

# What's New

## News Flash



November 2018

### **Delhi HC allows CENVAT credit on pre-fabricated towers, shelters and accessories to telecom operators and tower companies**

#### **Facts**

The appellants are cellular telecom operators and passive infrastructure providers. They availed CENVAT credit of excise duty paid on purchase of towers and shelters/ pre-fabricated structures, which was denied by the tax authorities. The larger bench of the CESTAT had earlier decided the matter against the appellants, *inter alia*, relying on the Mumbai High Court's (HC) decision on the issue denying the credit. Consequently, an appeal was filed in the HC.

#### **High Court's decision<sup>1</sup>**

The Delhi HC decided the matter in favour of the appellants. The major observations in the decision, which related to whether such pre-fabricated towers, structures, etc., qualify as immovable property, are as follows:

- i. The CESTAT did not appreciate the permanency test as laid down by the Supreme Court (SC) in *Solid and Correct Engineering*<sup>2</sup>. The towers are merely fastened to the civil foundation to make them wobble-free and ensure stability. Further, such towers can be unbolted and reassembled without any damage in a new location. Accordingly, the towers cannot be considered as permanently attached to the earth, and consequently, immovable property.
- ii. The towers, shelters, etc., qualify as capital goods, as a part/ component or alternatively, as accessories to the transmission apparatus. Further, the towers etc. also qualify as inputs, as they are used for providing services.
- iii. The contention that the appellants have received mild steel angles/ channels, which are not eligible for credit, does not seem to be correct, as these towers are supplied in completely knocked down form, which are used for providing services.
- iv. The entitlement of CENVAT credit is to be determined at the time of receipt of goods and the fact that towers are later on fixed to the earth for use would not make it a non-excisable commodity.
- v. The emergence of an immovable structure at an intermediate stage is of no consequence and the credit can be claimed even in such cases.

#### **The takeaways**

CENVAT credit on telecom towers has been a litigative issue for the telecom industry, with substantial financial implications. The HC, in this decision has accepted the position adopted by the industry and taken a different view from the Mumbai HC, which had decided the matter against the litigants. The industry awaits the final ruling from the SC, which will finally settle the issue.

<sup>1</sup> CEAC 12/2016, C.M. APPL. 37207/2016 and others

<sup>2</sup> 2010-TIOL-25-SC-CX

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