

Legal Communiqué

Information about important decisions



Department of Goods and Services Tax Government of Maharashtra

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Hon'ble Supreme Court
Judgment

Legal Communiqué Case No. 1

**Commissioner, CGST Appeal-1, Delhi etc.
Vs
M/S Bharti Airtel Limited**

**SUPREME COURT OF INDIA SPECIAL LEAVE
PETITION (CIVIL) DIARY NO. 35416/2025**



Hon'ble Delhi High Court
Judgment

(Telecommunication towers are to be treated as movable property under the GST law).

The Court's decision reinforces that telecommunication towers are to be treated as movable property under the GST law. In Vodafone Mobile Services and Bharti Airtel, the courts had already examined this issue under the older Cenvat Credit Rules, 2004 and held that telecom towers are movable, not immovable, since they can be dismantled, shifted, and are not permanently embedded in the ground.

Facts of the Case:

A Special Leave Petition (SLP) was filed by the Commissioner, CGST Appeal-1, Delhi against M/s Bharti Airtel Limited, Indus Towers Limited, and ElevarDigitel Infrastructure Pvt. Ltd. The matter arose from writ petitions [WP(C) No. 13211/2024, WP(C) No. 14710/2024, and WP(C) No. 16477/2024] decided by the Delhi High Court through a common final judgment and order dated 12 December 2024.

The SLP was filed with a delay of 105 days, but the Hon'ble Supreme Court condoned the delay and agreed to hear the petitions (IA No. 180588/2025 was allowed).

The Hon'ble Supreme Court held that we are not satisfied that these are fit cases to exercise our discretion under Article 136 of the Constitution of India. Accordingly dismissed the petitions.

Facts before the Hon'ble Delhi High Court in Bharti Airtel Ltd etc: -

The question before the court was of the characterization of telecommunication towers as immovable property and thus falling within the ambit of Section 17(5) of the CGST Act and being ineligible for input tax credit.

While Bharti Airtel assailed the validity of an Order-in-Original dated 24 March 2023 as affirmed in appeal in terms of the order dated 31 May 2024 passed by the Commissioner of Central Tax Appeals-1, the writ petitions preferred by Indus Towers Limited and ElevarDigitel Infrastructure Pvt Ltd, impugned Show Cause Notices laying similar allegations.

For purposes of brevity, the Hon. Court proposed to take note of the salient facts as they obtain in the writ petition preferred by Indus Towers. The impugned SCN under Section 74 of the CGST Act raised a demand of tax along with interest and penalty for the period 01 July 2017 to 31 March 2024 relating pan India to 48 Goods and Services Tax registrations of the writ petitioner. Indus Towers explains that it is engaged in the business of providing passive infrastructure services to telecommunication service providers.

The impugned SCNs' sought to deny input tax credit on inputs and input services used for setting up passive infrastructure on the ground that the same were used in the construction of telecommunication towers and consequently falling within the ambit of clause (d) of Section 17(5) of the CGST Act.

Petitioner's contention:

Petitioners submitted that telecommunication towers are moveable items of essential equipment used in telecommunications which can be dismantled at site and thus capable of being moved. It is explained that it is only the concrete structure on which those telecommunication towers are placed which could be treated as an immovable element of that equipment whereas the steel/metal structures are capable of being shifted to other locations.

The erection of those towers on a concrete base is essentially for the purposes of according stability to the towers and that in itself would not detract from their basic characteristic of being items of equipment which are principally moveable. In view of the above, they would contend that the assumption that the installation of these towers results in the establishment of an immovable structure is misconceived.

The question of whether telecommunication towers are liable to be treated as immovable property is no longer *res integra* and stands conclusively settled in light of the recent decision rendered by the Hon'ble Supreme Court in *Bharti Airtel Ltd vs. Commissioner of Central Excise, Pune*. It was pointed out that *Bharti Airtel*, in fact, affirms the view that was taken by this Court in *Vodafone Mobile Services Limited vs. Commissioner of Service Tax, Delhi*, albeit in the context of Rule 2 of the *Cenvat Credit Rules, 2004*. It was submitted that telecom towers, as the Hon'ble Supreme Court in *Bharti Airtel* holds, are intrinsically moveable items and were liable to be treated as capital goods entitled to be viewed as inputs under Rule 2(k) of the 2004 Rules.

observations & Judgement of the Hon'ble Delhi High Court:

While the conclusions rendered in *Bharti Airtel* as well as by this Court in *Vodafone Mobile Services* is not questioned by the respondents, they would seek to distinguish those decisions essentially in light of the Explanation which stands appended at the end of Section 17 of the CGST Act and the exclusion of telecommunication towers specifically in terms thereof.

"The Hon'ble Supreme Court in *Bharti Airtel* was principally concerned with whether mobile service providers who pay excise duties on various items of infrastructure including the erection of mobile towers and peripherals would be entitled to avail the benefit of the 2004 Rules. The High Courts, as the Hon'ble Supreme Court noted, had taken divergent views with the Hon'ble Bombay High Court having ruled against the Mobile Service Providers ["MSPs"]. Our Court, however, had held to the contrary.

While examining the principal question which arose, the Hon'ble Supreme Court firstly took note of the judgment rendered in *Vodafone Mobile Services* by this Court and which had found that it would be incorrect to characterize mobile towers as immovable property since they would not satisfy the test of permanency or be liable to be viewed as something attached to the earth. This becomes evident from a reading of Paras 10.9.1 and 10.9.2 of *Bharti Airtel* and which are extracted hereinbelow:-

"10.9.1. As regards the first issue as to whether towers, shelters and accessories used by the Assessee for providing business support services were immovable property or not, the Hon'ble Delhi High Court, after examining the relevant statutory provisions under Section 3(36) of the General Clauses Act, 1897 and Section 3 of the Transfer of Property Act, 1882, elaborately discussed the concept of immovable property, referring to a number of decisions and applied the

permanency test to come to the definitive finding that the entire tower and shelter are fabricated in the factories of the respective manufacturers and thereafter, are supplied in CKD condition to the mobile service providers. It was held that these are merely fastened to the civil foundation to make these wobble free and stable. It was also held that tower and PFB can be unbolted and reassembled without any damage and relocated to a new site. These are thus not permanently annexed to the earth for the beneficial enjoyment of the land of the owner. It was thus held that these are not immovable properties as held by the Tribunal.

- 10.9.2. Having held that these are not immovable but moveable, the Hon'ble Delhi High Court went on to examine the second issue as to whether the Assessee is entitled to claim CENVAT Credit on the tower and PFB either as "capital goods" or as "inputs" in terms of Rule 2(a)(A)(i) or Rule 2(k) of the CENVAT Rules, and whether these would qualify as accessories within the meaning of Rule 2(a)(A)(iii)."

After reviewing past precedents rendered in the context of what would constitute immovable property the Hon'ble Supreme Court identified following precepts :

- **Permanency Test:** If the property can be dismantled and relocated without any damage, the attachment cannot be said to be permanent but temporary and it can be considered to be movable.
- **Functionality Test:** If the article is fixed to the ground to enhance the operational efficacy of the article and for making it stable and wobble free, it is an indication that such fixation is for the benefit of the article, such the property is movable.
- **Intention Test:** If the parties intend that the property in issue is for permanent addition to the immovable property, it will be treated as immovable. If the attachment is not meant to be permanent, it indicates that it is movable.
- **Marketability Test:** If the property, even if attached to the earth or to an immovable property, can be removed and sold in the market, it can be said to be movable..

The Hon'ble Supreme Court ultimately came to render the following conclusions :-

- "11.9.9. Applying the tests of permanency, intendment, functionality and marketability, it is quite clearly evident that these items are not immovable but movable within the meaning of Section 3 of the Transfer of Property Act, read with Section 3 (36) of the General Clause Act.

If we consider the nature of annexation of the tower to the earth, it is seen that the annexation is not for permanent annexation to the land or the building as the tower can be removed or relocated without causing damage to it.

It is also to be noted that the attachment of the tower to the building or the land is not for the permanent enjoyment of the building or the land.

Further, the tower is fixed to the land or building for enhancing the operational efficacy and proper functioning of the antenna which is fixed on the tower by making it stable and wobble free.

The fact that the tower, if required can be removed, dismantled in the CKD and SKD and sold in the market is not disputed.

Application of the tests evolved and discussed above on these items clearly points to the movability as opposed to immovability of these items. We are, thus, of the view that mobile towers and PFBs are movable properties and hence, "goods".

- 11.11.12. We, therefore, agree with the conclusion arrived at by the Hon'ble Delhi High Court that towers and shelters (PFBs) support the BTS/antenna for effective transmission of mobile signals and thus enhance their efficiency and since these articles are components/accessories of BTS/antenna which are admittedly "capital goods" falling under Chapter 85 within sub-clause (i) of Rule 2(a)(A) of CENVAT Rules, these items consequently are covered by the definition of "capital goods" within the meaning of sub-clause (iii) read with sub-clause (i) of Rule 2(a)(A) of CENVAT Rules. Further, since these are used for providing output service, i.e., mobile telecommunication service, and since these are "capital goods" received in the premises of the provider of output service as contemplated under Rule 3(1)(i), the Assessee would be entitled to CENVAT credit on the excise duties paid on these goods.
- 11.12.6. Having held that the tower and pre-fabricated buildings (PFBs) are "goods" and not immovable property and since these goods are used for providing mobile telecommunication services, the inescapable conclusion is that they would also qualify as "inputs" under Rule 2(k) for the purpose of credit benefits under the CENVAT Rules.
- 11.13. For the foregoing reasons, we agree with the conclusions arrived at by the Hon'ble Delhi High Court and uphold the judgment rendered by it in Vodafone (supra)".

It is thus apparent that in Bharti Airtel, the Hon'ble Supreme Court has conclusively held that telecommunication towers cannot be construed as being immovable property.

It becomes apparent that the stand taken by the respondents, namely, of telecommunication towers being liable to be viewed as immovable property is rendered wholly untenable. As the Hon'ble Supreme Court held in Bharti Airtel, telecommunication towers would clearly not qualify the five fundamental precepts which define an immoveable property. It was found that they neither qualify the test of permanency nor can they be said to be "attached to the earth". Mobile towers, it was held, could be dismantled and moved and that they were never erected with an intent of conferring permanency. Their placement on concrete bases was only to enable those towers to overcome the vagaries of nature. Therefore, there cannot possibly be a doubt with respect to telecommunication towers being moveable property.

Application of Section 17(5):

The specific exclusion of telecommunication towers from the scope of the phrase "plant and machinery" would not lead one to conclude that the statute contemplates or envisages telecommunication towers to be immovable property. Telecommunication towers would in any event have to qualify as immovable property as a pre-condition to

fall within the ambit of clause (d) of Section 17(5). Their exclusion from the expression "plant and machinery" would not result in it being concomitantly held that they constitute articles which are immovable.

The decision in Vodafone Mobile Services as well as Bharti Airtel, though rendered in the context of the 2004 Rules, have on application of the generic principles which would apply to the concept of immovable property, have in explicit terms come to conclude that telecommunication towers are liable to be treated as movable. In view of the aforesaid, we have no hesitation in coming to the conclusion that telecommunication towers would not fall within the ambit of Section 17(5)(d) of the CGST Act. The denial of input tax credit, consequently, would not sustain. Accordingly, and for all the aforesaid reasons, W.P.(C) 13211/2024 is allowed and the impugned orders dated 24 March 2023 and 31 May 2024 is quashed. Since the SCNs impugned in W.P.(C) 14710/2024 and W.P.(C) 16477/2024 proceed on a wholly untenable premise of mobile towers being immovable property, those notices also held to be unsustainable.

Hon'ble Supreme Court's ruling in present case:

The Hon'ble Supreme Court has dismissed the Special Leave Petition (SLP) filed by the tax authorities challenging the High Court's decision, stating that there was no sufficient reason to interfere.

The High Court's ruling stands confirmed, and telecom towers are treated as movable property for the purpose of claiming ITC.

Way Forward:

Since telecom towers are movable property, Section 17(5)(d) CGST Act doesn't apply, and telecom companies are entitled to Input Tax Credit.



Legal Communique Case No. 2

**M/s. Sundyne Pumps and Compressors India Private Limited
V/s.
Union of India**

BOMBAY HIGHT COURT WP (C) No: 15228 of 2023

(Merely being Subsidiary does not qualify as an agent under GST)

Facts of the Case:

The petitioner is engaged in the business of providing engineering services for industrial and manufacturing projects, specialized office support services, management services, maintenance and repair services etc. During the period of dispute, petitioner entered into agreements with four companies for supply of goods and services on principal-to-principal basis. All these companies are a part of the Sundyne Group but are independent legal companies incorporated under the laws of the respective jurisdiction. All the aforesaid companies have independent board of directors and decision-making process and do not operate and control the business of each other.

Petitioner made two refund applications for claiming the refund of unutilized Input Tax Credit (ITC) on account of export of goods / services. These refund applications were rejected by the jurisdictional officer and petitioner filed appeal against both the refund rejection orders. In appeal, detailed submission was made by the petitioner against the notice issued by the appellate authority and appellate authority arrived at following conclusion;

A) Whether a clauses in the agreement, conduct of parties, and other documentary evidences prove that the foreign recipients has been carrying on business through "agency" in India?

Answer: Yes

B) Whether the foreign recipient has an "establishment" in India by virtue of conducting the business through "agency" as provided in Section 8, explanation (2) and consequently sub-section (1) of Section 8?

Answer: Yes

C) Whether the taxpayer has violated condition (v) of Section 2(6) of IGST Act i.e. the supplier of service and recipient of services should not merely be establishments of a distinct person?

Answer: Yes

D) Whether the taxpayer has provided zero rated supply as provided in Section 16 of IGST Act?

Answer: No zero-rated supply of services has been provided.

E) Whether the taxpayer is entitled to refund under Section 54 of MGST / CGST Act?

Answer: No refund can be granted to the taxpayer as per Section 54(3) as no zero-rated supply of services / export of services has been effected.

Based on this conclusion, appellate authority also rejected the refund of taxpayer both periods. Aggrieved by these orders, petitioner preferred current writ petition before Hon'ble Bombay high Court.

Discussion:

After hearing the counsels for petitioner & respondents Court first analysed some provisions of GST Act.

Section 2(5) of the IGST Act defines,

"Export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India.

Section 2(6) of the IGST Act defines,

"export of services" means the supply of any service when,--

- i. the supplier of service is located in India;
- ii. the recipient of service is located outside India;
- iii. the place of supply of service is outside India;
- iv. the payment for such service has been received by the supplier of service in convertible foreign exchange; and
- v. the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;"

From the order passed by appellate authority Court found that it was not disputed that the petitioner has satisfied all the conditions of "export of services" under Section 2(6) of IGST Act, except condition (v). The said condition (v) provides that 'the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8'.

Section 8 of the IGST Act defines "Intra State Supplies". It provides that in cases where the location of the supplier and place of supply are in the same State or Union Territory, the said supply shall qualify as Intra-State supplies. Explanation 1 to Section 8 explains what is an establishment of a distinct person. Clause (i) of Explanation 1 to Section 8 provides that "where a person has an establishment in India and any other establishment outside India, then such establishments shall be treated as establishments of distinct persons". Explanation 2 to Section 8 provides that "A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory."

The term "Agent" is defined under Section 2(5) of the CGST / MGST Act, which reads:

(5) "agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;"

From the records Court found that the impugned orders hold that the foreign recipient of goods and services are principal and the petitioner is their agent in India and thus,

the overseas recipient of services are carrying on business in India through "agency" of the petitioner. Consequently, petitioner is a mere establishment of the foreign recipients. Petitioner is not an independent contractor but an agent as defined under Section 2(5) of CGST/IGST Act, as clauses of the agreement and conduct of the parties prove that the foreign recipient has created an agency in India through the Petitioner.

Appellate authority has completely lost sight of the fact that the agreement between petitioner and his foreign recipients clearly provides that the petitioner is an independent contractor and that neither the petitioner nor its officers, directors, employees or sub-contractor are servants, agents or employees of the recipient of services. The reading of these agreement does not in any way bring out that the petitioner is providing services to the foreign recipient as its agent or that the recipient is carrying business in India through the petitioner. Petitioner does not carry on business of supply of goods or services or both on behalf of another (foreign recipient). Petitioner provides design and engineering services to its customers on principal-to-principal basis by employing its own manpower and other resources. Petitioner earns consideration of 110 per cent of the costs fixed between the parties, which is consistent with general commercial practice and as per the transfer pricing norms. Merely because consideration is fixed and the Petitioner receives a fixed mark-up, the same does not become commission paid to the petitioner as an agent. The consideration is paid for supply of goods and services.

To qualify as an agent under Section 2(5) of the CGST/IGST Act, the person has to act on behalf of or representing the other. In such case, there would be an involvement of a 3rd party viz. on whose behalf supply is made. However, in the present case, there are only 2 parties viz. the Petitioner and the recipients and hence, there is no "agency" relationship between the Petitioner and its recipient of services. The references by appellate authority to the meaning of the term "agent" or "agency" in Black's Law Dictionary, various judicial pronouncements, Bowstead on Agency, Halsbury's Laws of England, in the impugned orders, are wholly misplaced and irrelevant. He is bound by the definition of the word "agent" under Section 2(5) of the CGST/IGST Act.

Central Board of Indirect Taxes and Customs (CBIC) has issued a Circular No. 161/2017/2021 dated 20.09.2021 in the context of "export of services" and particularly condition (v) of Section 2(6) of the IGST Act. As per this Circular, a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as "merely establishments of a distinct person in accordance with Explanation 1 in section 8". Supply of services by a subsidiary / sister concern / group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Explanation 1 of section 8 of IGST Act 2017. Similarly, the supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person under

Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as 'export of services', subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act." Impugned orders run contrary to above Circular and wrongly refuses to follow the same by holding that since the Petitioner is an agent of foreign recipient, condition (v) of Section 2(6) of the IGST Act is violated and the facts of the case are not matching with that mentioned in the Circular.

Order:

It is beyond doubt that the petitioner is not an agency of the foreign recipient and both are independent and distinct person. Thus, condition (v) of Section 2(6) is fully satisfied in the present case. Accordingly, petitioner is eligible for refund of unutilized ITC on account of zero-rated supplies in terms of Section 54 of the CGST Act and the same shall be granted to them along with statutory interest under Section 56 of the CGST Act.

Way Forward:

1. Said decision is accepted by the department.
2. Merely being Subsidiary does not qualify as an agent under GST.
3. While dealing with the issue of Principal-Agent relationship agreement between both parties, nature of transaction and involvement of three parties are important factors.

Referred judgements can be accessed through the QR Code Provided on the note

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