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L&S Update

an e-update to clients from
Lakshmikumaran & Sridharan

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Cenvat credit in respect of towers and shelters admissible - Delhi High Court rules in favour of assessee

Judgment of Delhi High Court dated 31-10-2018 in *Vodafone Mobile Services Limited & Others v. Commissioner of Service Tax, Delhi & Others* – CEAC 12/2016 & Others

Issues involved

- Whether telecom and infrastructure companies are entitled to avail Cenvat credit of excise duty paid on towers, shelters and accessories, either as capital goods or inputs in terms of Rule 2(a) or 2(k) of the Cenvat Credit Rules, 2004 ('Credit Rules') and whether towers and shelters would qualify as "accessories"?

- Whether emergence of an immovable structure at an intermediate stage is a criterion for denial of Cenvat Credit?

Ratio and highlights of the judgment

- **Towers are movable property**

  - The High Court relied on the judgment of Supreme Court in CCE, Ahmedabad v. Solid and Correct Engineering Works & Ors. [2010 (5) SCC 122] and applied the permanency test laid down therein.

  - The Court held that towers are not attached to the earth for permanent beneficial enjoyment of the land to which they are attached. Towers can be dismantled without any substantial damage. They have been fastened to civil foundation to make them wobble free and ensure stability.

Ratio and highlights of the judgment

- **Towers can be considered as an accessory to the antenna. Hence, they qualify as 'capital goods' under Rule 2(a)(A)(iii) of the Credit Rules.**

    - The primary test to qualify as an accessory is whether the item adds to the beauty, convenience or effectiveness of something else. An accessory is an article or device that adds to the convenience or effectiveness of but is not essential to the main machinery.

    - Towers form part of the active infrastructure as the antennae cannot be placed at that altitude to generate uninterrupted frequency. Further, these shelters are accessories for the placement of various BTS equipment and other items for them to remain in a dust-free and ambient temperature.

Ratio and highlights of the judgment

- **Towers & shelters qualify as 'inputs', under Rule 2(k)(ii) of the Credit Rules**

  - The test applicable for determining whether inputs are used in the manufacture of goods is the "functional utility" test. If an item is required for providing output services of the service provider on a commercial scale, it satisfies the functional utility test.

  - The towers and pre-fabricated shelters are essential to provide the required connectivity for cellular phone users and for efficient telecommunication services.

Ratio and highlights of the judgment

- **Immovability is not a relevant criterion for denial of credit as the eligibility must be determined at the time of receipt of goods**
  - Definition of "input" does not contain any condition relating to emergence of immovable property to be ineligible for taking credit.
  - Eligibility to credit must be determined at the time of receipt of the goods in terms of Rule 4(1) of the Credit Rules. Credit cannot be denied so as long as the goods are used for the provision of output service.
  - Several High Courts in different contexts have taken a view that credit of excise duty and service tax paid would be available irrespective of the fact that inputs and input services were used for creation of an immovable property at the intermediate stage, if it was ultimately used in relation to provision of output service or manufacturing of final products.

Impact under GST law

- Section 17(5) of the CGST Act, 2017 places restrictions on availment of credit in respect of goods and/or services received for construction of an immovable property (other than plant or machinery).

- In light of this judgment, it may be necessary to examine the scope of this restriction based on the interpretation of the term ‘immovable property’.

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