



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय कर शुल्क भवन,
सातवीं मंजिल, पॉलिटेक्निक के पास,
आम्बावाडी, अहमदाबाद-380015



☎ : 079-26305065

टेलिफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(ST)85/A-II/2017-18 / 931-35
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-002-APP-246-17-18
दिनांक Date : 29-12-2017 जारी करने की तारीख Date of Issue 22/01/18

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD/05/12/DKJ/DC/2016-17 Dated 20.03.2017
Issued by Deputy Commr STC, Service Tax, Div-V, Ahmedabad

घ अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

M/s. Bharat Sanchar Nigam Pvt Ltd
Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

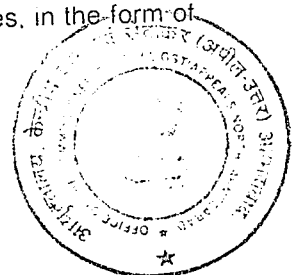
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी.- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees. in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फॉर्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219K केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश दत्त हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है --

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

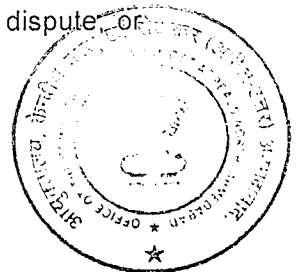
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute or penalty, where penalty alone is in dispute.



ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s. Bharat Sanchar Nigam Ltd., Taxation Section, O/O the CGMT, 7th Floor, P&T Admn Building, Khanpur, Ahmedbad-380001 (in short 'appellant') against Order-in-Original No.SD-05/12/DKJ/DC/2016-17 dated 27.03.2017 (in short 'impugned order') passed by the then Deputy Commissioner, Service Tax Division-V, Ahmedabad (in short 'adjudicating authority').

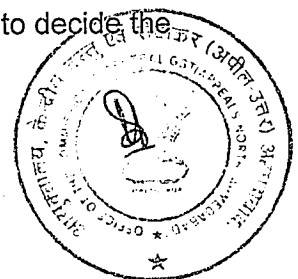
2. Briefly stated that periodical SCN dated 12.04.2016 was issued for the period April-2014 to March-2015 for recovery of Rs.8,26,094/- wrongly availed/utilized Cenvat credit on inputs used for construction of Towers/Shelters and for imposition of penalty. This SCN was adjudicated by the adjudicating authority vide impugned order wherein demand of Rs.8,26,094/- was confirmed along with interest under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73(2) and 75 of the Finance Act, 1994 respectively and penalty of Rs.8,26,094/- was imposed under Rule 15(1)ibid for contravention of Rule 3ibid.

3. Aggrieved with the impugned order, the appellant has filed the present appeal wherein, *inter alia*, submitted that:

- (a) towers are erected on nuts and bolts and can be easily moved from one place to another and they are also having cell on wheel(truck mounted towers) which are moved from one place to another.The documents submitted in support of movability of towers and facts and circumstance are completely ignored in deciding eligibility of Cenvat credit as specified in 37B order No.58/1/2002-CX point no.4(v) and 4(vi).
- (b) tower materials are essential and integral part of telecom services and are being used in delivering telecom services to their customers.
- (c) recovery of interest u/r 14 read with section 75 should be restricted to Cenvat utilized for Rs.2,88,093/- only.
- (d) since issue involved for eligibility of Cenvat credit on telecom tower is a pure question of interpretation of law, imposition of penalty of is not justified under Rule 15ibid as held by the Hon'ble CESTAT in appeal no.ST/413/2012 in similar case.

4. Personal hearing in the matter was held on 30.11.2017. Shri Anil N. Shah, Chartered Accountant, appeared on behalf of the appellant and submitted Tribunal's decision in their own case wherein penalty is waived vide Tribunal's Order No.A/10139-10147/2017 dated 20.01.2017; submitted case of Vodafone Ltd.; filed written submission, inter alia, stating that decision of Bharti Airtel case has been challenged before the Supreme Court decision may be kept in abeyance till its final outcome to avoid continuous litigation.

5. I have carefully gone through the appeal memorandum, submission made at the time of personal hearing and evidences available on records. I find that the main issue to be decided is whether the Cenvat credit availed on Towers/Shelters is admissible under the Cenvat credit Rules, 2002 or otherwise. Accordingly, I proceed to decide the case on merits.

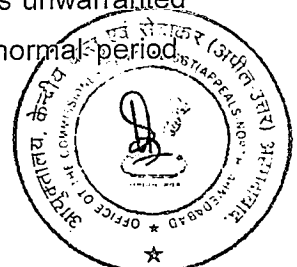


6. Prima facie, I find that the appellant has taken Cenvat credit considering the said goods as capital goods and during the adjudication process changed their views that the duty paid on goods received by them be considered as 'input' for delivering the 'telecom service' to their customers. So far Cenvat credit on capital goods is concern, the goods in question does not the test/definition as provided in Rule 2(k) of the Cenvat Credit Rules, 2004. This aspect has been discussed in detailed in the impugned order and the appellant has not given any further cognate reason to consider the same as capital goods eligible for Cenvat credit therein. Alternatively, the appellant made contention to consider it as 'input'. These parts of CKD towers/shelters, whether assembled or not, is falling under Chapter 73. These structures are actually used for supporting the capital goods i.e. Antenna which receives and transmit signals. As per Explanation 2 to Rule 3 of the CCR, 2004, inputs do not include items used for making of structures for supporting the capital goods consequently these parts of structure are not inputs. Hence, Cenvat credit on these items is not admissible. So, these goods are neither capital goods nor inputs. So, Cenvat credit on these items is not available. In this regard, I also find that in similar matter the Hon'ble High Court of Bombay in case of M/s. Bharti Airtel Ltd. Vs. CCE, Pune-III reported in 2014(35)STR-865 (Bom.) has held as under:

"Cenvat credit - Availment of - Towers/prefabricated buildings (PFB) with antenna, Base Trans-receiver Station (BTS) and parts thereof for providing cell phone service - Fastened/fixd to earth, and after their erection became immovable - HELD : Such towers cannot be said to be goods - They are immovable structures, non-marketable and non-excisable - They could not be capital goods also as they were neither components, spares and accessories of goods falling under any of Chapters or Headings of Central Excise Tariff as specified in sub-clause (i) of definition of capital goods in Rule 2(a)(A) of Cenvat Credit Rules, 2004 - Also, CKD or SKD condition tower and parts thereof would fall under Heading 7308 ibid which is not specified in clause (i) or clause (ii) of Rule 2(a)(A) ibid so as to be capital goods - Alternate contention of assessee that towers and PFB were accessories of antenna, hence qualified as capital goods falling under Chapter 85 ibid, rejected as antenna could function irrespective of tower and PFB - Otherwise also, it was misconceived and absurd to accept that tower was part of antenna - Towers and PFB did not qualify as inputs under Rule 2(k) ibid, as they were not directly used for output services viz. telecommunication services; they were immovable, fixed to earth and not excisable; and they could not be regarded as essential inputs as antenna could be installed irrespective of tower or one tower could install number of antennas for different service providers and hence could not be regarded as integral part of output services; plea that these were required to provide output service on commercial scale, and hence satisfied functional utility test, rejected. [paras 21, 23, 25, 26, 31, 32]"

Appeal rejected

6.1 I have also carefully gone through the CESTAT Order No. A/10139-10147/2017 dated 20.01.2017 passed in appellant's own case wherein it is held that the appellant is not eligible to avail and utilize CEVNAT credit on towers, tower parts and pre-fabricated building/shelters for normal period vide para 17 and 18 of the said order. It is also held that since the issue involved is a pure question of law, penalty imposed is unwarranted and accordingly set aside. I find that since the present appeal covers normal period



honouring the order of the Hon'ble CESTAT supra, penalty imposed vide impugned order is set-aside.

7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested:

B.A. Patel
22/01/18

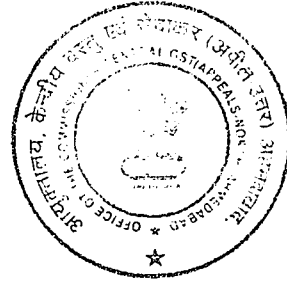
(B.A. Patel)
Supdt.(Appeals)
Central GST, Ahmedabad.

BY SPEED POST TO:

M/s. Bharat Sanchar Nigam Ltd.,
Taxation Section, 7th Floor, P&T Admn Building,
Khanpur, Ahmedbad-380001.

Copy to:-

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Principal Commissioner, CGST, Ahmedabad South (RRA Section).
- (3) The Assistant Commissioner, CGST, Division-VI, Ahmedabad South.
- (4) The Asstt. Commissioner(System), Central Tax , Ahmedabad-South
(for uploading OIA on website)
- (5) Guard file
- (6) P.A. file.



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