

Delhi HC allows ITC on telecom tower to Bharti Airtel, notes ITC covered by own judgment

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Delhi HC sets aside order confirming tax demand, interest and penalty in relation to goods and/or services used in construction and/or installation of telecommunication towers viz. Ground Based Towers (GBT) and Rooftop Towers (RTT); While allowing writ petition, in the case of lead matter of Bharti Airtel, HC took note of fact of issues involved in the present petition being covered by an earlier decision of this Court in [Vodafone Mobile Services Limited](#) (rendered under erstwhile service tax regime wherein the assessee/ Bharti was also a party); Earlier Bench had issued notice observing "Clearly, since the controversy involved is covered by the said decision, the petition is liable to be allowed"; Bench took note of Petitioner's argument that despite apprising, Commissioner of Appeal disregarded said fact citing pendency of Revenue's appeal before SC (the matter though got settled later in assessee's favour post filing of writ petition); Petitioner argued that, HC order holds field as the same has not been stayed or overturned by SC while harping on settled position in law that telecommunication towers are movable in nature.

Bharti Airtel Ltd. (Petitioner) was represented by Sr. Advocate Sujit Ghosh assisted by Advocates Kumar Visalaksh, Udit Jain, Akanksha Dikshit (from Economic Laws Practice).

The information contained in the above alert is source based.

Copy of the judgment is awaited.

The present writ petition seeks to challenge the Order in Appeal No. 217/Commr./Central Tax/Appeals-I/Delhi/2024 dated May 31, 2024 to the extent it confirms tax demand, interest and penalty in relation to goods and / or services used in construction and/or installation of telecommunication towers viz. Ground Based Towers (GBT) and Rooftop Towers (RTT) on following grounds:

1. It is contrary to the settled legal position, is based on assumptions and presumptions and has no legal basis whatsoever.
2. Order is passed in violation and complete disregard to the settled judicial position [by](#) disregarding the applicability of the decision in Vodafone Mobile Services Ltd issued in identical facts and legal issues, solely on the basis that the said decision is under appeal before the SC.
3. Respondent has failed to appreciate that although the challenge of the Department is pending, the order of this HC stills holds field as the same has not been stayed or overturned by SC.
4. Settled position in law is that telecommunication towers are movable in nature and as such section 17 of the CGST Act is not attracted.
5. Since the initiation of the present proceedings, the Petitioner, has at every stage, furnished various details and documents before the Department which unequivocally demonstrate that the telecommunication towers are movable in nature and separate from the concrete foundation
6. Order is passed by disregarding the applicability of the decision of SC in Commissioner of Central Excise, Ahmedabad vs. Solid and Correct Engineering Works & Others.
7. On a plain reading of Section 17(5)(d) of the CGST Act, input tax credit shall not be available in respect of goods and / or services received by a taxable person for construction of an immovable property (other than plant or machinery) on its own account, including when such goods and / or services are used in the course or furtherance of business. Accordingly, the two-fold condition for invocation of Section 17(5)(d) of the CGST Act are not fulfilled. Consequently, the Petitioner is eligible for ITC under Section 16 of the CGST

Act.

8. In any case, the activity undertaken by the Petitioner does not amount to 'construction'. The definition of construction under explanation to Section 17(5)(c) and (d) is restricted to re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property and does not include assembly.

9. Essentially, the towers are based on rudimentary 'screwdriver' technology. The Impugned Order has completely ignored that the towers are distinct and are not part of the foundation on which it is being assembled. Thus, none of the conditions for invocation of Section 17(5)(d) of the CGST Act are fulfilled.

10. The Impugned Order has been passed with an inconsistency by selectively allowing ITC on different types of telecommunication towers on the aspect of movability. In one breath the Respondent has confirmed the demand in relation to goods and services (or both) used in the installation of Ground Based Tower (GBT) and Roof Top Tower (RTT) by holding that the specific exclusion of telecommunication tower in definition of 'plant and machinery' in the second explanation to Section 17(5)(d) restricts ITC on telecommunication tower. On the other hand, the demand in relation to ITC availed on Cell on Wheels (COW) towers has been dropped while noting that the concept of immovability is a prime condition for disallowance of ITC under Section 17(5) of the CGST Act

GSTsutra Note:

- Taxsutra had reported yesterday about [SCN being quashed on the above subject in case of Indus Tower](#) which was tagged with the lead matter of Bharti Airtel.
- On [Sept. 20, 2024](#) relying upon own decision in [Vodafone Mobile Services Ltd.](#), Bench in case of Bharti Airtel (lead matter) issued notice observing "the controversy involved is covered by the said decision, the petition is liable to be allowed"
- On [October 7, 2024](#), Bench again took note of verdict in Vodafone Mobile Services and listed matter for final disposal on November 11, 2024 after acceding to Revenue's prayer for granting time to file counter-affidavit
- Vide order [October 21, 2024](#) passed in case of Indus Tower, HC remarked "we are informed of an identical challenge which forms subject matter of M/s Bharti Airtel Limited .. which is posted for 11.11.2024, let this matter be also included on our board of that date".
- While the writ was pending, SC in its landmark verdict in [Bharti Airtel](#) upheld Delhi HC judgment and allowed CENVAT credit on telecommunication towers, parts and shelters.