



Tax alert: Supreme Court allows CENVAT credit on mobile tower, its parts, prefabricated buildings to mobile service providers

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Supreme Court holds that mobile tower, its parts and prefabricated buildings (PFBs) are “goods” for the purpose of availing CENVAT credit.

In a nutshell



Conflicting rulings were passed on the issue of availing CENVAT credit on telecom towers by the Bombay High Court and Delhi High Court.



The Supreme Court applied the functionality test and observed that affixing of tower to the earth or building is not for the permanent beneficial enjoyment of the land or building, but to make it stable for effective functioning of the antenna for seamless rendering of mobile service.



Also, the tower and PFBS, after being dismantled without being damaged, can be relocated or sold, thereby possessed the character of marketability. Accordingly, it was held that the CENVAT credit would be available on the same to mobile service providers.



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The Supreme Court, vide its judgement dated 20 November 2024, holds that CENVAT credit is available on mobile tower, its parts and prefabricated buildings (PFBs) to mobile service providers (MSPs).

Background

- The Bombay High Court, vide judgment dated 26 August 2014, had held that mobile towers and other components do not fall within the definition of “capital goods” nor are these “inputs” as per CENVAT Credit Rules, 2004 (CCR). Hence, MSPs are not entitled to CENVAT credit on excise duty paid on such goods.
- On the contrary, the Delhi High Court, vide judgment dated 31 October 2018, had held that towers and other associated structures like PFBs are covered by the definition of “capital goods” and are “inputs” as defined under CENVAT Rules and hence, MSPs are entitled to input credit on excise duty paid towards installation of mobile towers and PFBs.
- The aggrieved parties filed appeals against the respective rulings of both High Courts, before the Supreme Court (SC).

Facts of the case

- For rendering wireless telecommunication services, MSPs usually own and operate the infrastructure such as cell towers, Base Transceiver System (BTS) along with accompanying network equipment and structures like PFBs, electricity generating sets (gensets), battery back-up and stabilisers, for uninterrupted power supply to ensure, seamless telecom service to subscribers.
- The mobile towers are bought at the site either in completely knocked down condition (CKD) or semi-knocked down condition (SKD) by the service provider.
- The tower is installed at an appropriate site based on technological viability. It is on this mobile tower that the antenna which receives and transmits the electromagnetic signal is hoisted and fixed at an appropriate height as may be technically determined.
- The mobile tower, in turn, is fixed to the ground or on the top of a building to provide stability and make it wobble free as the antenna cannot function effectively if the same is not kept at a particular height and is not stable and prevented from shaking due to wind, rain or any other reason.
- The MSPs/ passive infrastructure providers availed CENVAT credit on such goods which was denied by the Revenue.

Contentions of parties

- The Revenue contended that the goods in issue are attached to the earth, fixed permanently and not marketable, hence immovable and accordingly CENVAT Credit is not eligible.
- However, the taxpayers contended that:
 - Towers and parts of the towers, are “capital goods” as mobile service cannot be provided by the service provider without tower, antenna and BTS. Since BTS/antenna are “capital goods” under the CCR, the tower, being a part of BTS/antenna will be also deemed as “capital good”.
 - Prefabricated building/shelter, where ancillary items (such as battery back-up, rectifier, UPS, gensets etc.) and indispensable components of the mobile telephone system are securely housed, becomes an integral part of the mobile telephone system and CENVAT credit should be allowed on the same.

- Tower acts as an “accessory” of BTS and antenna and without the tower, the antenna and BTS cannot function properly. Consequently, mobile service cannot be provided by the service provider without tower, antenna and BTS. Accordingly, CEVAT credit would be available on the same as being an accessory to “capital goods” in the form of BTS and antenna.
- Alternatively, the goods under consideration are used for providing output service of telecommunication and hence, being “inputs” under Rule 2(k) which are used for providing output service i.e., mobile service. Accordingly, CENVAT credit will be available on these goods.

Observations and ruling of the SC

Tests applied to determine the nature of a property

- **Nature of annexation:** This test ascertains how firmly a property is attached to the earth. If the property is so attached that it cannot be removed or relocated without causing damage, it is an indication that it is immovable.
- **Object of annexation:** If the attachment is for the permanent beneficial enjoyment of the land, the property is to be classified as immovable. Conversely, if the attachment is merely to facilitate the use of the item itself, it is to be treated as movable, even if the attachment is to an immovable property.
- **Intendment of the parties:** If the parties intend that the property in issue is for permanent addition to the immovable property, it will be treated as immovable, else it is movable.
- **Functionality Test:** If the article is fixed to the ground to enhance the operational efficacy of the article and for making it stable and wobble free, it is an indication that such fixation is for the benefit of the article, and as such the property is movable.
- **Permanency Test:** If the property can be dismantled and relocated without any damage, the attachment cannot be said to be permanent but temporary and it can be considered to be movable.
- **Marketability Test:** If the property, even if attached to the earth or to an immovable property, can be removed and sold in the market, it can be said to be movable.

Towers, parts of towers and PFBs are “goods”

- Affixing of the tower to the earth or building is not for the permanent beneficial enjoyment of the land or building, but to make it stable for effective functioning of the antenna for seamless rendering of mobile services by the service provider to the consumers/subscribers. Same is the case for PFB.
- Therefore, by applying functionality test, it can be stated that the attachment of tower to the earth /building is not for the benefit of the land or the building, but for better functioning of the antenna which is fixed on the tower. Hence, it can be said that tower is a movable property.
- If the tower or the PFB can be dismantled and relocated in another site without causing any damage to either the tower or PFB, the mobility or the marketability of these items is retained. Thus, these exhibit the character of a movable property.
- Therefore, mobile towers and PFBs are movable properties and hence, “goods”.
- Circular dated 26 February 2008 issued by the Revenue, clarifying that inputs for civil structures such as angles, channels, beam of steel and prefabricated shelter, PUF panels are used by the

cellular phone service providers for erecting towers and making housing/storage units, and are not used for providing taxable service. Accordingly the circular clarified that credit of excise duty paid on such items is not available to the telecom service providers. This is contrary to the observations of the SC and liable to be withdrawn.

Towers, parts of towers and PFBs are “capital goods”

- The CCR provides that components, spares and accessories of specified goods will also be treated as “capital goods” if used for providing output service.
- The tower is necessary and helps in keeping the antenna at proper height and in a stable position so that the antenna can transmit signals for ensuring uninterrupted and seamless services to the subscribers. Therefore, the same is an accessory of antenna.
- PFBs house other BTS equipment and diesel generators to provide alternative and uninterrupted power supply to the antenna. Thus, PFBs enhance the efficacy and functioning of mobile antenna as well as BTS and accordingly, PFBs can also be considered as accessories to the antenna and BTS which are “capital goods”.
- Even though the goods may have an independent function, towers and shelters (PFBs) support the BTS/antenna for effective transmission of mobile signals and thus, enhance their efficiency. Accordingly, these goods are components/accessories of BTS/antenna which are “capital goods” under CCR.

Towers, parts of towers and PFBs are “inputs”

- “Input” as per CCR would mean any “good” which is used as “input” for providing taxable output service.
- Further, since these goods are used for providing output service, i.e. mobile service, the same can be considered to be “inputs” under CCR and CENVAT credit can be availed in respect of these goods for payment of service tax.
- Based on the above observations, the judgment of the Delhi High Court was upheld and the judgment of the Bombay High Court was set aside.

Deloitte comments

There were long-standing disputes on the availability of credit on telecom towers, not just in the erstwhile service tax regime, but under the GST law as well (since the GST law specifically restricts credit on telecom towers).

Several telecom service providers and passive infrastructure providers were issued notices disallowing credit availed on telecom towers.

Divergent rulings on the issue added to the ambiguity on the availability of credit on such goods which are essential for providing telecom services.

Based on the ruling of the SC, industry can consider representing for removal of restriction of credit on telecom towers under the GST law.

The tests applied by the Supreme Court for determining availability of credit on telecom towers would not just benefit the telecom industry but would help provide guidance in availing of credits on a lot of other goods where the Revenue disallows credits on various grounds.

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