



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
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Ambavadi, Ahmedabad-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)179/Ahd-South/2018-19 / 10888 to 10892

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-015-2019-20
दिनांक Date : 23-05-2019 जारी करने की तारीख Date of Issue 03/06/2019

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Pr. Commissioner (Appeals)

ग Arising out of Order-in-Original No. CGST/DEM/07/BSM/AC/DIV-VIII/18-19 दिनांक: 19.12.2018
issued by Assistant Commissioner, Div-VIII, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Vodafone Idea Ltd
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।



... 2 ...

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रूपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

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।

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 appeal has been filed by M/s Vodafone Mobile Services Ltd., Vodafone House, Building A, Corporate Road, Prahaladnagar, Off. S.G. Highway, Ahmedabad - 380015 (herein after referred to as the appellant) against the OIO No. CGST/DEM/07/BSM/AC/DIV-VIII/18-19 dtd. 19.12.2018 (herein after referred to as the impugned order) passed by the Assistant Commissioner, CGST, Division-VIII, Ahmedabad (South) (herein after referred to as the adjudicating authority).

2. The brief facts of the case are that during the audit, it was observed that the appellant had wrongly availed and utilized cenvat credit on capital goods in relation to erection of towers/ shelters and allied services in relation to installation of towers and shelters, soil testing for the period 01.04.2015 to 11.02.2016 amounting to Rs. 13,73,896/- in contravention of Cenvat Credit Rules, 2004 (for brevity "CCR). In view of this, a show cause notice dtd. 18.09.2017 was issued proposing disallowing of cenvat credit amounting to Rs. 13,73,896/- with interest and imposition of penalties under various Sections of the Act. The adjudicating authority who, vide the impugned order, confirmed the demand and imposed penalty of equal amount under Rule 15 (3) of the CCR read with Sections 78 of the Finance Act, 1994 by holding that the said goods did not fall under the definition of capital goods.

3. Being aggrieved by the impugned order, the appellant have filed this appeal on the following grounds:

- a) That the issue has squarely been decided in their favour by the Delhi High Court in Vodafone Mobile Services reported at 2018 (11) TMI-173;
- b) That the towers, shelters and tower materials are all accessories to the Base Trans-receiver Station (BTS) classified under Chapter 85.25 of the Central Excise Tariff Act, 1985 (for brevity "Tariff Act" and towers and tower materials which are integral to the erection of the cell sites for providing cellular coverage in public areas qualify as capital goods under Rule 2(a)(A)(iii) being accessories of antennae used in providing the output services. They rely on the case laws of CCE, Coimbatore vs. Jawahar Mills Ltd. - 2001 (132) ELT-3 (SC), Super Cassettes Industries Ltd. vs. CCE, Noida - 2006 (201) ELT-390, CCE, Guntur vs. Andhra Cements Ltd. - 2006 (200) ELT-272 and Prism Cements Ltd. vs. CCE, Bhopal - 2005 (185) ELT-264;



- c) That for any goods to be an accessory or part of a capital goods, it is not mandatory for the accessories to fall under the chapter headings specified in Rule 2(a)(i) of the CCR and this view is supported by the Circular No. 276/110/96-TRU dated 02.12.1996;
- d) That it is settled legal position that cenvat credit on goods used for making supporting structures of eligible capital goods are entitled for cenvat credit. They rely on the case laws of CCE vs. Prism Cement Ltd. – 2006 (199) ELT-777 (MP), New Bharat Ferro Alloys Ltd. vs. CCE – 2004 (61) RLT-68, Hindustan Sanitaryware Industries vs. CCE – 2001 (47) RLT-837, Lloyds Metals & Engineers Ltd. vs. CCE – 2002 (50) RLT-109 and Lloyds Steel Industries Ltd. vs. CCE – 2004 (64) RLT-732 etc.;
- e) That in the alternative, the goods qualify as inputs and the same has been held by the Delhi High Court in the case of Vodafone Mobile Services Ltd. (supra);
- f) That the appellant is procuring the towers as such in CKD/SKD conditions and not goods used for making the towers;
- g) That the impugned order has erred in holding that the goods are immovable whereas they can be moved from one location to another based on their need and further that the immovability is not a criteria for denial of credit. They rely on the case of BSNL vs. CCE, Kolkata – 2013(292) ELT-353 wherein it was held that if the goods attached to the earth can be dismantled, they cannot be called an immovable property;
- h) That credit cannot be denied when duty payment treating towers as “goods” is not reviewed at the supplier’s end;
- i) That since they had credit balance lying in the books of accounts, interest cannot be demanded. They seek reliance on the case laws of CCE, LTU vs. M/s Bill forge Pvt. Ltd. – 2012 (26) STR-204 and no penalty can be imposed under Rule 15 (3) of the CCR when there is no intention to evade payment of duty and they were under a bona fide belief that cenvat credit was correctly availed and that the issue involved interpretation of legal provisions. They rely on the case laws of GTL Infrastructure Ltd. vs. CST, Mumbai – 2015 (37) STR-577 (Tri.Mum.), Reliance Infratel Ltd. vs. CST, Mumbai-II – 2015 (38) STR-984 (Tri.Mum.);
- j) That the cenvat credit as far as it pertains to goods such as cells on wheels which are per se movable would be eligible for credit and



therefore out of a total demand, an amount of Rs. 4,96,492/- pertains to credit availed on towers installed on cells on wheels.

4. The personal hearing in the case was held on 02.05.2019 in which Shri Ambarish Pandey, Advocate appeared on behalf of the appellant. He reiterated the grounds of appeal and made additional submissions in the form of copies of case laws relied upon.

5. I have carefully perused the documents pertaining to the case and submitted by the appellants along with the appeal. I have considered the arguments made by the appellants in their appeal memorandum as well as oral submissions during personal hearing.

6. I find that the issue to be decided in the instant case is whether the towers, shelters etc. can be considered capital goods and accordingly eligible for cenvat credit.

7. First of all, I find the said goods fall in the chapter heading of 72, 73 and 94 and on plain reading do not fall in the category of capital goods as defined in Rule 2 (a) (A) of the CCR. Now I find from the submissions of the appellant that the said goods are all accessories to the Base Trans-receiver Station (BTS) which is classifiable under Chapter 85.25 of the Tariff Act. Further it is also submitted that towers are accessories of the antenna and the antennae cannot work without towers. If the antenna is kept on earth, it cannot receive microwaves because of the hindrances present in the form of trees, buildings, thickness of air etc. and if it does not receive microwaves, it cannot function. Thus the towers are required to place the antennae at a particular height to enable the antennae to work efficiently. This facts are not in dispute and no findings have been given by the adjudicating authority in the impugned order. So basically I find that in the present case, the debate mainly centers round the definition of 'capital goods' in clause (a) of Rule 2 of the Credit Rules. The definition of capital goods are reproduced below (relevant part only): --

"(a)"capital goods" means: -- (A) the following goods, namely: --

(i) all goods falling under Chapter 82, Chapter 84, *Chapter 85*, Chapter 90, heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Central Excise Tariff Act;

(ii) pollution control equipment;

(iii) **components, spares and accessories of the goods specified at (i) and (ii);**

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and



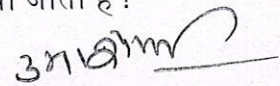
(vii) storage tank,
used—" (emphasis applied)

An accessory is an article or device that adds to the convenience or effectiveness of but is not essential to the main machinery. The appellants have contended in their grounds 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. Accordingly it can clearly be held that 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 are therefore covered by the definition of "capital goods". I fully agree with decision in the case law of Vodafone Mobile Services and others (supra).

8. In view of the above findings, I set aside the impugned order and allow the appeal by way of remand with a direction to the adjudicating authority to examine the facts of the case in the light of Hon'ble Delhi Tribunal's order cited supra.

9. The appeal is disposed off accordingly.

अपीलकर्ता द्वारा दर्ज की गयी अपील का निपटारा उपरोक्त तरीके से किया जाता है !



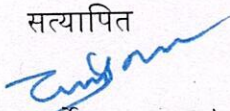
(उमा शंकर)

केंद्रीय कर आयुक्त (अपील्स)

अहमदाबाद

दिनांक:

सत्यापित



(धर्मेंद्र उपाध्याय)

अधीक्षक (अपील्स),

केंद्रीय कर, अहमदाबाद



By R.P.A.D.

To:

M/s Vodafone Mobile Services Ltd.,
Vodafone House,
Building A,
Corporate Road,
Praladnagar,
Off. S.G. Highway,
Ahmedabad - 380015

Copy to:-

- (1) The Chief Commissioner, CGST, Ahmedabad Zone,
- (2) The Commissioner, CGST, Ahmedabad (South),
- (3) The Dy./Asth. Commissioner, CGST, Div.-VIII, Ahmedabad (South),
- (4) The Dy./Asth. Commissioner(Systems),CGST, Ahmedabad (South),
- ✓ (5) Guard File,
- (6) P.A.File.

