
Bharti Airtel Ltd. Vs The Commissioner of Central Excise

Central Excise Appeal No. 73 of 2012 and Central Excise Appeal No. 119 of 2012

Court: Bombay High Court

Date of Decision: Aug. 26, 2014

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 â€” Section 3#Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 â€” Section 3#Central Excises and Salt Act, 1944 â€” Section 11AC, 2(d), 3, 35G#Central Sales Tax Act, 1956 â€” Section 7(1), 8(1), 8(1)(3)(b), 8(3)(b)#Customs Tariff Act, 1975 â€” Section 3#Finance Act, 1994 â€” Section 65, 65(102), 69, 73#Finance Act, 2001 â€” Section 136#Finance Act, 2003 â€” Section 157, 66#Finance Act, 2007 â€” Section 136, 138#General Clauses Act, 1897 â€” Section 3(25)#Maharashtra Regional and Town Planning Act, 1966 â€” Section 154, 45#Maharashtra Value Added Tax Act, 2002 â€” Section 48(5)#Telegraph Act, 1885 â€” Section 4#Transfer of Property Act, 1882 â€” Section 3

Citation: (2014) 35 STR 865 : (2015) 77 VST 434

Hon'ble Judges: S.C. Dharmadhikari, J; G.S. Kulkarni, J

Bench: Division Bench

Advocate: V. Sridharan, Senior Advocate, Prakash Shah and Ashish P. Abraham i/b. PDS and Associates, Advocate for the Appellant; Kevic Setalwad, Addl. Solicitor General and Pradeep Jetly i/b. J.B. Mishra and N.V. Kalantri, Advocate for the Respondent

Judgement

G.S. Kulkarni, J.

Both these appeals u/s 35G of the Central Excise Act 1944 arise out of the common orders dated 6.1.2012 of the

Customs, Excise & Service Tax Appellate Tribunal (Tribunal), West Zonal Bench at Mumbai (for brevity "the Tribunal") in Appeal nos.

ST/49/2007 and ST/145/2009. The Appellant has raised the following substantial questions of law:-

1. Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in holding that the Appellant was not

entitled to credit of duty paid on tower parts, green shelter, printers and office chairs ?

2. Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in holding that the Appellant was not entitled

to credit of duty paid on tower parts, green shelter on the ground that tower/green shelter is ""immovable property"" and hence, do not qualify as

capital goods"" or ""inputs"" as defined under the Cenvat Credit Rules, 2004 ?

3. Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in holding that tower would not qualify as

part"" or ""component"" or ""accessory"" of the capital goods i.e. antenna ?

The appeal is admitted on the above substantial questions of law. By consent of the Learned Counsel for the parties and at their request we have

taken up these appeals for final hearing.

The relevant facts are:-

2. The appellant is engaged in providing cellular telephone services and is paying applicable service tax on the cellular telephone services. The

appellant, inter alia, availed Cenvat credit on excise duty paid on towers parts and shelters/prefabricated buildings purchased by them and alleged

to be used for providing output service. The credit so availed was utilised for payment of service tax on output service viz. Cellular Mobile Service

being provided by the appellant.

3. The genesis of the issue is a show cause notice dated 25.4.2006 issued by the revenue to the appellant, inter alia, recording that the appellant

had wrongly taken and utilised Cenvat credit in contravention of the provisions of Rule 2(a)(A) of Cenvat Credit Rules, 2004 (hereinafter referred

to as ""Credit Rules""). The appellant was called upon to show cause as to why (i) the Cenvat credit amounting to Rs. 2,04,39,093/- taken and

utilized wrongly should not be recovered from them under the provisions of Rule 14 of the Credit Rules, read with Section 73 of the Act; (ii)

penalty should not be imposed under provisions of Rule 15(1) of the Credit Rules on account of Cenvat Credit wrongly taken and utilized; (iii)

penalty should not be also imposed on under provisions of Rule 15(2) of the Credit Rules read with Section 11AC of Central Excise Act, 1944 for

Cenvat credit wrongly taken and utilized on account of suppression of the facts; (iv) all such goods (as detailed in annexure-B to this notice) should

not be confiscated under the provisions of Rule 15(1) of the Credit Rules; and (v) interest should not be recovered from the Appellant from the

date on which the Cenvat credit has been wrongly taken till the date of recovery of the said credit, under provisions of Rule 14 of the Credit Rules

read with Section 75 of the Act.

4. To the show cause notice was enclosed Annexure ""A"" , in which it was stated that the Central Excise Officers had developed an intelligence to

the effect that the appellant has wrongly taken and utilised Cenvat Credit on certain goods which do not qualify as capital goods within the meaning

of Credit Rules. It was stated that after verification of documents and records relating to Cenvat credit on account of capital goods for the period

October, 2004 to September, 2005, it was observed that the credit availed by the appellant was not in accordance with the provisions of Credit

Rules and same was in contravention of the Rules. The relevant Rule being Rule 2(a)(A) of the Credit Rules which defined ""Capital goods"". It was

stated that while availing Cenvat credit in respect of any goods as ""Capital goods"" the requirement of Rule 2(a)(A) of the Credit Rules stipulates

satisfaction of following two conditions:-

- (a) The goods should fall under particular CSH or description specified for the purpose;
- (b) That in case of the service provider, the goods should be used for providing output service.

It was stated that the Cenvat Credit availed by the appellant during the period October, 2004 to September, 2005 in respect of the following items

was in contravention of Rule 2(a)(A) of the Credit Rules:-

- (i) Tower and Parts of tower,
- (ii) Prefabricated building,
- (iii) Printer,
- (iv) Office chairs.

It was stated that from the Cenvat Credit returns filed by the appellant for the said period it was found that the appellant had failed to give any

"chapter heading" under Central Excise Tariff nor the use of said goods in providing output service. Subsequently, information about use of the

goods and Chapter heading under the Central Excise tariff was called for from the appellant. The same was, thereafter, furnished by the appellant

vide its letter dated 8.3.2006. It was, alleged that the appellant had suppressed material facts and knowingly, willfully and wrongly had taken and

utilized Cenvat credit on the said items. It was alleged that the Cenvat credit amounting to Rs. 2,04,39,100/- was taken and utilized on account of

the goods which are not capital goods within the meaning of Rule 2(a)(A) of the Credit Rules and hence, the said amount was liable to be

recovered from the appellant under Rule 14 of the Credit Rules read with Section 73 of the Central Excise Act. It was also alleged that on account

of these acts and omissions the appellant had rendered itself liable for penalty under Rule 15(1) and (2) of the Credit Rules and the subject goods

were also liable for confiscation under rule 15(1) of the Credit Rules. It was alleged that the appellant was also liable to pay interest at stipulated

rates from the date of wrong availment of the Credit till the date of payment of service tax in terms of Rule 75 of the Act.

5. The appellant by its reply to the show cause notice dated 15.9.2006 denied the allegations and the stand of the revenue. The appellant stated

that the towers and parts of tower are capital goods and that credit is admissible on towers and parts of towers also as inputs. As regards the

prefabricated buildings (PFB) the appellant stated that they are eligible for capital goods credit and in any case were eligible for input credit. Similar

stand was taken in respect of printers. The appellant placed reliance on the Credit Rules introduced by the Central Government with effect from

10.9.2004 and more particularly Rule 3(1) which defines the term ""Cenvat Credit"", Rule 2(a)(A) which defines ""Capital goods"" and Rule 2(k)

which defines ""input"". It was the appellant's case that Rule 3(1) of the Credit Rules allows the service provider to take credit of the excise duties

paid on any ""inputs"" and ""capital goods"". That the definition of the term ""capital goods"" and ""input"" was clear to include the said goods for availing

credit of the duty paid. The appellant stated that for the goods to mean ""capital goods"" under the Credit Rules, the essentials were that they must

be goods; the goods must belong to any category as specified under Rule 2(a)(A)(i) to (vii) of the Credit Rules and that goods must be used

providing output service. It was stated that the appellant was a service provider and in so far as service provider is concerned, clause (ii) of sub-

rule (k) of Rule 2 of the Credit Rules is applicable. It was stated that under the said clause all goods except LDO, HSD and motor spirit are inputs

provided they are used for providing output service. The appellant also placed reliance on Rule 4 of the Credit Rules to contend that the credit in

respect of ""inputs"" can be availed of immediately on receipt of the goods in the premises of the service provider. It was stated that credit of ""inputs

can be taken in time and in any manner and non availment of whole or part of input credit immediately on receipt of inputs in the factory will not

vitate the right of the manufacturer or output service provider to take un-availed credit later. Further case of the Appellant was that the tower is

part of the "Base Transceiver Station (BTS)", which is an integrated system. It was stated that the BTS was classifiable under heading 85.25 of

Central Excise Tariff Act which comprises of the tower also as one of its parts, without which the output service cannot be provided. It was,

therefore, submitted that the towers are part of the eligible capital goods viz. BTS and are used for providing output services, as also the towers

were eligible for capital goods credit. The appellant placed reliance on whole architecture of BTS in a GSM network in support of this submission.

That the appellant had imported number of BTS for installation at various sites and that the BTS equipments are classified under heading No.

85.25 of the Central Excise Tariff Act (CETA) when they were imported. Depending on the site condition, additional peripheral equipments such

as battery back up, rectifier, UPS were also purchased by the appellant. All these equipments are brought to the site and they were

housed/installed in a prefabricated room or a building. Subsequently, installation of various equipments at the site is undertaken in accordance with

the Radio Frequency Design Plan. It was Appellant's case that in accordance with the site lay out, report of the structural consultant, the material is

ordered from various vendors. All the material is supplied by the vendors on payment of applicable duty when clearing from their factories.

Thereafter, erection of the tower for supporting antennas is undertaken. That the tower comprises of poles for mounting of GSM and Microwave

antenna. The poles are given necessary angular supports to ensure their stable positioning. Antenna mounts comprising of angles are fixed on these

poles and the antenna mounted on them. It was stated that a prefabricated housing/shelter is also purchased for housing electrical equipments viz.

isolation Transformers, batteries and stabilizers, rectifiers etc. and telecom equipments like BTS and Microwave/Radio Hops etc and serves as a

junction box. That the telecom installation vendor installs the BTS telecom equipments, lays cable (including feeder cables) from Antenna to BTS.

The electrical vendor installs the electrical equipments and does the required wiring inside and outside the room. A separate power supply

connection is taken from the concerned State Electricity Board as also the Diesel Generating (DG) set is used as a back-up source for power

supply in case of mains failure. The BTS and Microwave link is then commissioned and the site is integrated with the main network. It was

therefore submitted that since the BTS as a whole is considered as a single integrated system classifiable under 85.25 of Central Excise Tariff Act

and are eligible capital goods, towers and parts thereof which form part of the integrated system of BTS are part of specified capital goods eligible

for capital goods credit. It was further stated that in any case credit is admissible on towers and parts of towers as inputs as falling within the ambit

of Rule 2(k) of the Credit Rules which defines ""input"". It was stated that as per the definition of term ""input"" irrespective of classification of the said

goods under the Central Excise Tariff Act, they will qualify as ""inputs"" and will be eligible for input credit if they are used for providing output

service. In regard to the prefabricated building, the appellant contended that they are eligible for capital goods credit as they were part of the

integrated BTS and in any case they were eligible to input credit. As also, the same contention was raised in respect of office chairs and printers.

As regards the penalty as proposed to be levied under rule 15(1) and (2) of the Credit Rules, the appellant submitted that the penalty provision is

not attracted in view of classification of their goods as capital goods and in any case as ""inputs"". The appellant denied that they had availed credit

wrongly by practicing fraud or by making willful mis-statement, collusion or suppression of facts. It was stated that there was no willful

suppression. It was, therefore, submitted that the show cause notice as issued against the appellant be dropped.

6. The Commissioner after hearing the appellant on the show cause notice passed an order-in-original dated 19.12.2006 taking into consideration

the provisions of the Credit Rules, 2004 and more particularly, the definition of "capital goods" as defined under Rule 2(a)(A) and the definition of

the term "inputs" as defined under rule 2(k) of the Credit Rules, held that the appellant has wrongly availed of Cenvat Credit amount of Rs.

2,04,39,093/- under provisions of Rule 14 of the Credit Rules read with Section 73 of the Finance Act, 1994. In respect of towers and parts

thereof, prefabricated building, printers and office chairs, the Commissioner observed that the appellant had availed benefit of Cenvat Credit on the

Base Transceiver Station (BTS) claiming to be a single integrated system consisting of tower, GSM or Microwave Antennas, Prefabricated

building, isolation transformers, electrical equipments, generator sets, feeder cables etc. It was observed that these systems have been treated as

composite system"" classified under Chapter 85.25 of the Tariff Act and that the appellant's contention that these systems should be treated as

"capital goods" and credit be allowed, could not be accepted. It was observed that each of these goods had independent functions and hence,

they cannot be treated and classified as single unit. It was observed that all capital goods are not eligible for credit and only those relatable to the

output services would be eligible for credit. It was observed that only telecom equipments like BTS transmitters which are used in providing

telecom services alone would be liable to input credit. In regard to the extended period, it was observed that the service tax is based on self

assessment and therefore, it is the assessee who determines the duty and discharges the same. It was the responsibility of the appellant to give

details of items on which input credit was availed including a write-up to satisfy the department that availment of Cenvat credit was in accordance

with the Credit Rules which is a common legislation for both goods and services. It was held that by not providing the details and taking credit, the

appellant is guilty of suppression of facts and hence, it was held that the extended period was invocable in the appellant's case. The Commissioner

while confirming the rejection of the Credit availed by the appellant, imposed a penalty of an amount of Rs. 2,04,39,093/- for wrongly availing

credit under Rule 15(2) read with Section 11AC of the Central Excise Act, 1944. Further, payment of interest u/s 75 of the Central Excise Act at

the rates applicable from time to time was also ordered.

7. The appellant being aggrieved by the order in original dated 19.12.2006 filed an appeal before the Tribunal being Appeal no. ST/49/2007. In

the appeal, the principal ground of challenge to the order passed by the Commissioner disallowing Cenvat Credit was that the tower and parts

thereof, prefabricated building, office chairs and printers were capital goods as falling under the definition of Rule 2(a)(A) of the Credit Rules, as

also it was contended that in the alternative in any case the said goods also qualified as inputs under the definition of "input" under Credit Rules and

hence, the credit availed by the appellant was valid. The appellant also challenged the order of the Commissioner pertaining to interest on penalty

on the ground that Rule 15(2) of the Credit Rules is applicable to a manufacturer and hence, levying of penalty was not proper. The appellant also

field a stay application alongwith the appeal.

8. After the order in original dated 19.12.2006 was passed for the period October 2004 to September 2005 three further show cause cum

demand notices were issued covering the period October 2005 to March 2008 dated 23.4.2007, 8.2.2008 and 23.10.2008 making an

aggregate demand of Rs. 15,40,63,898/- as also interest and equivalent penalty was demanded.

9. The appellant filed its reply to the demand cum penalty notice and the corrigendum dated 2.3.2009 issued by the Commissioner. The appellant

now contended that the towers and the parts thereof are ""supporting structure"" for antenna which are capital goods and therefore, as antenna is

qualified as "capital goods", the towers and parts thereof would also qualify as "capital goods". It was submitted that the towers are nothing but the

structures installed in support of GSM and Microwave Antennas. Relying on the definition of ""inputs"", the appellant submitted that irrespective of

classification of the goods under the Central Excise Tariff Act, the goods will also qualify as ""inputs"" and will be eligible for Cenvat credit if they are

eligible for providing output services, falling under the definition under Rule 2(k) of the Credit Rules. It was contended that the towers and parts

thereof are used for providing output service viz. telecommunication service and hence, eligible for input credit. The appellant relied on several

decisions to contend the admissibility of the tower and tower parts and the prefabricated buildings to be capital goods and also that in any case the

said goods being used for providing output services they would qualify as "inputs" under the definition of "inputs" under Rule 2(k) of the Credit

Rules and hence, eligible for input credit. It was, therefore, contended that the tower, shelters and antenna, all the three items as used by the

appellants in providing telecommunication services are either capital goods within the meaning of Rule 2(a)(A) and in any case the said goods also

could be classified as inputs and therefore, entitled for availment of the credit under the Credit Rules, 2004.

10. The Commissioner adjudicated the demand cum penalty notices dated 23.4.2007, 8.2.2008 and 23.10.2008 by passing an order in original

dated 23.3.2009. By this order, the Commissioner disallowed the Appellant's claim for credit amounting to Rs. 13,02,08,928/- under the

provisions of Rule 14 of the Credit Rules. However, Cenvat credit on antenna amounting to Rs. 2,38,54,970/- was allowed and the demand in

that regard was dropped. The demand in respect of other items viz. the tower and parts thereof and the prefabricated building was confirmed. A

penalty of Rs. 13,02,08,928/- was also imposed under Rule 15(1) of the Credit Rules, 2004. In confirming the demand in respect of tower and

parts thereof, it was observed by the Commissioner that tower is fixed to the earth and after its installation becomes immovable and therefore,

cannot be goods. It was also observed that even in CKD or SKD condition, the Tower and parts thereof would fall under Chapter heading 7308

of the Central Excise Tariff Act which is not specified in clause (i) or clause (ii) of Rule 2(a)(A) of the Credit Rules, 2004 as capital goods. It was

held that tower and parts thereof are not directly utilised for output service as the same has been basically a structural support for certain

equipment. It was further observed that it may not be necessary if suitable alternate support is available. Such towers by no stretch of imagination

can be considered parts of telecom equipment or as telecom equipment by themselves and it was thus held that tower and parts thereof do not

qualify as capital goods. Applying the same reasoning, credit on prefabricated building was also rejected.

11. The appellant filed therefore another appeal before the Tribunal being Appeal No. ST/145/2009 against the order in original dated 23.3.2009

passed by the Commissioner. By this order dated 23.3.2009, the Commissioner had confirmed the demand cum penalty notices issued to the

appellant and sought recovery of Rs. 13,02,08,928/- for the period October, 2005 to March, 2008. An equivalent amount of penalty under Rule

15(1) of the Credit Rules read with Section 11AC of the Finance Act, 1994 was also imposed by the said order.

12. As regards the stay application, by an order dated 1.5.2007 passed in Application no. ST/S/587/2007 in Appeal no. ST/49/2007-Mumbai,

the Tribunal held that prima facie case was made out on admissibility of credit and waiver of pre-deposit in respect of credit on towers and parts

thereof and prefabricated building, the offer of the appellant of a pre-deposit of Rs. 10 lakhs in respect of office chairs and printers was accepted.

On such pre-deposit the balance amount and penalty was waived and recovery thereof was stayed pending the appeal. In regard to the other

appeal being Appeal no. ST/145/2009, the Tribunal by a detailed order dated 7.6.2010, directed a pre-deposit of Rs. 5 crores within eight weeks

and subject to deposit of the said amount, stayed the balance demand till the disposal of the appeal. The appellant being aggrieved by the said

order passed by the Tribunal had filed Central Excise Appeal no. 116 of 2010 before this Court. By an order dated 18.11.2010 passed by this

Court while admitting the appeal filed by the appellant, directed the Tribunal to dispose of the appeal alongwith other pending appeals without any

pre-deposit, as expeditiously as possible and preferably within a period of six months.

13. By the impugned judgment and order dated 6.1.2012 passed by the Tribunal, both the aforesaid appeals as filed by the appellant have been

rejected. The appellant's plea that the towers and parts thereof and the prefabricated building, printers and office chairs are capital goods under

the Credit Rules, 2004 as also the alternate plea of the appellant that the said goods are inputs falling under Rule 2(k) of the Credit Rules are also

rejected. The Tribunal in dismissing appeals filed by the appellants ordered as under:-

(a) The subject items are neither "capital goods" under Rule 2(a) nor "inputs" under Rule 2(k) of the CENVAT Credit Rules, 2004 and hence,

CENVAT credit of the duty paid thereon is not admissible to the appellant for the relevant period;

(b) The CENVAT credit taken on the said items and utilized by the appellant is recoverable subject to limitation;

(c) The limitation issue is remanded to the Commissioner for careful consideration and decision;

(d) The question whether, on the facts and circumstances of this case, the appellant is liable to be penalized under Rule 15 of the CENVAT Credit

Rules, 2004 and, if so, to what extent is also remanded to the Commissioner for fresh consideration and decision;

(e) The appellant shall be given a reasonable opportunity of being heard on the remanded issues.

14. We have heard Mr. V. Sridharan, learned Senior Counsel with Mr. Prakash Shah learned Advocate appearing on behalf of the appellant and

Mr. Kevic Setalvad, learned A.S.G. with Mr. Pradeep Jetly and Mr. J.B. Mishra, for Respondents.

15. The appellants have brought to our notice the following details of the Cenvat Credit taken on tower, shelter, prefabricated building and other

for the period in dispute:-

16. Mr. Sridharan, learned Senior Counsel on behalf of the Appellant has made the following submission in assailing the orders passed by the

Tribunal:-

(I) The Tribunal has misinterpreted the application of Cenvat Credit Rules, 2004 in rejecting the appellant's claim to avail credit of the duty paid on

the towers and parts thereof, prefabricated shelters and the printers. He submits that the goods in question clearly fall within the ambit of the

definition of ""capital goods"" under Rule 2(a)(A) of the Credit Rules.

(II) That alternatively the goods in question fall within the definition of ""input"" under 2(k) respectively of the Credit Rules. That the tower and

shelter were received by the appellants in knocked down condition (CKD) and were used for providing telecom services and hence these goods

qualify as ""inputs"" in terms of Rule 2(k) of the Credit Rules. It is submitted that Rule 2(k)(2) uses the words ""all goods"" which are ""used for

providing any ""output service"". He, therefore, submits that these goods completely fall within the purview of Rule 2(k) so as to mean inputs.

(III) It is submitted that a combined reading of these definitions read with Rules 3 and 4 of the Credit Rules entitles the appellants to avail the credit

of duty paid on purchase of these goods.

(IV) The appellant's case is fully covered under Rule 3(1) of the Credit Rules which provides that manufacturer or producer of the final product or

provider of output service shall be allowed to take credit. He lays emphasis on the following wording of Rule 3(1)(i) of the Credit Rules:-

any input or capital goods received in the factory of manufacturer of final product by the provider of output services"", on or after 10th September,

2004.

(emphasis supplied)

(V) It is submitted that Rule 3(1) of the Credit Rules stipulates the only condition for the purpose of availing credit of duties paid on inputs and

capital goods is that the inputs or the capital goods must be received by the provider of output services. It is submitted that the goods in questions

have been received by the appellant who has provided output services viz. Telecommunication services.

(VI) The contention of the Revenue that after the use of the towers and parts thereof and PFB they have become ""immovable"", is misconceived

and credit cannot be denied accepting this contention. In support of this submission, reliance is placed on the following decisions:-

- (a) Commissioner of Central Excise, Bangalore-II Vs. SLR Steels Ltd.,
- (b) Commissioner of Central Excise Vs. ICL Sugars Ltd.,
- (c) Commr. of C. Ex., Visakhapatnam-II Vs. Sai Sahmita Storages (P) Ltd.,
- (d) Bannari Amman Sugars Limited Vs. The Commissioner of Central Excise
- (e) CCE New Delhi Vs. Hindustan Sanitaryware & Industries Ltd. (2002(145) ELT (SC));
- (f) Orders of the Bombay High Court dated 7.10.2008 in CCE, Mumbai Vs. N.R.C. Ltd.

(VII) That the towers and shelters are used for providing telecommunication services on which service tax has been paid. That capital goods viz.

Antenna and BTS are fitted into the tower and shelter to provide telecommunication services and therefore, they qualify as inputs under Rule 2(k).

In support of this proposition, reliance is placed on the following judgments:-

- (a) Industrial Machinery Manufacturers Pvt. Ltd. Vs. The State of Gujarat,
- (b) Member, Board of Revenue, West Bengal Vs. Phelps and Co. (P) Ltd.,
- (c) Commissioner of Customs, Kolkata Vs. Rupa and Co. Ltd.,
- (d) Indian Farmers Fertiliser Cooperative Limited Vs. Collector of Central Excise, Ahmedabad,
- (e) J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur and Another,
- (f) Collector of Central Excise, Calcutta Vs. Jay Engineering Works Ltd., Calcutta,
- (g) M/s Indus Towers Limited Vs. The Commercial Tax Officer, Begumpet Circle, Mayur Kushal Complex, Abids, Hyderabad, The Appellate

Deputy Commissioner, Punjagutta Division, CCT Building 5th Floor, Nampally, Hyderabad and Commissioner of Commercial Taxes, Nampally,

Hyderabad,

(VIII) That it is impossible to conceive that the telecommunication services can be provided without towers and shelters and that necessity or the

functional utility test is required to be applied. In support of this submission, reliance is placed on the judgment of Calcutta High Court in the case

of ""Singh Alloys & Steel Ltd. Vs. ACC"" reported in ""1993(66) ELT 273 (Cal)."" It is submitted that these goods are used for providing output

services on commercial scale and hence, they satisfied the functional utility test. It is submitted that the functional utility of the towers is apparent

from the fact that the antennas are installed on the towers. The antennas continuously receive signals and transmit signals with the subscriber"s

devices to authenticate subscriber"s accounts and enable the roaming of the mobile subscriber. In support of this submission, reliance is placed on

the functioning of GSM Network as explained in ""Wireless Communications and Networks, 2nd Edition, Williams Stallings, Pearson Prentice Hall

and ""Mobile Cellular Telecommunications, Analog and Digital Systems, 2nd Edition, William C.Y. Lee, McGraw Hill.

(IX) Alternatively, it is submitted that in the mobile telecommunication service, towers are the ""accessory"" of the antenna and therefore, qualify as

capital goods falling under Chapter Heading 85. It is submitted that shelter is also an accessory of BTS equipment falling under Chapter heading

85. It is submitted that capital goods viz. Antenna and Base Transceiver Station are fitted into the tower and shelter respectively to provide

telecommunication service. In support of this proposition reliance is placed on the definition of "capital goods" as defined under Rule 2(a) of the

Credit Rules to contend that the accessories of goods fall within the ambit of capital goods when they are used for providing output services. As

regards the meaning of the word "accessory", reliance is placed on the following decisions.

(a) Annapurna Carbon Industries Co. Vs. State of Andhra Pradesh,

(b) Commissioner of Sales Tax, Maharashtra State, Bombay Vs. L. D. Bhawe and Sons,

(c) M/s. Mehra Bros Vs. The Joint Commercial Officer, Madras,

(d) Banco Products (India) Ltd. Vs. Commissioner of C.Ex., Vadodara-I, (2009(235) ELT 636 (Tri-LB));

(e) Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and Weaving Mills Ltd.,

It is submitted that these are cases in which items were held to be fall within the definition of "input" and also "capital goods" and hence, in any

case the appellant would be entitled for availing credit of duty paid on the same.

(X) In regard to the prefabricated building, it is submitted that all the aforesaid submissions are equally applicable in respect of prefabricated

building/shelter.

(XI) It is submitted that green shelters are falling under Chapter heading 85.37 and qualify as capital goods under Rule 2(a)(A) of the Credit Rules.

(XII) As regards the printers falling under Chapter Heading 84 and qualify as capital goods in terms of Rule 2(a)(A) of the Credit Rules, 2004 it is

submitted that the printers are classifiable under Chapter heading 84 of the Central Excise Tariff Act as printers are used for printing bills for

subscribers and that the service of telecommunication does not come to an end once the signal is communicated, and activity like printing of bills is

absolutely essential part of the telecommunication service. It is, therefore, submitted that the printers are being capital goods under Chapter 84 are

used for providing output services and hence, capital goods.

(XIII) As regards the chairs, it is submitted that the amount being small, the credit in that regard is not pressed.

17. On the other hand, learned ASG appearing for the Revenue has supported the impugned orders passed by the Tribunal. Learned ASG has

made the following submissions:-

(i) that the towers and parts thereof are fixed to the earth, on installation and become immovable and as such cannot be considered to be goods.

(ii) in CKD/SKD condition the tariff classification of the tower would be under Chapter heading 7308 of the Central Excise Tariff Act. It is

submitted that as Chapter 7308 is not specified in clause (i) or clause (ii) of Rule 2(a)(A) of the Credit Rules, 2004 and the tower is not one of the

items specified in clause (ii) of the said Rules that the parts of the tower cannot be claimed for credit as they are not components and spare from

accessories.

(iii) even if it is assumed that the Cenvat on these parts of towers would be admissible under clause (iii) of Rule 2(a)(A) even then though under this

clause no specific heading has been prescribed for eligibility of the capital goods, there is an explicit condition that the said goods should be

component, spare and accessories of the goods specified in clause (i) and (ii) of the said Rule. As the tower is not a capital good, duty paid on its

parts is not admissible for availing credit.

(iv) It is then submitted that only those articles which would go into composition of another article can be considered as components or parts of

later. It is submitted that GSM and network antenna and such other goods classified specifically under Tariff heading 8517, but not the tower on

which antenna is placed and hence tower cannot be considered as a component. That the tower does not enter into the composition of antenna, it

is not constituted as part of antenna.

(v) It is then contended that under the definition of input under the Credit Rules, the service provider cannot avail the Cenvat Credit on input goods

only the manufacturer can avail such credit. The service provider can avail of input credit and also on capital goods which satisfies the definition

under Rule 2(a) of the Credit Rules. Hence, the credit on excise duty paid on tower and prefabricated buildings do not satisfy the definition of

capital goods and hence, are certainly not covered as input service. In support of his aforesaid submissions, learned ASG relied on the following

judgments:-

(I) 2010 (253) ELT 440

(II) Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, U.P.,

(III) Triveni Engineering & Industries Ltd. & Anr. Versus Comm. Of C. Ex. (2000) & SCC 29

(IV) Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut,

(V) Commissioner of Central Excise, Indore Vs. Cethar Vessels Ltd. and Others,

(VI) Bharti Tele-Ventures Limited and Mr. Sunil Bharti Mittal Vs. State of Maharashtra, Urban Development Department and Pune Municipal

Corporation,

(VII) The Municipal Corporation of Greater Bombay and others Vs. The Indian Oil Corporation Ltd.,

(VIII) Cellular Operators Association of India and Others Vs. Municipal Corporation of Delhi etc. etc.,

(IX) Collector of Central Excise Vs. Hutchison Max Telecom P. Ltd., (2008(224) ELT 191 (Bom.));

(X) The Commissioner Central Excise Vs. Ultratech Cement Ltd. and The Customs, Excise and Service Tax Appellate Tribunal, West Zonal

Bench,

(XI) Coca Cola India Pvt. Ltd. Vs. The Commissioner of Central Excise,

(XII) Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi-III,

(XIII) Collector of Central Excise Vs. Solaris Chemtech Limited and Others,

18. With the assistance of learned Counsel for parties, we had gone through the paper book of the present appeals. We have also perused the

written submissions and additional written submissions as filed on behalf of the appellant.

19. To appreciate the issue as to whether the appellant would be entitled for availing Cenvat Credit in respect of excise duty paid on the purchase

of tower and parts thereof, prefabricated building and printers a reference to the relevant provisions of the Credit Rules and the Central Excise

Tariff Act would become necessary. Rule 2(a)(A) of the Credit Rules defines "capital goods" as under:-

2. In these rules, unless the context otherwise requires,-

(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 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-

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) for providing output service.

(emphasis supplied)

Rule 2(k) defines "input" as under:-

2(k) "input" means-

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of

final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils,

coolants, accessories of the final products cleared alongwith the final product, goods used as paint, or as packing material, or as fuel, or for

generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any out

service.

Explanation 1-The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose

whatsoever.

Explanation 2-Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacture;

Rule 3 provides for credit on excise duty paid in discharging liability towards service tax payable by the manufacturer. Rule 3 of Cenvat Credit

Rules provides as under:-

Rule 3. CENVAT credit.---

(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the

CENVAT credit) of-

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

(iii) the additional duty of excise leviable u/s 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable u/s 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable u/s 136 of the Finance Act, 2001(14 of 2001);

(vi) the Education Cess on excisable goods leviable u/s 91 read with section 93 of the Finance (No. 2) Act, 2004(23 of 2004);

(via) the Secondary and Higher Education Cess on excisable goods leviable u/s 136 read with section 138 of the Finance Act, 2007(22 of 2007);

(vii) the additional duty leviable u/s 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi)

and (via);

(viiia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, Provided that a provider of taxable service shall not

be eligible to take credit of such additional duty;

(viii) the additional duty of excise leviable u/s 157 of the Finance Act, 2003(32 of 2003);

(ix) the service tax leviable u/s 66 of the Finance Act;

20. In respect of a service taxable u/s 65 of the Finance Act 1994 for payment of service tax on the output service an assessee can utilize

CENVAT Credit of the duty paid on capital goods and inputs provided such "capital goods" and "inputs" fall within the respective definitions

under Rule 2 of the Credit Rules. A perusal of the definition of "capital goods", "inputs" and reveal the following position:-

(i) Capital goods

Only those goods qualify for Cenvat Credit as capital goods which are covered under Chapter 82, 84, 85, 90, 68.02 and those under heading

6805 of the first schedule to the Central Excise Tariff Act, pollution control equipment or those which are components, spares and accessories of

these goods and used in the factory of the manufacturer of the final products or for providing output service, but does not include any equipment or

appliance used in an office.

(ii) Inputs

All goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final

products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants,

accessories of the final products cleared alongwith the final product, goods used as paint, or as packing material, or as fuel, or for generation of

electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production; and all goods,

except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any out service.

Explanation 2 to the definition of inputs is relevant which includes goods used in the manufacture of capital goods which are further used in the

factory of the manufacture;

21. A plain reading of the definition of "capital goods" as defined under Rule 2(a)(A) of the Credit Rules show that all goods falling under Chapter

82, Chapter 84, Chapter 85, Chapter 90, heading No. 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First

Schedule to the Central Excise Tariff Act; pollution control equipments; components, spares and accessories of the goods specified at sub clauses

(i) and (ii) which are used either in the factory for manufacture of final products but does not include any equipment or appliance used in the office

and those used for providing output service. A combined reading of sub-clause (a)(A) (i) and (iii) and sub-rule (2) indicates that only the category

of goods in Rule 2(a)(A) falling under clause (i) and (iii) used for providing output services can qualify as capital goods and none other.

22. Further the definition of "input" as defined Rule 2(k) includes all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly

known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product

or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used

as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any

other purpose, within the factory of production, and as provided in sub-clause (ii) all goods except light diesel oil, high speed diesel oil, motor

spirit, commonly known as petrol and motor vehicles, used for providing any output service. Explanation (2) of sub-rule (k) is also relevant which

provides that input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. Similarly a

plain reading of the definition of input indicates that in the present context clause (i) of Rule 2(k) may not be of relevance as same pertains to

manufacturing activity and pertains to goods used in relation to manufacture of final product or any other purpose within the factory of production.

Sub-clause (ii) has been referred to as relevant by the appellant as the same pertains to goods except light diesel oil, high speed diesel oil, motor

spirit, commonly known as petrol and motor vehicles, used for providing any output service.

23. In the context of these definitions the contentions as raised by the appellant are required to be examined. The position of the goods in question

vis-à-vis the plain application of the rules is that the tower and parts thereof are fastened and are fixed to the earth and after their erection

become immovable and therefore cannot be goods. Further in the CKD or SKD condition the tower and parts thereof would fall under the

chapter heading 7308 of the Central Excise Tariff Act. Heading 7308 is not specified in clause (i) or clause (ii) of rule 2(a) (A) of the Credit Rules

so as to be capital goods. The goods in question would not be capital goods for the purpose of CENVAT credit as they are neither components,

spares and accessories of goods falling under any of the chapters or headings of the Central Excise Tariff Schedule as specified in sub-clause (i) of

the definition of capital goods.

24. The alternate contention of the appellant is therefore that tower is an accessory of antenna and that without towers antennas cannot be installed

and as such the antennas cannot function and hence the tower should be treated as parts or components of the antenna. It is urged that antennas

fall under chapter 85 of the schedule to the Central Excise Tariff Act and hence being capital goods used for providing cellular service falling under

rule 2(a)(A)(iii) as part of capital goods falling under rule 2(a)(A)(i) towers become accessories of antenna and should be held as capital goods for

availing of credit of duty paid.

25. In the context of the aforesaid rules and the issue as falling for consideration in these appeals we examine the various decisions as relied upon

by the Appellants.

(I) That towers and parts thereof and PFB are not immovable properties.:

(a) In the case of Commissioner of Central Excise, Bangalore-II Vs. SLR Steels Ltd., In this case the issue was whether credit of duty paid on

cement and steel used for manufacture for storage tank which is an immovable property can be availed of. The Commissioner of Excise held that

as cement and steel was used for manufacture of storage tank which was an immovable property and non-excisable no credit of duty paid on any

inputs used for any non-excisable goods is admissible in view of rule 6(1) of Cenvat Credit Rules 2003-04. The assessee had preferred an appeal

before the tribunal. The tribunal held that cement and steel used by the assessee for the purpose of construction of iron/coke storage tank, gas

storage tanks are capital goods for the purpose of constructing iron/coke and that these inputs being used for pollution control equipments hence

the assessee was entitled for Cenvat credit. The Court considered the storage tank as capital goods as the storage tanks were used as pollution

control equipments and as pollution control equipments were directly falling under rule 2(a) (A) (ii) of the credit rules. The Court came to a

conclusion that once storage tank and pollution control equipments constitute capital goods the duty paid on any raw material purchased for

construction of those goods could be utilised as a Cenvat credit by the assessee notwithstanding the fact that the storage tank is an immovable

property. However, the facts in the present case are quite different. The towers are not capital goods under the definition of capital goods as

defined in rule 2(a) of the credit rules being immovable and are non-excisable. This judgment is therefore of no assistance to the appellants.

(b) In the decision of the Karnataka High Court in the case of Commissioner of Central Excise Vs. ICL Sugars Ltd., "" the issue was in regard to

the input used in the manufacturing of storage tank which was an immovable property are admissible for MODVAT credit. The Assessee was a

sugar factory and had claimed CENVAT credit on the raw materials used for construction of storage tanks. The assessing authority had granted

credit in respect of water storage tank on the ground that water is an essential raw material of sugar after conversion into steam. The water storage

tank is a component of main machinery viz. boiler and the excise duty paid on the inputs in the construction of water storage tanks were held

eligible for availing Modvat credit. However, Modvat credit was disallowed, in respect of syrup and molasses storage tank-MS staging of tank

and shell plates/bottom plates/roof plates used for constructing non-excisable final molasses storage tank and shell of final molasses storage tank.

This was on the ground that molasses tank is constructed on the floor with a concrete foundation and the shell of the final molasses storage tank

will be placed over the concrete to hold about 2500 tons, and that since the final molasses storage tank is erected to the earth, it becomes non-

excisable. It was, therefore, held by Assessing Officer that any component used in the non-excisable molasses final storage tanks are ineligible for

Modvat credit. The Commissioner had set aside the order disallowing credit to the Assessee and further the same was upheld by the Tribunal. In

the background of this fact, the Division Bench of Karnataka High Court has observed as under:-

The storage tank has been held to be a component to the main machinery namely, boiler and the benefit is extended to the inputs used in the

construction of the storage tank though it is also embedded to the land. On the same reasoning the assessing authority ought to have extended the

benefit to the syrup and molasses storage tank also, as they are bye-products in the course of manufacturing activity which are also excisable at the

time of selling the same to the assessee. It appears even when the storage tanks if specifically mentioned in the definition of capital goods by

liberally incorporating these provisions the benefit was extended to the assessee. However, the controversy remains. In order to set right this

controversy by a Notification, specifically storage tank is introduced within the definition of capital goods. The said insertion is clarificatory in

nature. Under these circumstances even though the said insertion was in the year 2001 we are concerned with the period anterior to the said

insertion.

5. Having regard to the aforesaid facts and also the fact that the assessing authority has himself extended the benefit to storage tank storing water

as a component to main machinery namely, boiler he ought to have extended the benefit to the storage tank which are also a part of the factory

premises in which the bye-products are stored and thereafter sold as finished product....

This decision is clearly not applicable in the facts of the appellant's case as the issues in question cannot be held to be components of the antenna.

(c) In the case of Commr. of C. Ex., Visakhapatnam-II Vs. Sai Sahmita Storages (P) Ltd., "" decided by the Division Bench of Andhra Pradesh

High Court the assessee was registered u/s 69 of the Finance Act, 1994 for providing storage and warehouse services. The Assessee was filing

service tax returns classifying the services under storage and warehousing service. While scrutinizing the sale tax returns for the period from April,

2005 to September, 2005 the assessing officer came to a conclusion that the assessee had taken credit on Central Excise duty paid on cement,

iron bars, expansion bellows and pipes, and hence, a show cause notice was issued proposing to adjudicate and determine short paid service tax

and penalty thereon. The Assessing authority passed an order in original confirming the show cause notice and demanding service tax and interest

thereon. The Assessee had preferred an appeal before the Commissioner of Central Excise which came to be dismissed. Before the High Court, it

was contended by the Revenue that the cement used for making foundation and TMT bars used for reinforcement, cannot be treated as capital

goods as defined in Rule 2(a) of the Rules and that the assessee had wrongly claimed credit when the items were outside the definition of input

under Rule 2(k). That the assessee had suppressed this fact and filed returns adjusting the credit to which the assessee was not entitled to. In the

context of the definition of "storage and warehousing" as falling u/s 65(102) of the Finance Act, the Court considered the definition of "input" and

"input service" under the Credit Rules and in that context it was observed in paragraph (7) that the definition of "input" and "input services" would

show that, unless excluded, all goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable

service for providing an output service are eligible for Cenvat Credit. The Court considered the decision of the Supreme Court in the case of

Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III, wherein the definition of "input" as defined in Rule 2(g) of Cenvat Credit

Rules, 2002 was considered and it was observed by the Supreme Court that the crucial requirement of the Rule is that all goods "used in or in

relation to the manufacture" of final products qualify as "input". It was observed that this presupposes that "element of manufacture" must be

present. In noting the following observations of the Supreme Court, the Division Bench of the Andhra Pradesh High Court held that as the assessee

used cement and TMT bar for providing storage facility without which storage and warehousing services could not have been provided the

assessee was permitted to avail the credit on cement and TMT bar. Paragraph 8 of the Judgment reads as under:-

8. Yet again considering the inclusive part of the definition of "input", it was held as follows:-

All these considerations become relevant only when they are read with the expression "used in or in relation to the manufacture of final product" in

the substantive/specific part of the definition. In each case it has to be established that inputs mentioned in the inclusive part is "used in or in relation

to the manufacture of final product". It is the functional utility of the said item which would constitute the relevant consideration. Unless and until the

said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible

input. The said expression "used in or in relation to the manufacture" have many shades and would cover various situations based on the purpose

for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of

final product. Hydrogen gas used in the manufacture of sodium cyanide is an eligible input, since it has a significant role to play in the manufacturing

process and since the final product cannot emerge without the use of gas. Similarly, Heat Transfer oil used as a heating medium in the manufacture

of LAB is an eligible input since it has a persuasive role in the manufacturing process and without its use it is impossible to manufacture the final

product. Therefore, none of the categories in the inclusive part of the definition would constitute relevant consideration per se. They become

relevant only when the above crucial requirement of being "used in or in relation to the manufacture" stands complied with. In our view, one has to

therefore read the definition in its entirety.

The reliance on this judgment may not be helpful to the appellants inasmuch as the definition of storage and warehousing as contained in Section

65(102) of the Finance Act itself stand on a different footing. In that context the Division Bench of Andhra Pradesh High Court has held that use of

cement and TMT bars by the assessee for providing storage facility has become integral part of storage and warehousing and without the use of

cement and TMT bars, storage and housing could not have been provided. However, in the present case the facts are distinct. The towers are

admittedly immovable structures and non marketable and non excisable. We therefore, of the clear opinion that this judgment of the Division Bench

of Andhra Pradesh High Court is inapplicable in the facts of the present case.

(d) The case of Bannari Amman Sugars Limited Vs. The Commissioner of Central Excise "" as decided by the Division Bench of Karnataka High

Court concerned with credit of inputs used in manufacturing of storage tank by the assessee. The period in question was 12.5.2001 to 3.1.2002.

By notification no. 6/2001 storage tank was inserted in the definition of "capital goods" which was held to be applicable. The Tribunal in identical

circumstances had also held credit admissible. In this context allowing in the assessee's appeal, the Division Bench has taken into consideration the

provisions of Rule 57AA of the Central Excise Rules, in allowing the credit to the assessee. It was observed as under:-

9. The definition of the capital goods itself being explicit and clear we are of the opinion that the Tribunal was in error in ignoring the definition

"capital goods" as enumerated in Rule 57Aa. In view of the above, we are of the opinion that the substantial question which had been formulated

by this Court have to be answered in favour of the appellant-assessee and against the Revenue in so far as question nos. 1 and 2 are concerned. In

so far as question no. 3 is concerned the Tribunal having itself come to the conclusion that the storage tanks are not movable property, it could not

have held that the assessee would not be entitled to the benefit of Modvat credit.

As storage tank by a notification was declared as a capital goods the inputs used in the manufacture of storage tank were held to be admissible. In

the present case the output service is telecommunication service, this analogy therefore is inapplicable.

(e) The decision of the Supreme Court in the case of Collector of Central Excise, New Delhi Vs. Hindustan Sanitaryware and Industries, , was a

case of captive consumption. The assessee was a manufacturer of sanitarywares and used plaster of paris as inputs for the final product of

sanitaryware. This involved making of moulds from plaster of paris which in turn used as inputs for manufacture of sanitaryware. The assessee had

claimed the benefit of exemption under a Notification no. 217 of 1986. The revenue declined to grant benefit of exemption. The Tribunal had set

aside the orders passed by the Excise Authority and held that exemption would apply to the assessee. The Supreme Court after taking into

consideration the contents of the Notification no. 82/87 which showed that the description of inputs given in column (2) under Chapter 25, would

be "plaster of paris" and the final product given in column (3) under Chapter 69 would be "ceramic goods" held as under:-

9. The proviso postulates a situation where the final product itself is exempted in which case alone the exemption of plaster of paris under

Notification No. 217/86 cannot be availed. It is nobody's case that the sanitaryware falling under Chapter 69 has been exempted by the Central

Government. What is exempted is plastic moulds but they are only inputs and not final product in this case. This fact is further clarified by the

Central Government in Notification No. 221/96, as amended by Notification No. 89/89. Item 6 thereof clearly mentions that plaster of paris

moulds are input for ceramic products. 10. From the above discussion, it follows that plaster of paris which is used as inputs in relation to the

manufacture of sanitaryware (final product), is exempt under Notification No. 217/86, dated April 2, 1986, as amended.

This decision therefore cannot be applied to the case in hand.

(f) In so far as the decision of the Division Bench of this court in the case of ""The Commissioner of Central Excise Vs. M/s. N.R.C. Ltd."" dated

7.10.2008 in Central Excise Application no. 11 of 2002 the issue was "whether the Modvat Credit is admissible on components of Diesel

Generating Power Plant (DGPP) installed in the factory when the Diesel Generating Power Plants are exempted from payment of duty. The

Division Bench of this Court had passed the following order in rejecting the application as filed by the Revenue:-

2. It is not in dispute that the Diesel Generating Power Plants on which Modvat credit is availed, have been used in the manufacture of final

product and on which excise duty has been paid. The decision of the Tribunal is in accordance with the judgment of the Apex Court in the case of

Escorts Ltd. Vs. Commissioner of Central Excise, Delhi, Since the question raised in this application is covered by the decision of the Apex Court,

we dismiss the application. Rule is discharge with no order as to costs.

Perusal of the aforesaid judgment clearly shows that it would not be applicable to the facts of the present case. Firstly for the reason that tower and

parts thereof and prefabricated buildings are not capital goods within the meaning of Rule 2(a)(A) of the Credit Rules.

(II) On the proposition that the towers and shelters are used for providing telecommunication services as the antenna and BTS are fitted into the

tower and shelter respectively and therefore, tower and parts thereof and shelter qualify as inputs under Rule 2(k) of the Credit Rules. In support

of this proposition, the appellant"s place reliance on the following decisions:-

(a) The decision of the Gujarat High Court in the case of Industrial Machinery Manufacturers Pvt. Ltd. Vs. The State of Gujarat, concerned the

item, "humidifiers" used by cotton textile mills in order to maintain certain humidity for the purpose of increasing the strength of yarn, avoiding

breakages of yarn and improving the quality of yarn, are essential to the modern textile industry. It was held that humidifiers are machinery used in

the manufacture of cloth and fall within Entry 15 of Schedule C to the Bombay Sales Tax Act, 1959. The appellants on the basis of this decision

intend to canvass that similar to the position of humidifiers as held by the Division Bench of Gujarat High Court, to be used in manufacturing of the

goods, the towers and parts thereof and PFB are also to be construed to be used in providing output services and hence, credit ought to be

granted. This decision, however, would not be applicable to the towers and PFB in view of the fact that they are not directly used for the output

services namely telecommunication services and further as they are non excisable and hence, not falling within the definition of "input" as defined

under Rule 2(k) of the Credit Rules.

(b) The decision of the Supreme Court in the case of Member, Board of Revenue, West Bengal Vs. Phelps and Co. (P) Ltd., concerned the issue

in regard to the gloves used by workmen engaged in hot jobs and handling corrosive substances to qualify as goods used in the course of

manufacture of the goods for sale. The issue which fell for consideration was under the Bengal Finance (Sales Tax) Act, 1941. The Supreme Court

considered as to what should be meant by the wording ""for use by him in the manufacture of goods for sale"" as appearing in Section 5(2) of Bengal

Finance (Sales Tax) Act, 1941, making a reference to the earlier decision rendered in the case of J.K. Cotton Spinning and Weaving Mills Co.

Ltd. Vs. Sales Tax Officer, Kanpur and Another, wherein it was held that the expression ""in the manufacture of goods"" would normally encompass

the entire process carried on by the dealer of converting raw materials into finished goods and that where any particular process is so integrally

connected with the ultimate production of goods, that but for that process, manufacture or processing of goods would be commercially

inexpedient, goods required in that process would fall within the expression ""in the manufacture of goods"". It was held that the Assessee company

had sold goods in question to certain manufactures who are manufacturing iron steel materials and that the gloves were to be used by workmen

who were engaged in hot jobs or in handling corrosive substances in the course of manufacture. It was therefore, held that it cannot be denied that

the gloves had to be used in the course of manufacture.

As this decision concerned the manufacturing of excisable goods which is different from the present context of a excisable service namely

telecommunication service, the same is of no avail to the appellant.

(c) The decision of the Supreme Court in the case of Commissioner of Customs, Kolkata Vs. Rupa and Co. Ltd., "" the facts were that under

Notification no. 29/97-Cus. dated 1.4.1997 exemption from custom duty was granted to capital goods, components and spares thereof etc.

imported under the Export Promotion Capital Goods Scheme (EPCG Scheme). Under the EPCG Scheme the capital goods imported were

exempted from payment of customs duty and so much of the additional duty as was in excess of the amount calculated at the rate of 10% of the

value of the goods. Under the proviso, if the capital goods were imported for manufacture of items mentioned therein then they were exempted

from payment of whole of the additional duty. Thus, in the facts of the case, if the capital goods were imported for the manufacture of textile

garments then under the notification the importer would be exempted from payment of customs duty and additional duty. The assessee had

imported machines for processing of fabric/yarn, fabric inspection machines, machines for knitting and dyeing fabrics and other such machines. The

assessee was denied benefit of 100% exemption on the ground that the machines imported by them were not required for the purposes of

manufacture of textile garments. In this context, the Supreme Court in paragraphs 8 and 9 has observed as under:-

8. Further, in our view, this Notification is very clear. The 100% exemption is given to capital goods required for manufacture of, amongst others,

textile garments"". The term ""capital goods"" has been defined in the Notification. The term ""capital goods"" means goods which are used in the

manufacture of that product and also goods which would be required for manufacture or production of other goods including packaging machinery

and equipments. The term also includes instruments for testing, research and development. The term includes machines for pollution control,

refrigeration, power generating sets etc. Thus, the example, if after manufacturing of textile garments the same have to be packed, the machinery

required for packing would be capital goods required for manufacture of textile garments. Similarly, refrigeration machinery for refrigerating the

plant would also fall within the term capital goods required for manufacture of textile garments. If such sort of equipments and machinery get

covered by the term ""capital goods"" we fail to understand as to how machinery required for knitting, dyeing, compacting are not covered.

9. For the purposes of manufacture of garments it cannot be said that only stitching and knitting machines are required. Apart from stitching and

cutting the manufacturer may himself manufacture the yarn or fabric. The quality of the yarn or fabric would have to be tested. Machines would be

required for that. Similarly, machines for dyeing and/or drying the fabric or yarn, machines for inspecting the defects etc. would be required. The

term ""capital goods"" required for manufacture of textile garments would thus include all machines required for the ultimate manufacture of the

garments. The Notification has its own safeguards. The import can only be under a license issued under the EPCG scheme. The license would

contain a condition that garments must be exported by the importer. The Notification also contains a condition that the capital goods (which are

imported) are installed in the importers' factory or premises and a certificate to that effect has to be produced within 6 months of the date of the

import.

We are afraid that this judgment is of any assistance to the appellant. The observations of the Supreme Court in paragraph 8 clearly indicates that

the term "capital goods" was defined in the Notification so as to include goods which are used in the manufacture of that product and also goods

which would be required for manufacture or production of other goods including packaging machinery and equipments. In view of the wide

definition of the term "capital goods" as interpreted, the Supreme Court has come to the conclusion that the Assessee was entitled for the benefit of

the exemption notification. However, in the present case, the term "capital goods" as defined in Rule 2(a)(A) does not include tower and parts

thereof or the PFB so that the said goods qualify as "capital goods" and become entitle to credit of the duty paid thereon.

(d) In the decision of the Supreme Court in the case of Indian Farmers Fertiliser Cooperative Limited Vs. Collector of Central Excise,

Ahmedabad, the issue was "whether the ammonia used in the off-site plants is also ammonia which is used elsewhere in the manufacture of

fertilisers". An exemption Notification no. 187/61-C.E. was issued under the provisions of Rule 8 of the Central Excise Rules whereby the Central

Government exempted raw naphtha falling under item no. 6 of the First Schedule to the Central Excises and Salt Act, 1944, from the payment of

excise duty in excess of Rs. 4.36 per kilolitre at 15 degrees centigrade. The exemption Notification applied ""in respect of such raw naphtha as is

used in the manufacture of Ammonia provided such Ammonia is used elsewhere in the manufacture of fertilisers"" and the procedure set out in

Chapter-X of the said Rules was followed. The appellant-assessee was in the manufacture of urea which was a fertilizer and utilised for the

purpose raw naphtha. The raw naphtha was obtained at the concessional rate of duty and was used for producing ammonia which in turn was used

partly, directly in the urea plant and partly, directly, in the production of urea by being employed in off-site plants viz. the water treatment plant,

steam generation plant, inert gas generation plant and effluent treatment plant, all of which were part of the integral process of the manufacture of

urea. Show cause notices were issued to the appellant-assessee for the period from 1.4.1974 to 31.12.1982 demanding excise duty at full rate on

the raw naphtha used for making ammonia which has been used in water treatment plant, steam generation plant, inert gas generation plant and

effluent treatment plant on the ground that such raw naphtha was not used in the manufacture of fertilisers-urea. The demand was confirmed. In

appeal by the appellants, the Collector of Central Excise and Customs upheld the contention of the appellants insofar as the ammonia was used in

the water treatment plant, steam generation plant and inert gas generation plant. However, as regards the effluent treatment plant was concerned,

the Collector took a view that the effluents were waste produced after the fertilisers had been manufactured and that treatment of effluent cannot

be directly linked to the process of manufacture of fertilizer and the effluent treatment plant could not be said to be integral part of the process of

manufacture of fertilizers. The demand on the appellant-assessee insofar as it related to the effluent treatment plant was, therefore upheld. There

were cross appeals filed before the Tribunal by the assessee and by the revenue. The Tribunal reversed the decision of the Collector insofar as it

held that off-site plants other than effluent treatment plant were part of the process of manufacture of fertilizers. It held that Ammonia was used for

the maintenance of the plant and equipment meant for testing and commissioning the plant and could not be said to be utilised in manufacture. It

was held that the purpose of water treatment being essential for the protection of the boiler and other process equipment from corrosion, formation

of scales, etc. the ammonia used for the said purpose could not be said to be used in the manufacture of fertilizers. As regards the findings of the

Collector, in so far as the effluent treatment plant was concerned, the same were upheld. In this context, referring to its earlier decisions in the case

of J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur and Another, and Collector of Central Excise, Calcutta-II Vs.

Eastend Paper Industries Ltd., held that the treatment of effluents from a plant is an essential and integral part of the process of manufacture in the

plant and that the apparatus used for such treatment of effluents in a plant manufacturing a particular end product is part and parcel of the

manufacturing process of that end product. It was held that the ammonia used in the treatment of effluents from the urea plant of the assessee was

therefore, required to be held to be used in the manufacture of urea and the raw naphtha used in the manufacture of such ammonia would be

entitled for exemption. This conclusion was reached on the basis of the observations that the exemption Notification did not require that the

ammonia should be used directly in the manufacture of fertilisers and that it requires only that the ammonia should be used in the manufacture of

fertilisers. It was observed that exemption notification must be so construed as to give due weight to the liberal language it uses.

From perusal of the facts and the observations of the Supreme Court in this decision as relied upon by the appellants, it is clear that the Supreme

Court had construed the provisions of the notification by which exemption was granted. As the notification did not bar use of Ammonia from any

indirect use in the factor of the assessee, the Supreme Court held that the water treatment plant, steam generation plant and inert gas generation

plants are part and parcel of composite process and that Ammonia used in these ancillary plants is also used in manufacture of fertiliser.

(e) In the decision of the Supreme Court in the case of ""J.K. Cotton Spg. & Wvg. Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur, (1997(91)

E.L.T. 34 (S.C.)"" the issue arose under the Central Sales Tax Act, 1956 in respect of the business of the assessee dealing in manufacture of

cotton textiles, tiles and other commodities for sale. The assessee was dealing in the goods which were ordinarily purchased in the course of inter-

State trade for which it had sought registration as dealer u/s 7(1) of the Central Sales Tax Act, 1956 in respect of the items viz. coal. In the

registration certificate the Sales Tax Officer cancelled the specification and issued a show cause notice as to why registration should not be

amended so as to exclude certain items. The assessee in reply to the show cause notice contended that all the articles specified in the certificate

were required in the manufacture and processing of goods for sale. By an order passed by the Sales Tax Officer, certain items under the certificate

of registration were deleted. Against this action on the part of the Sales Tax Officer, the Assessee had approached the Allahabad High Court. The

High Court held that drawing instruments, photographic materials, colours, chemicals, electricals, machinery and building materials such as cement,

lime are not comprehended in the expression ""in the manufacture or processing of goods for sale"" u/s 8(3)(b) read with Rule 13 and dismissed the

petition filed by the assessee. The assessee had approached the Supreme Court. It is in this context in construing the provisions of Section 8(3)(b)

and Rule 13, it was observed that by Rule 13 the Central Government has prescribed the goods referred to in Section 8(3)(b), such goods must

be intended for use in the manufacture or processing of goods for sale or in mining or generation or distribution of power, and the intended use of

the goods must be as specified in Rule 18. It was observed that under Rule 13 read with Section 8(3)(b) mere intention to use the goods in the

manufacture or processing of goods for sale, will not be a sufficient ground for specification. The intention must be to use the goods as raw

materials, as processing materials, as machinery, as plant, as equipment, as tools, as stores, as spare parts, as accessories, as fuel or as lubricants.

It is in this context, it was held that the expression ""in the manufacture of goods"" should normally encompass the entire process carried on by the

dealer of converting raw materials into finished goods and where any particular process is so integrally connected with the ultimate production of

goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would fall

within the expression ""in the manufacture of goods"".

The aforesaid observations of the Supreme Court were clearly in the context of Section 8(3)(b) of the Central Sales Tax Act and Rule 13 as

relevant in the said decision. However, the context in the present case as falling under the definition of "input" as defined under Rule 2(k) would not

permit the interpretation as it became possible under the Central Sales Tax Act as in this decision of the Supreme Court, as the towers and PFB

cannot be considered to be an integral part of the output services viz. telecommunication services, inasmuch as the telecommunication services

become viable on account of antenna, the towers and PFB are immovable in nature fixed to the earth and cannot be regarded as essential inputs

inasmuch as an antenna can be installed irrespective of tower or one tower can install number of antennas for different service providers and hence,

the same cannot be regarded as integral part of the output services as being provided by the appellants.

(f) The appellants then placed reliance on the decision of Andhra Pradesh High Court in the case of M/s Indus Towers Limited Vs. The

Commercial Tax Officer, Begumpet Circle, Mayur Kushal Complex, Abids, Hyderabad, The Appellate Deputy Commissioner, Punjagutta

Division, CCT Building 5th Floor, Nampally, Hyderabad and Commissioner of Commercial Taxes, Nampally, Hyderabad, on the basis of which

of which the Appellant contend that the towers and the PFB being employed in erection and maintenance of cell phone towers are integral to

telecommunication network and hence qualify as inputs under the Credit Rules. The issue in the case of Indus Towers arises in the context of

adjudication of a sales tax dispute under the Central Sales Tax Act more particularly in regard to the construction of Section 8(1)(3)(b) and (d)

and (4) of the Central Sales Tax Act, 1956, in regard to purchase of goods by the dealer from the outside State comprising of goods specified in

the certificate of registration under the Central Sales Tax Act granted to it against the issue of ""C"" form and were goods employed for erection and

maintenance of cell phone towers which were contended to be integral to communication network. The Division Bench of Andhra Pradesh High

Court referred to an earlier Division Bench's judgment in the case of The State of Andhra Pradesh Vs. M/s. Bharat Sanchar Nigam Limited,

Hyderabad and observed that telecommunication towers are held to be immovable property. Learned Counsel for the Appellant has relied on the

following observation in the judgment:-

31. Telecommunication towers are held by a Division Bench of this Court in The State of Andhra Pradesh Vs. M/s. Bharat Sanchar Nigam

Limited, Hyderabad to be immovable property. We are not informed at the Bar that the judgment in The State of Andhra Pradesh Vs. M/s. Bharat

Sanchar Nigam Limited, Hyderabad has either been stayed or appealed against or the ratio of the said decision stands eclipsed. This judgment has

also analysed that the service providers (passive infrastructure service providers) provide other assets like shelter, air-conditioning equipment,

diesel generator, electrical wiring, power plant, etc., for their network operations and concluded that sharing of infrastructure is incidental and only

as a means of rendition of telecommunication service; that the effective control and possession of such equipment continues with the passive service

provider; is not parted to the other service providers who are merely permitted use of this equipment; and levying tax on the proceeds received by

the passive infrastructure provider from sharing of their infrastructure with other service providers, treating it as a sale under Explanation IV to sub-

section (28) of Section 2 of the APVAT Act, 2005, is without jurisdiction and illegal.

39. In the facts and circumstances of this lis (adverted to supra), in view of the ratio deducible from the judgments of the Supreme Court in

Commercial Taxes Officer, Circle D, Jaipur Vs. Rajasthan Electricity Board, Jaipur, and in J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs.

Sales Tax Officer, Kanpur and Another, we are of the considered view that the purchase of goods by the petitioners from outside the State,

comprising goods specified in the certificates of registration under the CST Act granted to them, against issue of C forms and where the goods

have been employed in erection and maintenance of cell phone towers which are integral to telecommunication network, fall within the ambit of

section 8(1) read with section 8(3)(b) of the CST Act and are entitled to be taxed accordingly. The fact that the goods purchased by the

petitioners were neither sold nor used in the manufacture of goods for re-sale does not constitute violation of the C forms. Consequently, levy of

penalty, on the factual parameters apparent on the record of these cases is unsustainable.

(emphasis supplied)

We are afraid that the observations in the aforesaid judgment would be of no assistance to the appellant. The issue which fell for consideration in

this case was under the Central Sales Tax Act in the context of registration certificate issued to the petitioner (Indus Towers Ltd) under the Central

Sales Tax vis a vis the nature of business of the petitioners therein. The controversy was whether the goods purchased by the petitioners (Indus

Towers Ltd/dealers) are registered under the Central Sales Tax Act which were used for building operating and maintaining passive telecom

infrastructure and erection of telecom towers and maintenance and whether the same, would fall within the ambit of Section 8(1) read with 8(3)(b)

of the Central Sales Tax Act and thus taxable only at concessional rate of sale tax provided u/s 8(1) of the Act. In regard to the utilization of said

goods for the purpose of telecom towers/services and in the context of registration certificate held by the dealer under the Central Sales Tax Act,

the Division Bench observed that the goods as purchased by the dealer which were employed in the erection and maintenance of the cell phone

towers were integral to the telecommunication network and hence, the goods fell within the ambit of section 8(1) read with section 8(3)(b) of the

Central Sales Tax Act and were entitled to be taxed at the concessional rate of tax under the said provision. The Division Bench in this case was

examining three aspects, firstly the goods as procured by the dealer in the context of the registration obtained by the dealer under the Central sales

Tax Act by procuring "C" form under the Central Sales Tax Act and the benefit of the "C" forms whether would be entitled in the context of the

provisions of Section 8(1) and 8(3)(b) of the Act. The Division Bench was dealing in a case arising under the Central Sales Tax Act and was

examining the benefits which would be available to the dealer of reduction in duties on a ""C"" form being availed by the dealer. It is in this context

that the Division Bench had come to the conclusion that the cell phone towers are integral to telecommunication network. Secondly, the expression

telecommunication network"" was being considered in the context of Section 8(1) read with section 8(3)(b) of the Central Sales Tax Act. It was

also observed that in the case of ""State of Andhra Pradesh Vs. Bharat Sanchar Nigam Ltd."" (supra) ruling of the Division Bench of Andhra

Pradesh High Court, it was held that telecommunication tower is immovable property and that it being a immovable property must have direct

relevance to the issue as arising for adjudication in the said case. In the present case the issue is one which falls under the Credit Rules and as to

whether towers and parts thereof fall within the scope and ambit of the specific definition of Capital goods and the definition of inputs under the

Credit Rules, 2004. Any issue falling for interpretation under the provisions of Section 8(1) and Section 8(3)(b) and 8(1) of the Central Sales Tax

Act cannot ipso facto be made applicable in the context of the Credit Rules as arising in the present appeals and more particularly, when the

definition as falling under the Cenvat Credit Rules are distinct and are noticeably different.

(g) The decision of the Supreme Court in Collector of Central Excise, Calcutta Vs. Jay Engineering Works Ltd., Calcutta, concerned the

nameplate affixed on a fan which was held as an as an input and an essential ingredient failing which the fan does not become marketable and

covered by a notification entitling the manufacturer for set off duty on the nameplates. This decision however is ex-facie not applicable in the

present context.

(h) The reliance of the appellant on the judgment of the Division Bench of this Court in the case of ""Deepak Fertilizers & Petrochemicals Corpn.

Ltd. Vs. C.C.E., Belapur, (2013(288) E.L.T. 316(Tri.-Mumbai))"" would also be of no assistance to the appellant. The appellant relied on the

following observations in paragraph (5) of the judgment.

The Tribunal has placed an interpretation which runs contrary to the plain and literal meaning of the words used in Rule 2(1). Moreover, as we

have noted earlier, where as Rule 3(1) allows a manufacturer of final products to take credit of excise duty and Service Tax among others paid on

any input or capital goods received in the factory of manufacturer of the final product, insofar as any input service is concerned, the only stipulation

is that it should be received by the manufacturer of the final product. This must be read with the broad and comprehensive meaning of the

expression ""input service"" in Rule 2(1). the input services in the present case were used by the appellant whether directly or indirectly, in or in

relation to the manufacture of final products. The appellant, it is undisputed, manufactures dutiable final products and the storage and use of

ammonia is an intrinsic part of that process.

However, the observations are required to be read in the context of the facts of the said case. The appellant the said case was engaged in

manufacturing of excisable goods which fell under Chapters 28, 29 and 31 of the Central Excise Tariff Act, 1985. The appellant had installed

storage tanks for storing ammonia at its premises situated at JNPT and had claimed that it is eligible for Cenvat Credit of service tax paid on input

services used for the ammonia storage tanks installed at JNPT so that input/raw material stored therein was intended for manufacture of the final

product at the factory of the appellant at Taloja. The Cenvat Credit in respect of the services of consulting engineers, technical inspection and

certification, construction, erection, commissioning and installation services for the installation of the ammonia storage tanks was claimed. The facts

of this case can no manner apply to towers and parts thereof, prefabricated building/shelter which are immovable property and not excisable goods

and hence, reliance on this judgment is misconceived.

26. The appellants in support of their alternate contention that the "towers are the accessories of antenna" and therefore, qualify as "capital goods"

falling under Chapter Heading 85 and that PFB is also an accessory of BTS equipment falling under Chapter 85 on the basis of definition of

"capital goods" as defined under rule 2(a)(A) of the Credit Rules, relied on the following decisions:-

(a) In the case of Annapurna Carbon Industries Co. Vs. State of Andhra Pradesh, the issue which fell for consideration of the Supreme Court was

in respect of A.P. General Sales Tax Act, 1957, in regard to the interpretation of Entry 4 of Schedule I concerning cinematographic equipment etc.

and parts and accessories required for use therewith. The question was whether "arc carbons" commonly known as ""cinema are carbons"" were

parts and accessories"" required for use with cinematographic equipment. It was held that the term ""accessories"" is used in the Schedule to

describe goods which may have been manufactured for use as an aid or addition, but ""accessories"" are not necessarily confined to particular

machines for which they may serve as aids. The same item may be an accessory of more than one kind of instrument. Considering that main use of

the arc carbons under consideration was duly proved to be that of production of powerful light used in projectors in cinemas, and that they can

also be used for searchlights, signaling, stage lighting, or where powerful lighting for photography or other purpose may be required could be

detracted from the classification to which the carbon arcs belong. It was, therefore, held that "cinema arc carbons" can, therefore, be brought

under Entry no. 4 of Schedule I of A.P. General Sales Tax Act, 1957, which reads as under:-

Cinematographic equipment, including cameras, projectors, and sound recording and reproducing equipment, lenses, films and parts and

accessories required for use therewith.

In reaching the aforesaid conclusion in paragraph (6) of the decision, the Supreme Court has specifically observed that the meaning to this entry

can only be satisfactorily determined in the light of the language of the entry itself considered in the context in which it occurs. This decision

however cannot assist the appellants as the aforesaid entry made to A.P. General Sales Tax Act itself included accessories of cinematographic

equipment. In the present case tower cannot be held to be an accessory of antenna.

(b) In the decision of the Division Bench of this Court in the case of Commissioner of Sales Tax, Maharashtra State, Bombay Vs. L. D. Bhave and

Sons, the issue was as regards the stand specially designed for keeping gas stoves and whether they were "accessories" for gas stoves. This issue

arose in the context of Entry 7A of Schedule E to the Bombay Sales Tax Act, 1959 and the rate of sales tax as would be applicable to the items. It

is in this context the Division Bench has considered the judgment of the Supreme Court in the case of M/s. Annapurna Carbon Industries Co. Vs.

State of Andhra Pradesh"" (supra), and has observed as under:-

Thus, an accessory is considered as something that is an extra or additional item, an adjunct to the main item. It may add to the performance of

the main items but it can also be for more convenient use of the main item. It fact, there can be various types of accessories and whether an item

constitutes an accessory or not will depend upon how the item is considered in common parlance more than in terms of its dictionary meaning. For

example, the leather case in which a transistor radio is kept is an accessory though it does not add to the performance of the transistor radio. At

the highest, it protects the transistor radio and makes for its easy carriage.

7. In the case of Annapurna Carbon Industries Co. v. State of Andhra Pradesh the Supreme Court was required to consider whether are carbons

known as ""cinema are carbons"" were accessories required for use along with cinematographic equipment or projectors. In deciding this question,

the Supreme Court cited with approval the meaning of the term ""accessory"" given in Webster's Third New International Dictionary and observed

"Accessories" are not necessarily confined to particular machines for which they may serve as aids. The same item may be an accessory of more

than one kind of instrument.

The entry in question in that case specifically referred to accessories which were required for use alongwith the main item. In the present case, the

entry in question does not have any such limitation. In any case, in order to decide whether an item is an accessory or not, it has to be considered

along with the main item. In the present case, the stands on which gas stoves are kept are designed specially for the purpose. They help in

facilitating the cleaning of the gas stoves and they are sold by the respondents who deal in gas stoves. The argument of Mr. Joshi that they should

not be considered as accessories because they do not improve the performance of the gas stoves cannot be accepted. They are clearly additional

items required for use along with the gas stoves and are sold as such. Both according to the dictionary meaning of the term and its use in common

parlance, they should be considered as accessories of gas stoves. These stands, therefore, are covered by entry 7A in Schedule E to the Bombay

Sales Tax Act, 1959.

(c) In the decision in the case of M/s. Mehra Bros Vs. The Joint Commercial Officer, Madras, the issue arose under the Sales Tax Act as to

whether car seat covers and upholstery are accessories to be taxable under Entry 3 of Schedule I read with Section 3(3) of Tamil Nadu General

Sales Tax Act, 1959. It was held that the car seat covers and upholstery are accessories as an addition, an adjunct, an accompaniment for

comfortable use of the motor vehicles or for adding elegance to the seat.

(d) The decision in the case of "Banco Products (India) Ltd. Vs. Commissioner of C.Ex., Vadodara-I, (2009(235) ELT 636 (Tri-LB))" of the

Larger Bench of the Central Excise and Service Tax Appellate Tribunal concerns the issue as to whether the plastic crates would either to be

capital goods or inputs so as to qualify for input credit. These plastic crates were used for internal transportation of the raw material/semi-finished

and finished goods from stores to processing machine and from one machine to other machine and to finished goods storage. They were mainly

used for storage and supply of different components of radiators, in the production of which the appellant is engaged. The issue which is

considered was "whether the plastic crates can be considered as accessories as falling under clause (iii) of the goods specified in Clause (I) of the

definition of capital goods as defined under 2(b) of Cenvat Credit Rules, 2002. The observations in paragraphs 14 and 19 are relevant they read

as under:-

14. Reference to all the above decisions was necessary to understand the scope of the term "accessory". If the plastic crates are held to be an

accessory to the main machine, appearing against Sr. no. (i) of the definition of the capital goods, as contained in Rule 2(b) of the Cenvat Credit

Rules, 2002, they would earn the status of the eligible capital goods for the purposes of Modvat. The appreciation of the various judgments on

expression "accessory" as discussed above, leads us to observe that an accessory may or may not be required for essential working of the main

unit, but is an object which is used for the convenience and effectiveness of that unit. It may also not be necessary that such accessory must be

designed to be used in a particular machine. The same may be of a kind, which is capable of being used as a common object, with number of

machines. The only criteria for an object to be held as an accessory, an emerging from the above extracted portion of various judgments is that that

a particular item should be capable of being used with a machine and should advance the effectiveness of working of that machine. The plastic

crates in question are used for transportation of the raw material to the processing machine and all the finished goods from the machine to the

storage area. It can be argued that instead of using such plastic crates as material handling device, the various components or the inputs can be

carried manually also. However, the question is as to whether such transportation of the inputs or semi-finished goods in the factory would be

convenient way of dealing, and whether the same would not hamper the continuous working of the machine on account of delays in the delivery of

the raw material etc. It may be possible in theory to do so, but is neither practical nor possible to do in the actual manner. The delivery of the raw

material in time for increasing the effective working of the same and then removal of the finished goods from the vicinity of the machine contributes

may be in a subordinate degree to attain a general result or effect. Same adds to definition of effectiveness of the machinery, and when viewed and

judged in the light of interpretation of the term ""accessory"" by various Courts, the plastic crates are required to be held as accessory only. If that be

so, the same would fall under Sr. no. 3(i) of Rule 2(b) of Cenvat Credit Rules, 2002.

19. Further, in the case of M/s. Hindustan Seals Ltd. Vs. CCE Kolkata-II 2006(196) E.L.T. 302 (Tri-Kolkata), the claim of the assessee for

availing Modvat credit of duty paid on the plastic crates was under Rule 57A and 57B as "inputs". The claim for admissibility of the credit as

capital goods was not one of the issue before the Bench. As such, it can be recorded that M/s. PKPN Spinning Mills" case and followed

subsequently in M/s. Sugavaneswara Spinning Mills" case, was by way of concession and M/s. Hindustan Seals judgment having not considered

the availability of credit as capital goods, there is no decision holding against the admissibility of the plastic crates as accessory. In any case, having

elaborately discussed as to what is the meaning and scope of the term ""accessory"", as interpreted by Hon"ble Supreme Court in various decisions

and by Tribunal, it has to be held that the plastic crates are eligible capital goods for the purposes of Modvat credit. We answer accordingly.

The insistence on behalf of the appellants that the analogy as applied by the Larger Bench be applied in the facts of the present case is not

acceptable. The argument of the appellants is that the antenna is being classified as capital goods and being held eligible for availing credit of duty

paid, tower and PFB become its accessories. To reach to this conclusion on the lines on which the larger Bench of the Tribunal in this decision has

held, it would be required to be held that it is impossible for cellular antenna to function in the absence of a tower or a prefabricated building. It is

not a case of the appellants that the antenna becomes non functional in the absence of tower and prefabricated building. On the basis of technical

material it is clear that an antenna can function irrespective of tower and the prefabricated building and hence, it would be an absurdity to hold that

tower is an accessory of antenna.

Perusal of the observations in the decisions in the case of ""L.D. Bhawe"" (supra), ""Mehra Brothers"" (supra) and ""Banco Products (India) Ltd.

(supra) clearly go to show that the same cannot be applied in the facts of the present case inasmuch as tower, PFB and printer cannot be held to

be ""input"" as defined under Rule 2(k) of the Credit Rules.

(e) In the decision of the Supreme Court in the case of Commissioner of Central Excise, Jaipur Vs. Rajasthan Spinning and Weaving Mills Ltd.,

the issue was whether the assessee was right in availing Modvat Credit in respect of steel plates and M.S. Channels used in fabrication of chimney

for the diesel generating set, by treating these items as capital goods in terms of Rule 57Q of the Central Excise Rules, 1944. In the context of Rule

57Q the Supreme Court in paragraphs 2, 10, 12 and 13 has observed as under:-

9. The language of Rule 57Q is clear and unambiguous. It applies to the final products described in column (3) of the Table under the Rule as also

to other goods, referred to as ""capital goods"", described in the corresponding entry in column (2) of the said Table, used in the factory of the

manufacturer of final product. The parties are ad idem that diesel generating set falls under Chapter 85 under Heading No. 85.02, as described at

Serial no. 3 of the afore-extracted Table. Similarly there is no dispute that chimney attached with the generating set is covered by the items

described in Serial No. 5 thereof. However, the controversy centres around the question whether the steel plates and M.S. Channels used in the

fabrication of chimney would fall within the purview of Serial no. 5 of the Table below rule 57Q.

10. Having examined the question in the light of the language employed in Rule 57Q and the case law on the point, we are of the opinion that the

appeal is devoid of any merit.

12. Inter alia observing that capital goods can be machines, machinery, plant, equipment, apparatus, tools or appliances if any of these goods is

used for producing or processing of any goods or for bringing about any change in the substance for the manufacture of final product, although this

view was expressed in the light of the afore-noted definition of ""capital goods"" in the said Rule, which is not there in Rule 57Q, as applicable in the

instant case, yet the ""user test"" evolved in the judgment, which is required to be satisfied to find out whether or not particular goods could be said

to be capital goods, would apply on all fours to the facts of the present case, in fact, in para 6 of the said judgment, the court noted the stand of the

learned Additional Solicitor General, appearing for the Revenue, to the effect that the question whether an item falls within the purview of ""capital

goods"" would depend upon the user it is put to.

13. Applying the ""user test"" on the facts in hand, we have no hesitation in holding that the steel plates and M.S. channels, used in the fabrication of

chimney would fall within the ambit of ""capital goods"" as contemplated in Rule 57Q, it is not the case of the Revenue that both these items are not

required to be used in the fabrication of chimney, which is an integral part of the diesel generating set, particularly when the Pollution Control laws

make it mandatory that all plants which emit effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases.

Therefore, any equipment used for the said purpose has to be treated as an accessory in terms of Serial no. 5 of the goods described in column

(20 of the Table below Rule 57Q.

From the observations of the Supreme Court in the aforesaid paragraphs, it is clear that it was an undisputed position and that the parties were ad

idem that diesel generating set was falling under Chapter 85 under Heading No. 85.02 as described at Serial no. 3 in the table below Rule 57Q

and it is in this context the Supreme Court held that the Assessee was entitled for modvat credit in respect of steel plates and M.S. Channels used

in the fabrication of chimney by those items as capital goods in terms of Rule 57Q of the Rules.

27. The reliance of the appellants on the decision of the learned Single Judge of the Calcutta High Court in the case of Singh Alloys and Steel Ltd.

Vs. Assistant Collector of Central Excise, to contend that it is impossible to conceive that telecommunication service can be provided without

towers and shelters and functional utility test is required to be applied, is also misplaced. The issue in this judgment concerns the construction of

Rule 57A of Central Excise Rules, 1944 in respect of credit of duty paid on excisable goods used as inputs on the manufactured item. The

question was whether dolopatch mix, magnesite peas and ramming mass were input of steel ingots. In the context of Explanation to Rule 57A,

Kolkata High Court in paragraphs 6 and 7 has observed as under:-

6. The object of the legislature appears to the to be to exclude from the genus of inputs, the species mentioned in the excluded categories because

otherwise a manufacturer would be entitled to claim modvat in respect of such inputs repeatedly as these would not be inputs which would be

consumed in the process of manufacture. This is clear from a scrutiny of the excluded inputs.

7. It is not disputed that Ramming mass and dolopatch mix have been classified as miscellaneous chemical products under Chapter 38 Heading

3816.00 of the Schedule to the Central Excise Tariff Act, 1985. Magnesite peas have been classified under Heading No. 28.20 of the Schedule to

the Tariff Act which deal with Manganese Oxides. Heading no. 28.20 is under Chapter 28 which deals with inorganic chemicals, organic or

inorganic compounds of precious metals, or rare earth metals, of radioactive elements or of isotopes. These three items are used when ingots are

manufactured. It is the admitted case that these items are first charged into the furnace as fettling materials. The items dissolve and seal the crevices

in the refractory walls of the furnace to prevent leaking of the liquid metal from the furnace and to reduce the erosion of the refractory lining of the

furnace. The items lose their identity and are consumed in the process. Some part of the items remains in the liquid metal which forms the ingot and

the balance forms part of the residue or slug.

It is on the basis of the aforesaid observations, the Court in paragraph 23 concluded as under:-

23. The respondents then argued that steel ingots could be manufactured even without the items. That may be so, but that is immaterial. The

definition of inputs is not dependent upon what ought to be used but what is in fact used. There is no dispute that the petitioner No. 1 had in fact,

used and uses the items in the manufacturing of ingots. The Supreme Court has also held that manufacture would include a process which was

commercially expedient in the production of goods [See: Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana,

Rajasthan, That the process in question is commercially expedient has not been doubted.

The contention of the appellants that the test in this judgment is the test of "functional utility" as to determine whether the inputs are used in the

manufacture of the goods. It is contended that when an item is required for providing output services of the service provider on commercial scale, it

satisfies the functional utility test, and therefore, it ought to be held that the towers and shelters are inputs used for providing output services as also

on the basis of functional utility test. We are afraid that this contention on behalf of the appellants cannot be accepted for the reason that the tower

and parts thereof and PFB cannot be regarded as inputs as defined under Rule 2(k) of the Credit Rules and that they are not integral part of the

output services viz. telecommunication services as provided by the appellants. To consider the towers and parts thereof and PFB as inputs would

clearly go contrary to the clear reading of Rule 2(k) read with definition of "excisable goods" as defined in Section 2(d) of the Central Excise Act,

1944.

28. The next decision as relied upon by the Ld. Counsel for the Appellant is in the case of ""M/s. Mahalaxmi Cotton Ginning Pressing and Oil

Industries, Kolhapur Vs. The State of Maharashtra & Ors."" (Writ Petition no. 33 of 2012), to contend that the provisions of the credit rules are

required to be read harmoniously and such reading of the relevant rules would entitle the appellants for the credit of the duty paid. This was a case

falling under the Maharashtra Value Added Tax Act 2002. The challenge in this case was to the constitutional validity of Section 48(5) of the

Maharashtra Value Added Tax Act, 2002 in the context of an order of assessment. The petitioner sought a writ of mandamus against the State

Government to recover from the vendor tax paid on goods on which a set off was claimed. The proposition which the Appellant would canvass in

relying on this decision is that the Credit Rules are required to be harmoniously construed so as to permit the benefit of the credit of the excise duty

to the appellants in discharge of their service tax liability. Reliance is placed on paragraph 15 and 16 of the judgment wherein the Division Bench of

this Court speaking through Dr. Justice D.Y. Chandrachud (as His Lordship then was) observed thus:-

15. The White Paper on a State level Value Add Tax published under the aegis of the Empowered Committee of State Finance Ministers on 17

January 2005 took note of the fact that in the existing structure of indirect taxation, the tax regime resulted in a cascading tax burden where inputs

are first taxed and after a commodity is produced with an input tax the output is taxed again. VAT was considered as a preferred alternative to

rationalize the overall tax burden so as to obviate the cascading effects of indirect taxation. Moreover, VAT was to replace existing systems of

inspection by a system of built in self assessment by dealers and auditing, which would make the system simple and transparent. Improved tax

compliance and the augmentation of revenue were important policy objectives of the system of value added taxation.

16. As an economic concept, translated into State legislation VAT sub-serves two important fiscal goals. First a system of taxation based on VAT

obviates a cascading effect of tax burdens. This is achieved inter alia by the grant of a set off for input taxation and in respect of taxes paid on

previous purchases. Second the VAT regime is also and no less important, an instrument in promoting compliance and for broad basing the tax

base. Both aspects of the regime have to be harmonized. This aspect merits importance because while interpreting the provisions of legislation, it is

necessary to bring about a harmony that would preserve the balance between the need on the one hand of ensuring against a cascading tax burden

and on the other hand of promoting regulatory compliance. The first element is preserved by a multi point levy and collection of tax which allows a

set off of taxes paid in the course of intermediate transactions. The second element of compliance is ensured by envisaging that every business in

the supply chain is associated in the process of collecting the tax and by remitting the proportion of tax corresponding to its own margin to the

government. The legislation in the present case which forms the subject matter of consideration contains specific provisions which are intended to

bring about that harmony. The need for that harmony must be underscored. For it is only then that the object and purpose of the legislation can be

attained.

There cannot be any dispute on the legal proposition as observed in the aforesaid paragraphs. The appellants, however, would not be justified in

relying on the aforesaid observations in the present context inasmuch as in paragraph 16 of the aforesaid Judgment, the Division Bench has

categorically observed that the specific provisions which are applicable which are intended to bring about harmony are required to be considered

in the context of object and purpose the Legislature seeks to achieve. Applying this principle, we are required to apply the provisions of Cenvat

Credit Rules and in that context examine as to whether the appellants would be entitled to avail of the credit on duties paid on the purchases in

respect of the goods in question.

29. We now deal with the decisions as relied upon by the learned ASG for the revenue.

(a) In the larger Bench decision of the Tribunal in the case of 2010 (253) ELT 440 "" the question was whether the term "capital goods" can include

plant and structures embedded to earth, and whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of such

structures can be treated as ""inputs"" in relation to their final products as inputs for capital goods or none of the above, and whether the credit can

be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant. It was the case

of the assessee that structural support should be considered as a part of capital goods and that the definition of "capital goods" under the Credit

rules includes goods falling under Chapters 82, 84, 85 and 90, as well as specified goods such as pollution control equipment, storage tanks etc.

and the only condition laid down in the definition is that these should be used in the factory of the manufacturer of the final products. It was further

contended by the Assessee that the definition of "capital goods" does not stipulate that same should be in movable condition and there is no bar to

avail credit if a plant and machinery item is embedded to earth. The Assessee also contended that "capital goods" cannot be made functional unless

structural support is provided and such machineries are erected and installed in the factory and that further the capital goods becoming immovable

property is irrelevant. The only requirement is that the capital goods should be used for manufacture of excisable goods in the factory. The

Assessee also urged that phrase "capital goods" should be read together and understood as it has been defined without breaking the same into two

words viz. "capital" and "goods". The alternate argument advanced on behalf of the Assessee was that the steel satisfies the criteria of "inputs"

used in or in relation to the manufacture of dutiable final products. On the other hand the case of the Department was that though the word "goods"

has not been defined in the Act ""excisable goods"" has been defined. The Revenue urged that there is distinction between capital goods from inputs

and it was urged that capital goods are not used immediately in the process of production unlike raw material or intermediate goods. By referring

to the scheme of Central Excise Act and rules framed thereunder, the Revenue urged that capital goods in the context of Central Excise Law must

be taken to mean excisable capital goods and that goods which are not excisable cannot be considered as capital goods for the purpose of excise

law including Cenvat Credit Rules. It was urged by the Revenue that those goods which are embedded to earth on which duty is not payable

cannot be called as capital goods either under the Central Excise Rules or under the Cenvat Credit Rules. In order to draw a difference between

intermediate goods and capital goods, it was stated that intermediate goods get consumed or converted in the process of manufacture whereas

capital goods do not get consumed nor undergo any change in the process of manufacture. It was, therefore, contended by the Revenue that the

claim of the assessee that capital goods should be considered as intermediate goods is not tenable. It was also urged that if the input includes

capital goods then there was no need to define capital goods separately and that since the two terms have been defined in the statute, it cannot be

said that commodities covered under one will be included in the other. The revenue relying on the judgment of the Supreme Court in the case of

Collector of Central Excise Vs. Solaris Chemtech Limited and Others, contended that considering the wider scope of inputs, the structures which

are not connected with the process of manufacture cannot be held to be eligible for credit. After taking into consideration the law laid down by the

Supreme Court, it was held that phrases "capital assets" and "capital goods" cannot be held to be synonymous and that the arguments on behalf of

the assessee that the term "capital goods" included plants, structures embedded to earth was negated. It was further held that the foundation and

supporting structures are neither machinery items nor components, spares and accessories of machinery, nor that those items have been listed for

special inclusion in the definition. The observations of the Larger Bench in paragraphs 41, 42 and 43 of this decision are relevant which read as

under:-

41. Keeping in view the scheme of the Act and the Cenvat Credit Rules, we are of the opinion that the phrases "capital assets" and "capital

goods" cannot be held to be synonymous. The phrase capital goods has been defined in the Cenvat Credit Rules enumerating a number of goods.

Obviously, the said definition of "capital goods" has to be adopted while interpreting the rules for the purposes of granting and denying of credit.

The phrase "capital assets" has a wider meaning and it would certainly include capital goods and other assets" such as immovable property in the

form of building etc. Once this distinction is appreciated, it is easy to see that foundations and supporting structures embedded to earth may be

categorized as capital assets but would not qualify to be capital goods in terms of the definition contained in the Cenvat Credit Rules. In fact, the

definition states that "capital goods" means "the following goods, namely" after which a list of goods has been provided. Mainly all goods falling in

the machinery chapters of the Tariff have been specified in the list as also components, spares and accessories of such goods. As stated above

earlier in paragraph 39, a few additional items have also been specially included in the list such as pollution control equipment, moulds and dies,

refractories, tubes and pipes, and storage tank. We find that the foundation and supporting structures are neither machinery items, nor components,

spares and accessories of machineries, nor have they been listed for special inclusion in the definition. Some arguments have been advanced that

the supporting structures should be considered as parts and accessories of the machinery. Parts (which include components parts and spare parts

and accessories have specific connotation in the context of the Customs and Excise Tariff Schedules in terms of which the supporting structures

cannot be classified either as part or as accessory. A component part is required to complete a machinery and is, therefore, integral to its

manufacture and function. A spare part is used to replace a worn out or damaged component part. An accessory either improves the

efficiency/effectiveness of a machinery without changing its basic functions, or performs a secondary or subordinate function. For proper viewing, a

television set may be required to be placed either on a table or on a TV stand/trolley or fixed on the wall. However, it cannot be anyone's case

that the table, the TV stand, the TV trolley or the wall should be considered as a part or accessory of the television set. Similarly, the foundation

and the supporting structure for a machinery cannot be considered to be part or accessory of the machinery.

42. Additionally, it has been argued on behalf of the Department that the capital goods have to be goods first and that the foundation and the

supporting structures being embedded to earth are in the nature of immovable property and are not goods or excisable goods. Not only is the

departmental contention well supported by a plethora of case laws, but even by the definition of "capital goods" in the Cenvat Credit Rules which

reads as ""the following goods"" supplemented with a list of goods that follows.

43. Since the foundation and the supporting structures cannot be considered as capital goods, nor as parts or accessories of capital goods, nor the

same have been specifically listed in the definition of capital goods; (as tubes and pipes and storage tank etc. have been specifically listed), the

question of treating cement and steel items as inputs for capital goods cannot arise. Hence, Explanation 2 to Rule 2(k) cannot be held to cover

cement and steel items used for laying foundation and for building structural support even during the period prior to the 2009 amendment.

(b) In the case of Union of India (UOI) and Others Vs. Mahindra and Mahindra Ltd., Bombay, the question which fell for consideration of the

Supreme Court was "whether the tube mill and welding head erected and installed by the appellant for manufacture of tubes and pipes out of

duty-paid raw material was assessable to duty under residuary Tariff Item no. 68 of the Schedule being excisable goods within the meaning of

Central Excises and Salt Act, 1944. The Supreme Court repelled the contention of the assessee. The Supreme Court in paragraphs 5 and 6 has

observed as under:-

5. In several decisions rendered by this Court commencing from Union of India (UOI) Vs. Delhi Cloth and General Mills, to M/s. Indian Cable

Company Ltd., Calcutta Vs. Collector of Central Excise, Calcutta and others, the twin test of eligibility of an article to duty under Excise Act are

that it must be a good mentioned either in the Schedule or under Item 68 and must be marketable. In Delhi Cloth Mills (supra) it having been held

that the word "good" applies to those goods which can be brought to market for being bought and sold it is implied that it applies to such goods as

are moveable. The requirement of the goods being brought to the market for being bought and sold has become known as the test of marketability

which has been reiterated by this Court in Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd., The Court has held

in Union Carbide India Limited Vs. Union of India (UOI) and Others, that even if a good was capable of being brought to market, it would satisfy

the test of marketability. The basic test, therefore, of levying duty under the Act is two fold. One, that any article must be a good and second, that

it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become immovable do not satisfy

the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold.

Therefore, both the tests, as explained by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been

erected and installed in the premises and embedded to earth they ceased to be goods within meaning of Section 3 of the Act.

6. Learned counsel for the revenue urged that even if the goods were capable of being brought to the market it would attract levy. True, but

erection and installation of a plant cannot be held to be excisable goods. If such wide meaning is assigned it would result in bringing in its ambit

structures, erections and installations. That surely would not be in consonance with accepted meaning of excisable goods and its exigibility to duty.

(emphasis supplied)

(c) In the case of Satish Rawat Vs. Union of India (UOI) and Others, the assessee dealt with the turbo alternator which had two components viz.

(i) steam turbine and (ii) complete alternator also called as generator. The assessee manufactured steam turbine in their factories and paid excise

duty on them. The assessee however, purchased duty-paid complete alternators which were delivered at the customer's site. By the combination

of "steam turbine" and "alternator" a turbo alternator emerged at the customer's site. The Excise Authorities and CEGAT held that turbo

alternators were liable to excise duty under Heading 85.02 of the Central Excise Tariff Act, 1985. In this context the Supreme Court in paragraph

14 held as under:-

There can be no doubt that if an article is an immovable property, it cannot be termed as excisable goods for purposes of the Act. From a

combined reading of the definition of immovable property in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act,

it is evident that in an immovable property there is neither mobility nor marketability as understood in the Excise Law. Whether an article is

permanently fastened to anything attached to the earth require determination of both the intention as well as the factum of fastening to anything

attached to the earth and this has to be ascertained from the facts and circumstances of each case.

(d) The decision of the Supreme Court in Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut, concerned moto vertical

crystallisers whether are goods in the context of exigibility to excise duty. The Supreme Court held that as the same was required to be assembled,

erected and attached to the earth by a foundation at the site of the sugar factory, it was not capable of being sold as it is. It was held that erection

and installation of a plant is not excisable. In paragraphs 9 and 10 the Supreme Court has observed as under:-

9. Upon the material placed upon record and referred to above, we are in no doubt that the mono vertical crystalliser has to be assembled,

erected and attached to the earth by a foundation at the site of the sugar factory. It is not capable of being sold as it is, without anything more. As

was stated by this Court in the case of Quality Steel Tubes (P) Ltd. the erection and installation of a plant is not excisable. To so hold would,

impermissibly, bring into the net of excise duty all manner of plants and installations.

The Tribunal took an unreasonable view of the evidence. It was the case of the appellants, not disputed by the revenue, that mono vertical

crystallisers were delivered to the customers in a knocked-down condition and had to be assembled and erected at the customers' factory. Such

assembly and erection was done either by the appellants or by the customer. Where it was done by the appellants, fabrication materials of the

customer were used and the customer sent to the appellants debit notes in regard to their value. Where the assembly and erection was done by the

customer", there was no occasion for it to send to the appellants a debit note. The fact that there was no debit note in respect of one customer

could not reasonably have led the Tribunal to conclude that in the case of that customer a complete mono vertical crystalliser had left the

appellants' factory and that therefore, mono vertical crystallisers were marketable. The Tribunal ought to have remembered that the record

showed that mono vertical crystallisers had, apart from assembly, to be erected and attached by foundations to the earth and, therefore, were not,

in any event, marketable as they were.

(e) The decision of the Supreme Court in the case of Commissioner of Central Excise, Indore Vs. Cethar Vessels Ltd. and Others, , concerned an

issue as to whether the erection of boiler at site by assembling various components and parts has brought into existence immovable property or

not, fell for consideration, The Revenue had contended that fabrication of such plants out of duty-paid bought out items amounts to manufacture of

a new marketable commodity and therefore, excise duty is payable. The Tribunal had held that no excise duty is leviable and thus these plants are

not subject to excisability. While accepting the stand of the assessee that these plants are basically systems comprising of various components and

are thus in the nature of systems and not machines as a whole, and hence, were not excisable goods. Taking into consideration its earlier decision

in regard to excisability of plants and machinery assembled at site and in pursuance of Circular No. 58/1/2002-CX dated 15.1.2002, issued by

Minister of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi, the Supreme Court in paragraph (6) referred the

contents of the said circular in relation to items assembled and erected at site, which provides as under:-

.....

4. The plethora of such judgments appears to have created some confusion with the assessing officers. The matter has been examined by the

Board in consultation with the Solicitor General of India and the matter is clarified as under:- (a) For goods manufactured at site to be dutiable they

should have a new identity, character and use, distinct from the inputs/components that have gone into its production. Further, such resultant goods

should be specified in the Central Excise Tariff as excisable goods besides being marketable i.e. they can be taken to the market and sold (even if

they are not actually sold). The goods should not be immovable.

(b) Where processing of inputs results in a new products with a distinct commercial name, identity and use (prior to such product being assimilated

in a structure which would render them as a part of immovable property), excise duty would be chargeable on such goods immediately upon their

change of identity and prior to their assimilation in the structure or other immovable property.

(c) Where change of identity takes place in the course of construction or erection of a structure which is an immovable property, then there would

be no manufacture of ""goods"" involved and no levy of excise duty.

(d) Integrated plants/machines, as a whole, may or may not be "goods". For example, plants for transportation of material (such as handling plants)

are actually a system or a net work of machines. The system comes into being upon assembly of its component. In such a situation there is no

manufacture of "goods" as it is only a case of assembly of manufactured goods into a system. This cannot be compared to a fabrication where a

group of machines themselves may be combined to constitute a new machine which has its own identity/marketability and is dutiable (e.g. a paper

making machine assembled at site and fixed to the earth only for the purpose of ensuring vibration free movement)

(e) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components

and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods.....

(f) In the Division Bench's judgment of this Court in the case of ""Bharti Tele-Ventures Ltd. and Sunil Bharti Mittal Vs. State of Maharashtra,

(2007 Vol. 109(1) Bom. L.R. 0595)"" the issue was whether the construction of cell sites and erection of towers is included in ""building"" and/or

development"" within the meaning of Maharashtra Regional and Town Planning Act, 1966 (for short "MRTP Act") or other Corporations Act. The

issue arose in the context of a Notification dated 4.7.2005 issued by the Government of Maharashtra u/s 154 of the MRTP Act by which the

Government of Maharashtra had sought to amend its earlier order dated 9.10.1996 thereby authorising various Municipal Corporations in the

State to charge retrospectively from 9.10.1996 a premium at the rate of land value as per the ready reckoner for the area occupied by the cabin,

the tower for granting permission u/s 45 of the MRTP Act to the petitioners for installing the semi permanent structures/cabins on the top of the

building for housing Base Station/Telephone Connector to set up a cellular mobile telecommunication system. In this context the Division Bench in

interpreting the provisions of MRTP Act and considering the nature of cabins and the towers in paragraph 26 has observed as under:-

26..... At the same time, the tower and the cabin would be within the meaning of the ""building"" as well as the ""development"" under the BPMC

Act (including other Corporation Act) and the MRTP Act respectively. The expression ""development"" under the MRTP Act clearly includes

erection of any structure as well as any material or structural change in the building or its precinct. The term ""precinct"" would refer to the area

adjacent as well as adjoining the building.

(g) In the case of The Municipal Corporation of Greater Bombay and others Vs. The Indian Oil Corporation Ltd., the issue which fell for

consideration before the Supreme Court was as to whether storage tanks for petroleum products are ""land"" within the meaning of Section 3(r) or

buildings"" as defined u/s 3(s) of the Bombay Municipal Corporation Act, 1988 and are exigible to property tax. It was held that the petroleum

storage tanks are structures or things attached to the land and were exigible to the property tax. In paragraphs 32 and 33 it was observed as

under:-

32. The tanks, though, are resting on earth on their own weight without being fixed with nuts and bolts, they have permanently been erected

without being shifted from place to place. Permanency is the test. The chattel whether is movable to another place of use in the same position or

liable to be dismantled and re-erected at the later place? If the answer is yes to the former it must be a moveable property and thereby it must be

held that it is not attached to the earth. If the answer is yes to the latter it is attached to the earth. For instance a shop for sale of merchandise or

eatables is a structure. The same could be sold by keeping in a push cart which has its mobility from place to place. Merely because it is stationed

at a particular place and business was carried on, it cannot be said that push cart is a shop. The fact that no nuts and bolts were used to imbed the

tank to the earth by itself is not conclusive. Though the witness stated that the tank is capable of being shifted, as a fact the tanks were never shifted

from the places of erection. By scientific process, the tanks stand on their own weight on the earth at the place of erection as a permanent

structure.

33. The petroleum products are being stored through pipes and are taken out by mechanical process. The operational mechanisation also though

relevant, is not conclusive. The rateable value is based on the rent, which the building or land is capable to fetch. Due to erection of the tanks

whether the value of the demised property had appreciated or not, is also yet another consideration. Undoubtedly, when the tanks are erected and

used for commercial purposes, the value of the demised property would get appreciated. The annual letting value is capable of increase. However,

the rate of increase is a question of fact but the fact remains that the value of the land gets increased by virtue of erection of the storage tanks.

Considering from this perspective we have no hesitation to hold that the petroleum storage tanks are structures or things attached to the land within

the definition of Sections 3(s) and 3(r) of the Act. Thereby they are exigible to property tax.

(emphasis supplied)

(h) In the case of Cellular Operators Association of India and Others Vs. Municipal Corporation of Delhi etc. etc., , in the context of levy of fee by

the Municipal Corporation of Delhi for grant of permission for installation of temporary structures/towers on roof tops for providing Cellular Basic

Mobile Phone Services, the learned Single Judge of the Delhi High Court held that cellular towers would fall within the definition of ""buildings"" and

hence, the Municipal Corporation of Delhi had jurisdiction not only to prohibit installation/erection of such towers without its permission and that

such installation requires approval. In paragraphs 38 and 40 the learned Single Judge has observed thus:-

38. The next question to be determined is as to the nature of the said towers i.e. whether they are merely apparatus/equipment or their installations

and functioning falls in the domain of the MCD. The ASG has sought to justify installation and operation of the said towers as an activity which can

be licenced by the MCD. However MCD can insist upon such licence/permission only if empowered in this regard. The DMC Act does not

permit the MCD to require licence for any and everything done within its jurisdiction. The activities/purposes which cannot be W.P. (C) 3267,

3423, 439/10, 13476, 13863, 14178, 14199/09, 2382, 4084/10 Page 55 of 68 carried out without licence are specified in Section 417 of the

Act. No specific reference to any provision of the MCD Act prohibiting installation of an antenna without a licence has been pointed out, nor is

found. Section 417 is also not omnibus. Licence is required for use of premises for the purposes specified in Part-I of the Eleventh Schedule to the

DMC Act or for any purpose which in the opinion of the Commissioner is/are dangerous to life, health and property or likely to create nuisance or

for keeping horses, cattle or any animals or birds or for storing articles specified in Part-II of the Eleventh Schedule. I have gone through the

Eleventh Schedule carefully; even by extending any entry therein, it is not possible to include such installation of towers therein. As far as requiring

licence for the towers for the reason of the Commissioner forming an opinion of the same being dangerous to life, health or property or likely to

create nuisance is concerned, neither is there any opinion in this regard nor can it be at this stage said that such installation will fall in the said

category. The reliance on Section 430 is misconceived without showing that licence or written permission is needed for such licence. I am thus

W.P. (C) 3267, 3423, 439/10, 13476, 13863, 14178, 14199/09, 2382, 4084/10 Page 56 of 68 unable to hold that the Commissioner under the

Act is empowered to prevent installation of such towers without a licence.

40. I am however firmly of the view that the said towers definitely fall within the definition of building which includes within its ambit a structure of

metal or other materials. What else is a tower but a metallic structure. The contention of the senior counsels for the petitioners that a building has to

be necessarily a house/habitable cannot be accepted.

(i) In the decision of the Division Bench of this Court in the case of ""Commissioner of C.Ex., Mumbai-IV Vs. Hutchison Max Telecom P. Ltd.,

(2008(224) E.L.T. 191 (Bom.)"" , the issue which fell for consideration of the Division Bench inter alia was pertaining to transmission tower set up

by the assessee and whether the setting up of the towers amounted to manufacture as the towers being a new product with a distinct name,

characteristics and use and is distinct from the components used in the manufacture as contended on behalf of the Revenue. The Division Bench

after making the following observations in paragraphs 7 to 9 held that the towers being not moveable, saleable and marketable, they would not be

subject to excise duty. Paragraphs 7 to 9 reads as under:-

7. It is, therefore, clear that the goods must be excisable or that the goods covered having the attributes of excisable goods as understood in

Excise Law which includes marketability. The real question, therefore, that arises is whether, the Transmission Apparatus is goods and secondly if

even so whether they are marketable. The Commissioner noting the various equipments held that the transmission apparatus meets the test of

manufacture. The Commissioner further noted the various equipments installed at the BTS site room.

The following equipments/apparatus were found to be installed in BTS site room:-

- a) Microwave Antennas
- b) Base station controller/Base Transceiver station
- c) Microwave Terminal.
- d) GSM Antennas
- e) Power supplement with rechargeable battery back up.
- f) Air conditioners.
- g) Transmission tower was erected at the top of the building. h) The tower was fitted with microwave antennas.
- i) The BTS/BSC was installed in prefabricated building object.

Based on this material the Commissioner held that what emerges is a new commodity. The argument advanced that only ""Base station

controller/Base transceiver station, cell site/Mobile Switching centre"" were connected with the transmission and reception signals and other

equipments were not part of the same, the argument was held as not acceptable as without the tower, UPS, Cable trays, AC., etc., the BTS would

not be in a position to function as transmitting and receiving apparatus. The contention of the assessee that various equipments installed at site were

individual machine was rejected. The Commissioner further held that with the assembly of various equipment installed what emerges is a

commodity with a distinct name, identity, character and use; distinct from inputs and classifiable under chapter 8525 of Central Excise Tariff and

the same is distinct and separate from the various equipments which have gone into manufacture of the above transmission apparatus. The

argument that after installation of BTS of cell site it becomes immovable property was rejected. The statement of Narayan in his statement dated

28/1/2004 was partly relied upon to hold it was not immovable property.

8. The Learned Tribunal re-examining the various aspects of what is described as determination of levy of duty of base station, noted that the

appellant is engaged in providing Mobile Telecommunication Service (MTS) and is based on global system for mobile communication (GSM). The

infrastructure for GSM is similar to other networks. The Tribunal then set out the various infrastructure required for GSM and noted that GSM

Architecture consists of Radio Station Sub Systems (constitution of MS, BTS, & BSCs) which are networked with the operation support

subsystem (constituted MSCs) which networked with the Public network. The entire sub systems of BTSs and BSCs or MSCs and the number

of constituents would depend on the Geographical area covered by the Cellular Network and there is no fixed designation numbers to constitute a

component of transmission apparatus. It is not necessary to set out the other facts in detail considering the Tribunal has in extenso set out the facts.

The Tribunal relying on para 20 in the case of Triveni Engineering & India Ltd. (supra) on the test of marketability, held that the so called

BTS/BSC site erected, installed and commissioned by the contractors of the company cannot be construed as marketable goods manufactured by

the appellant since they cannot go to the market as such BTS/BSC site are not marketable. It also held that the test of marketability would also not

be satisfied for another reason being, that for the installation of every BTS/BSC, licence from WPC/SACFA a wing of Department of

Telecommunications, Government of India has to be obtained which invariably is user specific and site specific, meaning thereby if one wishes to

sell the site to another user, it is not permissible under law, as the approval granted by the aforesaid authority for the frequency allocation and the

site is for the user only and the purchaser would have to reapply for the license for that site. It cannot be sold/purchased marketed unattended and

be equated to marketable goods. BTS/BSC site, therefore, are neither marketable nor capable of being marketed. The learned Tribunal also held

that the appellants are not manufacturers and they are engaged in providing cellular mobile services by virtue of a license granted by the

Government of India under the provisions of section 4 of the Indian Telegraph Act, 1885. Thus, their activity is purely service oriented. The

Tribunal held that in such circumstances, the activity of installing and commissioning cell site cannot be an activity of either manufacture and no

marketable goods arise. For the aforesaid reasons, the appeal was allowed and accordingly, the orders were set aside.

9. It is not necessary for us to answer the issue as to whether the activities is purely service and consequently, the appellants are not manufacturers.

We proceed on the footing that what has been assembled and installed is a new commodity having a distinct name from the components from

which it was assembled. The question is whether this new commodity is marketable. We have already considered the test of marketability as laid

down by the Supreme Court in Triveni Engineering & India Ltd. (supra) and also Moti Laminates Pvt. Ltd. (supra). At this stage, we also note that

we proceed on the footing by ignoring the second finding of marketability recorded by the Tribunal namely that BTS/BSC is not marketable as

licence is required from the Department of Telecommunication, Government of India. The facts on record would indicate that the equipments

erected are embedded in the earth or on a building. The Tribunal noted that revenue does not contest or dispute the fact that whenever BTS/BSC

site has to be relocated, all the equipments like BTS/BSC, Microwave Equipment, batteries, control panels, air conditioners, UPS, tower antennae

are required to be dismantled into individual components, then they are to be moved from the existing site and reassembled at new site. This

involves damages to certain parts like cable trays, etc. which are embedded/fixed to the Civil structure as also the BTS microwave equipment

itself. All the components of the new product cannot be shifted as an illustration the room housing the equipment. This act of dismantling from the

permanent site would render such goods not marketable. Apart from that the goods cannot be re-erected as in the previous place as the

requirement of each place is different. Further, from the statement of Narayan as set out in the order of the Commissioner, it may be noted that he

had stated that regarding installation of BTS the designing team after survey identified the location as per the requirements of the local coverage

needs, determining the shelter location, fabrication of I-beam and pole location. It may be possible for us to agree that by installing or erecting, a

new product comes into being with a different name in the market from its components. However, as discussed the test of marketability is not

satisfied. The product cannot be shifted without damage. Apart from that various items and components are embedded in the earth. The product,

therefore, is immovable.

The order dated 15/1/2002 of Central Board of Excise & Customs, New Delhi itself regards items assembled and erected on the site and attached

to the foundation on earth which cannot be dismantled without substantial damage to their components and thus, cannot be reassembled, as non

excisable. The new product would not be considered as movable and, therefore, will not be an excisable good. Para 6 of the said circular will not

apply to the facts of this case. In our opinion, therefore, though a new product comes into existence, yet as it is not movable, saleable and

marketable, it would not be subject to excise duty.

(j) In the decision of the Supreme Court in the case of Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi-III, "" the issue which fell

for consideration of the Supreme Court in this decision was whether the Iron and Steel structures manufactured and used captively in the factory

for installation of the Sugar manufacturing plant by the assessee can be classified as capital goods under Rule 57Q of the Central Excise Rules,

1944. The assessee was a manufacturer of sugar and molasses and was availing Modvat credit facility on the excise duty paid for the capital goods

used in the factory for manufacturing process under Rule 57Q of the Central Excise Rules. In April, 1999, the assessee, in order to modernize the

manufacturing process of sugar and molasses, has installed new machineries by replacing the old one. However, certain machineries like cane

milling plant, clarification plant, evaporator and pan boiling plant, power generation plant etc. which were specified as capital goods in terms of

Serial no. 2 and 3 of the Table below sub-rule (1) of Rule 57Q of the Rules, required the support of structural items for their installation. In view of

this, the assessee started the manufacturing of iron and steel structures, after purchasing excise duty paid iron and steel sheets, angels, nuts and

bolts etc. for the installation of the said machineries. Thus, iron and steel structures were classified under sub-heading 7308.90 of Chapter 73 as

capital goods and claimed exemption under Notification date 16.3.1995 which exempts capital goods as defined in Rule 57Q of the Rules,

manufactured and used within the factory from the excise duty leviable on such goods. The Assistant Commissioner, Central Excise had issued a

show cause notice to the assessee for short payment of excise duty claiming that the notification is not applicable to iron and steel structures and

hence, exemption was not available to the assessee. After considering the reply as filed by the Assessee, the Assistant Commissioner confirmed the

duty demand as also imposed a penalty on the ground that notification was not applicable to the iron and steel structures as they are neither inputs

used in relation to manufacture of final products nor capital goods as defined in column 2 of the table given below sub-rule (1) of Rule 57Q of the

Rules. In appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer and rejected the appeal of the assessee on the ground

that the iron and steel structure formed parts of the building. In the appeal to the Tribunal by the Assessee the Tribunal confirmed the duty demand.

The Supreme Court assailing the findings of the Tribunal contended that iron and steel structures were fabricated by the assessee in its factory and

subsequently used within the factory in installation and effective functioning of sugar manufacturing machineries which fall under Serial nos. 2 and 3

of the Table below Rule 57Q of the Rules as components of goods. It was contended that iron and steel structures are in the form of components

in the sugar manufacturing plant and therefore, such structures are capital goods in terms of the Rules. Taking into consideration several judgments

arising in the context, the Supreme Court in paragraphs 17, 18, 19 and 24 has observed as under:-

17. The issue for our consideration, as we have already noticed, is whether the Iron and Steel Structures are components of the Capital Goods

specified in the Table below Rule 57Q of the Rules. This issue can be resolved by looking into the literature which gives some glimpse how sugar is

manufactured in a sugar industry and what is the essential machinery for manufacture of sugar.

18. The process of making sugar commences from the stage of collecting the harvest, cleansing and grinding, juicing, clarifying, evaporation,

crystallization, refining and lastly separation and packing. For the purpose of manufacturing cane sugar in a sugar industry, the essential machineries

that are required are sugar presses, diffusers, vacuum pans, evaporators and sugar handling equipments, crystallizers, sugar grader, elevator and

cooling tower. We can call these machineries as essential items in a sugar manufacturing plant. The assessee also fabricates Iron and Steel

Structures for installation of the aforementioned equipments. Even according to learned senior counsel Sri Lakshmikumaran, these Iron and Steel

Structures are used for effective functioning of Sugar Manufacturing Plant. Under the Notification, the Central Government had exempted duty in

respect of ""capital goods"", as defined in Rule 57 Q of the Rules if they are utilized in a place where such goods are manufactured and used within

the factory of production. The Notification specifically states that what is exempted under the Notification are ""capital goods"" as defined in Rule

57Q. Rule 57Q specifies five categories of items as capital goods. It is not the case of the assessee or its learned counsel that the exemption

claimed was on Items 1 to 4 of the Table to Rule 57Q but as components which would fall under item No. 5 of the Table to Rule 57Q. Therefore,

in order to get the benefit of non excise duty on Iron and Steel Structures, it had to be established by the assessee that Iron and Steel Structures

are utilized as component parts for the finished products, viz. vacuum pan, crystallizers, sugar grader, elevator, cooling tower etc.

Our Analysis And Conclusion:

19. It appears to us, in the light of the meaning of the expression `component parts" that the iron and steel structures are not essential requirements

in the sugar manufacturing unit. Anything required to make the goods a finished item can be described as component parts. Iron and Steel

structures would not go into the composition of vacuum pans, crystallizers etc. If an article is an element in the composition of another article made

out of it, such an article may be described as a component of another article. Thus, structures in question do not satisfy description of

`components". Therefore, in our opinion, the Tribunal was right in the view it took.

30. In the decision of 2001 (138) ELT 1063 the appellant was a manufacturer of sugar and availed a MODVAT credit on the joints, channels,

angles and MS Beams used in fabricating supporting structures for installation of equipments such as vacuum pan, crystallizers, sugar grader,

elevator, etc., HR plates (black steel) are used in boiler of sugar plant to keep temperature high, MS bars, shapes and sections are used for

erection of new cooling tower, chequered plates and ITR plates are used to construct the platforms, the cane carrier chain and spares are used to

transfer the raw material/semi processed material from stage to other, as the capital goods in the terms of Rule 57Q, treating these items as the

parts and components of the plant. The question which arose before the Tribunal was that whether these items used for fabricating structures to

support and install various machineries of the sugar plant are capital goods in terms of the Rule 57Q. The Tribunal while allowing the MODVAT

credit found that these items, except MS sections and shapes, used for raising structure to support the various machines, parts of machineries of

the plant would be covered by the explanation to Rule 57Q as capital goods. The Tribunal referred to its own decision in *Malavika Steel Limited*'s

case and without semblance of any discussion, has partly allowed the assessee's appeal. In view of our findings and the conclusion in the earlier

part of the judgment, we cannot agree with the reasoning of the Tribunal.

The reliance of the aforesaid judgment on behalf of the Revenue is quite appropriate. The enunciation of law as laid down in the judgment clearly

goes to show that the towers are immovable property and non excisable and hence, can neither be regarded capital goods so as to fall within the

definition of "capital goods" appearing in Rule 2(a) of the Credit Rules, nor can be categorized as "input" applying Rule 2(k) of the Credit Rules.

31. In the light of the aforesaid discussion we examine whether on the rules as they stand the appellants would be entitled to the credit of the duty

paid on the item in question on the output service namely the cellular service. We may observe that a plain reading of the definition of "capital

goods" as defined under Rule 2(a)(A) of the Credit Rules show that all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90,

heading No. 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Central Excise Tariff Act;

pollution control equipments; components, spares and accessories of the goods specified at sub clauses (i) and (ii) which are used either in the

factory for manufacture of final products but does not include any equipment or appliance used in the office and those used for providing output

service. Further in the CKD or SKD condition the tower and parts thereof would fall under the chapter heading 7308 of the Central Excise Tariff

Act. Heading 7308 is not specified in clause (i) or clause (ii) of rule 2(a)(A) of the Credit Rules so as to be capital goods. Further the Appellants

contention that they were entitled for credit of the duty paid as the Base Transceiver Station (BTS) is a single integrated system consisting of

tower, GSM or Microwave Antennas, Prefabricated building, isolation transformers, electrical equipments, generator sets, feeder cables etc. and

that these systems are to be treated as "composite system" classified under Chapter 85.25 of the Tariff Act and be treated as "capital goods" and

credit be allowed, also is not acceptable. It is clear that each of the component had independent functions and hence, they cannot be treated and

classified as single unit. It is clear that all capital goods are not eligible for credit and only those relatable to the output services would be eligible for

credit. The goods in question in any case cannot be held to be capital goods for the purpose of CENVAT credit as they are neither components,

spares and accessories of goods falling under any of the chapters or headings of the Central Excise Tariff Schedule as specified in sub-clause (i) of

the definition of capital goods. Hence a combined reading of sub-clause (a)(A) (i) and (iii) and sub-rule (2) indicates that only the category of

goods in Rule 2(a)(A) falling under clause (i) and (iii) used for providing output services can only qualify as capital goods and none other.

Admittedly the goods in question namely the tower and part thereof, the PFB and the printers do not fall within the definition of capital goods and

hence the appellants cannot claim the credit of duty paid on these items. Even applying the ratio of the judgments as relied upon by the appellants

as observed above the said goods in the present context cannot be classified as capital goods.

32. As regards second contention of the appellants that the tower and part thereof, the PFB and the printers would also falls under the definition of

"input" as defined Rule 2(k) also cannot be sustained. The definition of inputs as defined under rule 2(k) includes all goods, except light diesel oil,

high speed diesel oil, motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or

indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final

products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used

in or in relation to manufacture of final products or for any other purpose, within the factory of production, and as provided in sub-clause (ii) all

goods except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output

service. Explanation (2) of sub-rule (k) is also which provides that input include goods used in the manufacture of capital goods which are further

used in the factory of the manufacturer. A plain reading of the definition of input indicates that in the present context, clause (i) of Rule 2(k) may not

be of relevance as same pertains to manufacturing activity and pertains to goods used in relation to manufacture of final product or any other

purpose within the factory of production. Sub-clause (ii) has been referred to as relevant by the appellant as the same pertains to goods except

light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service. Tower and

parts thereof are fastened and are fixed to the earth and after their erection become immovable and therefore cannot be goods

33. The alternative contention of the appellant is that tower is an accessory of antenna and that without towers antennas cannot be installed and as

such the antennas cannot function and hence the tower should be treated as parts and components of the antenna. It is urged that antennas fall

under chapter 85 of the schedule to the Central Excise Tariff Act and hence being capital goods used for providing cellular service falling under rule

2(a)(A)(iii) as part of capital goods falling under rule 2(a)(A)(i) towers become accessories of antenna and should be held as capital goods for

availing of credit of duty paid. The argument at the first blush appeared to be attractive however a deeper scrutiny shows that the same is without

substance. It would be misconceived and absurd to accept that tower is a part of antenna. An accessory or a part of any goods would necessarily

mean such accessory or part which would be utilized to make the goods a finished product or such articles which would go into the composition of

another article. The towers are structures fastened to the earth on which the antennas are installed and hence cannot be considered to be an

accessory or part of the antenna. The position in this regard stands fortified from the decision of the Supreme Court in the case of *Saraswati Sugar*

Mills Vs. Commissioner of Central Excise, Delhi-III, From the definition of the term "input" as defined in 2 (k) of the Credit rules it is clear that the

Appellant is a service provider and not a manufacturer of capital goods. A close scrutiny of the definition of the term capital goods and input

indicates that only those goods as used by a manufacturer would qualify for credit of the duty paid. As observed hereinabove a service provider

like the appellant can avail of the credit of the duty paid only if the goods fall within the ambit of the definition of capital goods as defined under

Rule 2(a)(A) of the Credit Rules. The contention of the appellant that they are entitled for the credit of the duty paid towers and PFB and printers

is defeated by the very wording of the definition of input. In any case towers and PFB are in the nature of immovable goods and are non-

marketable and non-excisable. If this be the position then towers and parts thereof cannot be classified as inputs so as to fall within the definition of

Rule 2(k) of the credit rules. We clarify that we are not deciding any wider question but restricting our conclusion to the facts and circumstances

which have fell for our consideration in these appeals.

34. We therefore find no infirmity or illegality in the findings as recorded by the tribunal in holding that the subject items are neither capital goods

under Rule 2(a) nor inputs under Rule 2(k) of the Credit Rules and hence CENVAT credit of the duty paid thereon was not admissible to the

appellants. The appeals are devoid of merit and accordingly stand rejected. No orders as to costs.