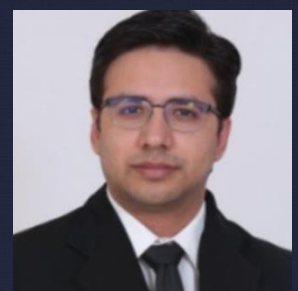




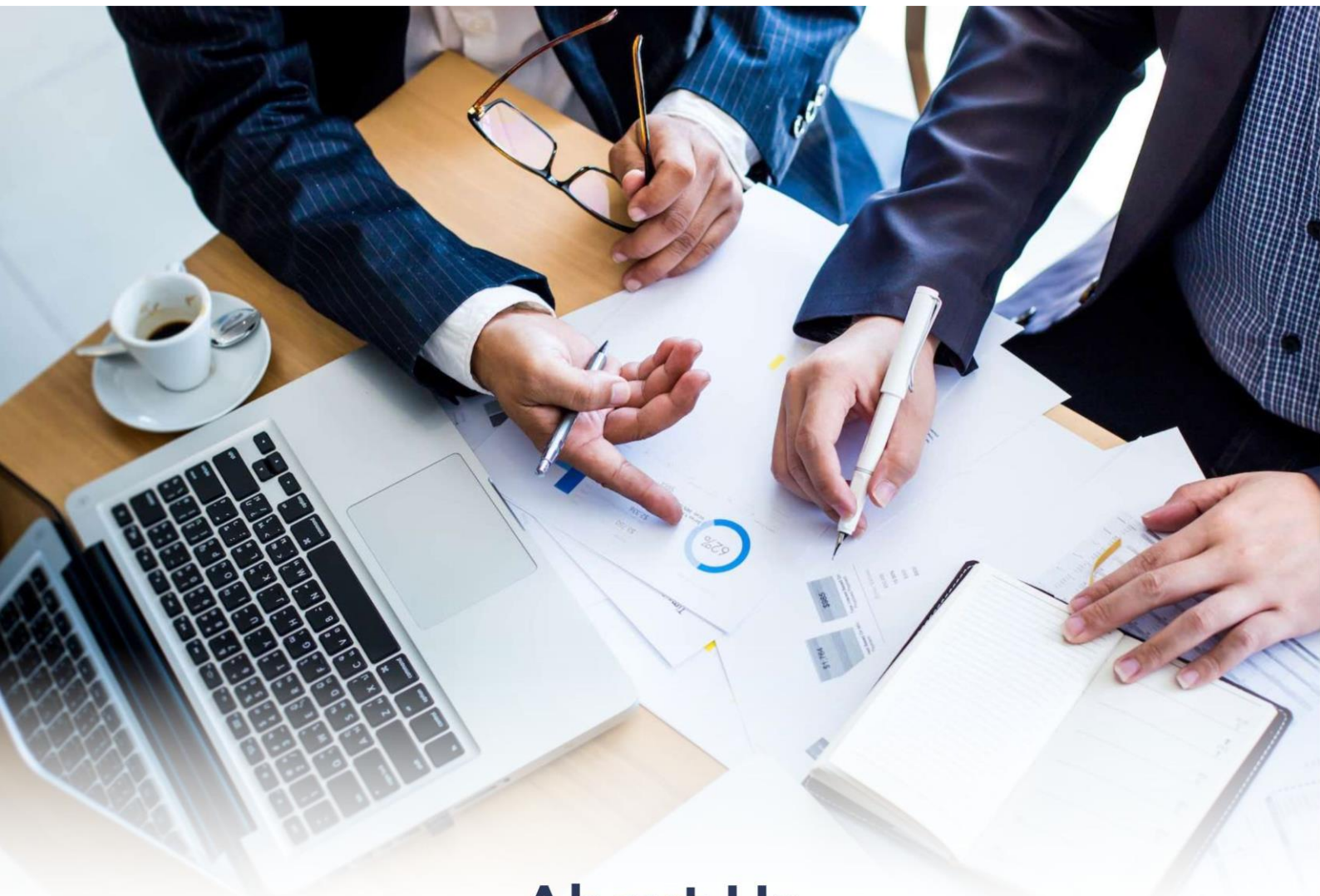
Case Analysis: M/s Bharti Airtel Ltd. v. The Commissioner of Central Excise, Pune



CA Tushar Aggarwal



Adv. Kabir Rishi



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Case Analysis: M/s Bharti Airtel Ltd. v. The Commissioner of Central Excise, Pune

Introduction:

1. In a recent judgment, the Supreme Court has given its ruling on the eligibility of CENVAT credit in respect of the mobile towers and prefabricated buildings which are installed at the site of telecommunication towers. The judgment will undoubtedly provide major relief to the telecommunication sector as a highly contentious and long-drawn-out issue has been finally settled by the Supreme Court. However, some of the findings of the Court, especially on the concept of movability, will have a far-reaching impact on the issue regarding availability of input tax credit (ITC) under the GST regime as well.
2. Mobile service providers (“MSPs”) are key actors in the telecommunications industry, enabling wireless communication services through requisite telecommunication infrastructure. A telecommunication tower comprises of various components for transmission of signals such as base transceiver system (BTS), antenna etc. Further, in order to ensure constant electric supply, gensets, UPS batteries along with stabilizers are also kept at the base of the towers. These gensets and UPS batteries are usually housed in prefabricated buildings (“PFBs”) to protect them from damage. The antennas which receive and transmit the electromagnetic signal are required to be fixed at the appropriate height. Therefore, these antennas are fixed on mobile towers which in turn, are fixed to the ground or on the top of a building to provide stability and make the antennas wobble free.
3. The mobile towers and PFBs are generally received at the site in CKD/SKD condition and are fastened to the earth/buildings on-site using nuts and bolts. During the erstwhile Service Tax regime, there were a lot of concerns regarding the availability of the CENVAT credit for the MSPs in respect of the excise duty paid on the mobile towers and prefabricated structures. This issue was further complicated by the contrasting decisions of the Delhi High Court and Bombay High Court. This issue revolved around the question of the coverage of mobile towers and PFBs as “capital goods” or “inputs” as per the definitions provided under the CENVAT Rules.

4. The Bombay High Court, in the case of *M/s Bharti Airtel Ltd. v. The Commissioner of Central Excise, Pune*¹, held that mobile towers and PFBs are ineligible for CENVAT credit as they do not qualify as “capital goods” under **Rule 2(a)(A) of the CENVAT Rules** or “inputs” under **Rule 2(k) of the CENVAT Rules**. The Court based its conclusion on the fact that these structures become immovable property as they are erected and fastened to the earth. Further, the Court also rejected the argument that towers are accessories to antennas, emphasizing that towers are structural supports, not components or parts of antennas.
5. On the other hand, the Delhi High Court in *Vodafone Mobile Services Ltd. & Ors v. Commissioner of Service Tax, Delhi*², ruled that the towers, its parts thereof, and PFBs, can be dismantled without causing any damage to such structures and without changing the nature of such structures and can be re-assembled at another location, therefore, these structures are movable property. Accordingly, it was held that they qualify as “capital goods” under **Rule 2(a)(A)** and “inputs” under **Rule 2(k)**. The Court applied the functional utility test, emphasizing their role in enhancing the efficiency of network equipment such as antennas, BTS, etc. It rejected the Bombay HC’s interpretation, stressing upon the practical functionality of these structures and the need to facilitate credit utilization.

Decision By the Supreme Court:

6. The Supreme Court³ has now given its verdict on this long-standing dispute over the availability of CENVAT credit on mobile towers, its parts thereof and PFBs. Let us now delve into finer intricacies of the decision of the Supreme Court.

Issue-In-Brief:

7. As discussed, the issue arose in light of the fact that the CENVAT Rules provided for the availability of credit of excise duty paid on the “capital goods” or “inputs” used for the purpose of providing taxable service. Now, as acknowledged by the Supreme Court, the whole controversy revolved around the question as to whether the mobile tower, its parts

¹ 2014 (9) TMI 38.

² 2018 (11) TMI 713.

³ *M/S Bharti Airtel Ltd. v. The Commissioner of Central Excise, Pune* 2024-VIL-49-SC-CE.

and PFBs, falls under the purview of “capital goods” or “inputs” within the meaning of the CENVAT Rules.

8. On one side, it was argued that mobile towers and PFBs are essential components for delivering telecommunication services, and the same qualified as “capital goods” or “inputs” under the CENVAT Rules. However, on the other side, it was argued that mobile towers, once installed, become immovable property as they are erected and fastened to the earth and thus, the same fail to qualify as “goods” and thus, the same cannot be regarded as “capital goods” or “inputs” under the CENVAT Rules. It was further argued that towers and PFBs perform independent functions and cannot be treated as part of a unified system, contrary to the functionality test endorsed by the Delhi High Court.

Observations and Reasoning by The Court:

“Movable” or “Immovable” Property-

9. The Court relied upon the definition of the expressions ‘immovable property’ and ‘attached to earth’ under the General Clauses Act and the Transfer of Property Act, respectively and came to the conclusion that in order for a property to be considered as immovable, the property must either be: (i) rooted in the earth, as in the case of trees and shrubs; (ii) imbedded in the earth, as in the case of walls or buildings; or (iii) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.
10. Reference was made to various earlier judgments of the Supreme Court regarding this issue and on the basis of the same, the Court summarised the principles basis which a nature of the property is required to be ascertained:
 - i. **Nature of Annexation:** If the property is attached to the earth in such a manner that it would not be possible to dismantle and relocate it to some other place without causing any damage to it, then the property will be regarded as immovable.
 - ii. **Object of Annexation:** If attachment is for permanent beneficial enjoyment of the land, it is immovable in nature. However, if it is for facilitating the use of the items attached to it, it is movable in nature.

- iii. **Intendment of Parties:** If the parties intend that the property in issue is for permanent addition to the immovable property, it will be treated as immovable. If the attachment is not meant to be permanent, it indicates that it is movable.
 - iv. **Functionality Test:** If the property is for enhancing the functional utility of the articles attached to it, then this indicates that such property is for the benefit of such articles and such property is moveable.
 - v. **Permanency Test:** If the property can be dismantled and relocated without causing any damage or change in the nature of the property, this indicates that the property is moveable.
 - vi. **Marketability Test:** If the property can be removed and sold in the market, the property can be said to be movable.
11. While examining the nature of the mobile towers and PFBs in question, the Court made the following observations:
- The antennas are affixed on the mobile towers as the same have to be installed at a certain height. The mobile towers are attached and fastened to earth or building to provide stability and make the antennas unshakable due to wind, rain or any other external forces.
 - The mobile towers can be dismantled and shifted to any other location as per the requirements of the service provider and can be resold in the same form.
 - Dismantling the tower may entail some damage, but such damage will be to the BTS or wiring/cables. However, while dismantling, there will be no damage to the tower or the PFB.
 - Affixing of the tower to the earth/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 seamlessly providing the telecommunication services. Same is the case with the PFBs.
12. In light of the above observations, the Court held that by applying the tests of permanency, intendment, functionality and marketability, the items are not immovable but movable.

Classification as “capital goods”-

13. The mobile towers and PFBs were categorized as “**capital goods**” under **Rule 2(a)(A)(iii) of the CENVAT Rules**. This classification is based on:
- Their role as accessories is critical for the proper functioning of antennas and BTS.
 - Their contribution to the operational efficacy of the BTS system, housing equipment, and providing substitute power supplies.

Classification as “inputs”-

14. In this regard, it was held that the mobile towers, its parts thereof and PFBs, qualify as “inputs” because they are directly used in providing telecommunication services by stabilizing antennas and housing essential equipment, thereby contributing to the output supply.

Judgement:

15. **Conclusively**, the Supreme Court, after determining that the tower and PFBs are “goods” rather than immovable property, held that the same would qualify as “capital goods” as well as “inputs” under the CENVAT Rules, allowing MSPs to claim credit.
16. The Apex Court effectively overturned the Bombay High Court’s decision and affirmed the Delhi High Court’s interpretation, establishing that these items qualify for credit under the CENVAT Rules.

Conclusion:

17. The above decision of the Supreme Court gives a sigh of relief to the taxpayers in telecom industry from the perspective of the availability of CENVAT credit of excise duty paid on telecom towers and PFBs. However, the benefits reaping from this decision cannot be said to be limited to the extent of availability of CENVAT credit. It is plausible that the above decision can have a significant impact on the availability of ITC on telecom towers and other similar structures under the GST law.
18. The restriction relating to availment of ITC under Section 17(5)(c) and Section 17(5)(d) of the CGST Act is in respect of works contract services as well as other goods and services which are used for construction of immovable property (other and plant and machinery). In view of the judgment of the Supreme Court, these PFBs and mobile towers would not be

regarded as immovable property under the provisions of the GST law as well. Thus, the benefit of the said judgment would be available to the telecommunication industry in the GST regime as well since the restriction regarding availment of ITC should not be applicable in relation to the goods and services used in erection/installation of these PFBs and mobile towers.

19. Under the GST law, telecommunication towers have also been categorically excluded from the scope of the definition of “plant and machinery” as defined under the Explanation in Section 17 of the CGST Act. However, applying the ratio of this judgment, as these mobile towers and PFBs used in telecommunication industry will be regarded as movable property, the restriction under Section 17(5)(c) and Section 17(5)(d) will not be applicable, irrespective of the said exclusion.
20. Additionally, this decision will have broader implications for other sectors using similar prefabricated buildings/shelters/structures for providing output supplies, as these may now be regarded as movable goods. However, it is pertinent to note that the above judgment of the Supreme Court has been rendered after considering specific set of facts wherein it was specifically noted that the structures were affixed to the land/building not for the permanent beneficial enjoyment of the land or building, but for stability and effective functioning of the antenna and other equipment, for seamlessly providing the telecommunication services. With technological developments and owing to the ease of installation/usage, the pre-fabricated buildings/structures are being used extensively across various sectors, including as warehouses as well as factory buildings. All such pre-fabricated buildings may not be directly covered by the judgment of the Supreme Court and the tests laid down by the Supreme Court will have to be applied independently in each such case to examine whether such buildings can be considered as movable or immovable. Consequently, after this judgment, it would be worthwhile to explore as to whether the businesses will be eligible to claim ITC on such prefabricated buildings/shelters.



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