterrupted transmission and receipt of radio signals by antenna on mobile tower are housed in PFBs or shelters.

Given that these items, along with PFBs, are used to provide mobile telephone service to subscribers, they should be eligible for CENVAT credit.

- ▶ The towers and shelters were acquired in completely knocked down (CKD) or semi-knocked down (SKD) condition and not merely as individual components like angles, channels, beams, or bars.

There was no loss of identity or creation of a new product upon assembly, maintaining the consistency between the received inputs (as tower parts) and installed inputs (as assembled towers).

With no manufacturing process involved, the credit chain remains unbroken.

- ▶ Alternatively, given that antennas installed on towers/ shelters are employed in the provision of telecommunication services, they can be classified as "inputs" in accordance with Rule 2(k).

The credit in respect of "inputs" can be availed immediately on receipt of goods in the premises of service provider under Rule 4(1) and the assessee need not wait until these goods are actually installed for providing services to the consumers.

## Revenue's Contention

- ▶ A tower, after erection, becomes immovable property having been fixed to Earth and thus, cannot be considered to be "goods" or "capital goods" within the meaning of the CENVAT Credit Rules.
- ▶ If the article cannot be shifted without first being dismantled and thereafter re-erected at another site, it cannot be considered to be a movable property but an immovable property.
- ▶ Tower even in CKD or SKD condition would fall under Chapter 7308 of the Central Excise Tariff Act, 1985 which does not find mention in Rule 2(a)(A) or in Rule 2(k).
- ▶ Further, tower or its parts are also not considered as components, spares or accessories of "capital goods" as specified in Rule 2(a)(A).
- ▶ Towers, antenna, PFBs etc., have independent and definite functions and cannot be treated as a single

<sup>4</sup> 2014 (35) S.T.R. 865 (Bom.)

<sup>5</sup> 2019 (27) G.S.T.L. 481 (Del.)

<sup>6</sup> TS-551-SC-2024

integrated unit and accordingly cannot be treated as capital goods.

- ▶ PFBs are used as shelter for protecting transmission devices etc., and not for providing output service i.e. telecom service and hence, cannot be considered "capital goods" within the meaning of Rule 2(a)(A).
- ▶ Only equipment like BTS, transmitter, antenna which are used in providing telecom service and which are covered under Rule 2(a)(A), are eligible for CENVAT credit.
- ▶ Furthermore, towers and PFBs cannot be said to be "inputs" within the meaning of Rule 2(k) since they are not used for providing output services.
- ▶ Only a manufacturer of capital goods can avail CENVAT credit in respect of "inputs" mentioned in Rule 2(k), and not a service provider.
- ▶ Central Board of Excise and Customs (CBEC) issued a Circular<sup>7</sup>, which clarified that steel angles, channels, beams, and PFBs, etc. used for telecom tower construction and creating housing/storage units, should not be considered excisable goods since they are attached to Earth.

The circular also states that these items are not utilized for providing taxable service, and thus, telecom service providers are not entitled to credit for excise duty paid on such items.

## Supreme Court's Ruling

- ▶ For the items in question to qualify as "capital goods" it must first qualify as "goods".
- Since CENVAT Credit Rules do not define "goods," reference may be drawn to other statutes, including the Sale of Goods Act, 1930, which defines goods as every kind of movable property except actionable claims and money.
- ▶ In order to determine whether towers and PFBs are movable or immovable properties, reference has to be given to the definitions contained in the General Clauses Act, 1897 and Transfer of Property Act, 1882
- ▶ In this regard reliance was placed on various rulings<sup>8</sup> to examine characteristics of immovable property based on the above definitions. Some principles applied by Court to determine the nature of property are:
  - ▶ Nature of annexation: How firmly the property is attached to Earth and cannot be relocated without damage, is likely to be immovable.
  - ▶ Object of annexation: Property attached for land's permanent enjoyment is immovable

<sup>7</sup> F.No.137/315/2007-CX.4 dated 26 February 2008

<sup>8</sup> (2010) 5 SCC 122, (2000) 7 SCC 29, (1995) 2 SCC 372, (1997) 1 SCC 203, (2004) 4 SCC 751, (1998) 1 SCC 400, 1991 Supp (2) SCC 18  
<sup>9</sup> (2010) 5 SCC 122

- ▶ Intendment of parties: The property is immovable if intended as a permanent addition.
- ▶ Functionality test: If fixation of property to the ground is for the benefit of such property, then it is movable.
- ▶ Permanency test: Property that can be dismantled and moved without damage is considered movable.
- ▶ Marketability test: Even if attached to the Earth/ immovable property, property can be removed and sold in market, can be said to be movable.
- ▶ Mobile towers, acquired in CKD or SKD form, are assembled on-site and can be dismantled, relocated, and resold in the same form, fulfilling functionality and marketability and lack of permanency criteria. Damage caused by dismantling is *qua* the BTS or cables connecting various components, but not the tower or PFB itself.
- ▶ Antennas, essential for receiving and transmitting radio signals, are mounted at a specific height, on towers fastened to Earth/ building, to ensure stability.

Such affixing is not for the permanent beneficial enjoyment of the land or building. Therefore, mobile towers and PFBs are movable properties and, therefore, qualify as "goods".

- ▶ The decision in the case of Solid and Correct Engineering<sup>9</sup> was not presented to the Bombay HC, leading to an assumption that towers, their components, and PFBs are immovable.

Bombay HC, referring the judgment by the Andhra Pradesh HC<sup>10</sup>, deemed towers as immovable and non-marketable. However, this was a misinterpretation, as the assessee had not admitted to towers being immovable, which was the actual point of contention for the Court to determine.

- ▶ The term "accessory" refers to any item which adds to the beauty, convenience or effectiveness of other items and it may or may not be essential for functioning of main machinery.

In this context, a tower is a structure affixed to the Earth/ building, providing the necessary height and stability, ensuring it remains steady so that the antenna can transmit signals for uninterrupted and seamless services.

Therefore, tower is accessory of "antenna" which is part of BTS, considered as "capital goods". Hence, by virtue of sub-clause (iii) of Rule 2(a)(A) such mobile tower is also to be treated as "capital goods".

<sup>10</sup> (2011) 23 STR 341 (AP)

- Similarly, PFBs enhance efficacy and functioning of mobile antenna as well as BTS, accordingly, it can also be considered as accessory to antenna and BTS.
- Addressing the reliance on the Circular dated 26 February 2008, Revenue may issue circular based on their understanding of matter and authorities are bound to follow it. Any circular contrary to the Court's findings would be unenforceable and would be liable to be withdrawn.
- Accordingly, Delhi HC was correct in holding that towers and PFBs support the BTS/antenna for effective transmission of mobile signal thereby falling under "capital goods" category as accessories of BTS/antenna. As these items are utilized in providing mobile telecommunication services and are received at the service provider's premises as per Rule 3(1)(i), assessees are eligible for CENVAT credit on the excise duties paid on them.
- On assessees' alternative plea of towers and PFBs being "inputs", it is to be noted that without such items there cannot be proper service of mobile telecommunication. Definition of "input" under Rule 2(k) does not impose any conditions/ qualifications except to mean goods used for providing any output service.
- The definition of "input" related to manufacturing is broad and includes goods used directly or indirectly, whether contained in the final product or not. However, the definition of "input" related to providing output service is simpler, stating "used for providing any output service."
- Therefore, any item that qualifies as a "good" and is "used" for providing output service would fall within the scope of "input".
- Mobile towers and PFBs, being "goods" used in the provision of telecommunication services, qualify as "inputs" under Rule 2(k) for the purpose of availing CENVAT credit.
- Accordingly, SC set aside the judgement of Bombay HC and upheld the decision of Delhi HC, confirming that MSPs and other passive infrastructure service providers are entitled to claim CENVAT credit on the excise duties paid for mobile towers and PFBs.

## Comments

- a. For pending cases under the erstwhile regime where CENVAT credit was reversed under protest, businesses may explore claiming refund of the same basis SC ruling.
- b. Under GST, ITC is not available on construction of immovable property except for plant and machinery. Further, telecom towers have been specifically excluded from the ambit of plant and machinery. Industry may now evaluate whether ratio of this ruling can be applied under GST to avail ITC.
- c. Analogy of the ruling may also be relevant for determining ITC eligibility on transmission towers, railway sidings, etc.

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