CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 52342 OF 2015

(Arising out of Order–in-Original No. 18/Commr./2014-15 dated 29.08.2014 passed by the Commissioner of Central Excise & Service Tax, Large Taxpayer Unit, New Delhi)

M/s Mahanagar Telephone Nigam Limited ……Appellant
1st Floor, Khurshid Lal Bhawan
Janpath, New Delhi

Versus

Commissioner, ……Respondent
Central Excise & Service Tax,
Large Taxpayer Unit
NBCC Plaza Pushp Vihar
Saket, New Delhi

APPEARANCE:

Shri Puneet Agarwal, Shri Gaurav Gupta and Shri Chetan Kumar Shukla Advocate for the Appellant
Dr. Radhe Tallo, Authorised Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: March 18, 2021
Date of Decision: March 31, 2021

FINAL ORDER NO. 51183/2021

JUSTICE DILIP GUPTA:

This appeal is directed against the order dated August 29, 2014 passed by the Commissioner of Central Excise and Service Tax, New Delhi[1], by which the demand of service tax amounting to Rs. 5,94,76,320/- not paid on the amount received against development

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1. **The Commissioner**

compensation charges[2] and for recovery of same under section 73 of the Finance Act 1994[3] by invoking the extended period of limitation, has been confirmed. The impugned order also holds that the appellant had wrongly availed and utilized CENVAT credit of Rs. 4,99,32,736 /- against the capital goods falling under chapter 73. The order also confirms the demand of service tax of Rs. 12,56,342 /- not paid on Point of Projection[4] charges received by the appellant. The order also demands interest and has imposed penalty.

2. **M/s Mahanagar Telephone Nigam Limited[5]** is a Public Sector Undertaking of the Government of India and is engaged in the business of providing "telecommunication service". The appellant was in possession of land measuring 19.76 acres situated at B-3, Institutional Area, Sector-62 Phase-II, Noida, Utter Pradesh. It desired to develop this land as a Core Knowledge Park and for this purpose it invited proposals from the bidders for the selection of a Joint Development Partner in implementing the project. IDEB SUCG JV was selected for the project and this Joint Development Partner consisted of two members, with **IDEB Projects (P) Ltd.[6]** being the lead member and **Shanghai Urban Construction (Group) Corporation[7]** as a member. These two members formed IDEB-SUCG Knowledge Park Private Limited[8] for implementation of the Project. It entered into a **Deed of Confirmation and Ratification** on August 7, 2007 with the Project Development Company.

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2. Development Charges
3. the Finance Act
4. POP
5. the appellant
6. IDEB
7. SUCG
8. the Project Development Company

3. A Project Agreement dated August 7, 2007 was also executed between MTNL, the Joint Venture Company and the Project Development Company. MTNL agreed to transfer and assign to the Joint Venture Company/the Project Development Company its rights and obligations with regard to designing, planning, financing, marketing, development of buildings/ developed units, provision of necessary infrastructure & services, operation & maintenance of services & infrastructure, administration and management of the 'Project' upon the terms as set out in the Agreement.

4. An audit of the appellant was conducted for the period 2006-07 to 2007-08 and it was noticed that the appellant had received a sum of Rs. 48.12 crores as consideration against the granting of rights for 50 years to the Project Development Company for developing the "Knowledge Park" on the aforesaid land situated at Noida. It was also noticed from a perusal of clauses of the aforesaid Agreement that the activity of the appellant to grant the rights to develop the project was taxable under section 65 (105)(zze) of the Finance Act 1994 [9]. It was further noticed that the appellant had wrongly availed and utilized CENVAT credit against capital goods for discharge of the service tax liabilities for the period 2004-05 to 2007-08, since towers, which are covered under Chapter Heading 73, do not qualify as 'capital goods' defined under the CENVAT Credit Rules 2004[10]. Thus, the amount of Rs. 4,99,32,736/- taken as CENVAT credit against capital goods for the period 2004-05 to 2006-07 would be recoverable alongwith interest under sections 73 and 75 of the Finance Act. It was also noticed by the

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9. the Finance Act
10. CENVAT Rules

audit team that Rs. 1,01,64,579/- were charged by the appellant against POP charges from M/s BCL, for which payment was received during September 2007, and though supplementary invoices charging service tax on this amount were raised on 4.10.2007, but service tax amounting to Rs. 12,56,342/- with interest was not paid by the appellant.

5. Accordingly, a show cause notice dated June 9, 2009 was issued to the appellant requiring the appellant to show cause within thirty days as to why:-

(i) Service tax (including education cess and secondary and higher education cess) of Rs. 5,94,76,320/- (Rupees Five Crores Ninety Four lakhs Seventy Six thousand Three Hundred and Twenty), not paid on the amounts received against Development Compensation Charges (DCC) as per details in para 3.2 above should not be demanded and recovered from them in terms of Section 73 read with Section 95 and Section 140 of the of the Finance Act 1994 as amended, by invoking extended period of limitation under sub-section (1) of section 73 of the said Act;

(ii) Cenvat credit of Rs. 4,99,32,736/- (Rs. Four Crores Ninety Nine Lakhs Thirty Two Thousand Seven Hundred and Thirty Six only) wrongly availed and utilized against capital goods falling under chapter 73 as per details in para 4.3 above should not be disallowed and recovered from them in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73 of the Finance Act read with Section 95 of the Finance Act, 1994 should not be demanded and recovered from them;

(iii) Service tax (including education cess and higher and secondary education cess) of Rs. 12,56,342/- (Rs. Twelve Lakhs Fifty Six Thousand Three Hundred and Forty Two only) not paid on the POP charges received as per details in para 5.2 above should not be demanded and recovered from them in terms of Section 73 of the Finance Act read with Section 95 and Section 140 of the Finance Act, 1994 should not be demanded and recovered from them;

(iv) Interest on the service tax not paid and Cenvat Credit utilized wrongly should not be demanded and recovered from them under Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004;

(v) Penalty under Section 76 of the Finance Act, 1994 should not be imposed upon them for failure to pay the Service Tax, in accordance with the provisions of Section 68 of the said Act read with Rule 6 of Service Tax Rules, 1994;

(vi) Penalty under Section 77 of the said Act should not be imposed for failure to file ST-3 returns with correct details.

(vii) Penalty under Section 78 of the said Act should not be imposed upon them for deliberately suppressing of facts with the intention to evade payment of Service Tax."

6. This show cause notice was earlier adjudicated upon by an order dated 12.1.2011 by the Commissioner, but this order was set aside by the Tribunal by order dated 13.12.2001 in the appeal filed by the appellant. A direction was issued by the Tribunal that the appellant should be provided an opportunity to file a reply to the show cause notice and should also be provided an effective opportunity of hearing.

7. The appellant filed a reply and thereafter the order dated 29.08.2014 was passed by the Commissioner, which order has been impugned in the present appeal.

8. The following three issues, therefore, arise for consideration in this Appeal:

(i) Whether the appellant as a franchisor had provided any service to the franchisee in relation to a franchise when it granted 'land development rights' to the Project Development Company/Joint Venture Company;

(ii) Whether the appellant was entitled to avail CENVAT credit on the purchase of towers during the period 2004-05, 2005-06 and 2006-07; and

(iii) Whether additional demand for liability of service tax on **"POP"** service is justified.

9. Shri Puneet Agrawal learned counsel for the appellant made the following submissions:

Service Tax under section 65(105)(zze)

(i) The transaction between the appellant and the Project Development Company/Joint Venture Company is purely in the nature of a transaction in immovable property in lieu of the rights granted on the land owned by the appellant. This transaction is not chargeable to service tax and, in any case, is not a taxable service under section 65 (105)(zze) of the Finance Act;

(ii) For a service provided under an agreement to be taxable, the Department has to establish that the right conferred is a **representational right,** which means that a right is available with the franchisee to represent the franchisor, but the Department failed to establish this fact. In this connection reliance has been placed upon a decision of the Delhi High Court in **Delhi International Airport P. Ltd.** vs. **Union of India**[11]**;**

(iii) In any case, neither does the show cause notice allege that a representational right was granted by the appellant to

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11. 2017 (50) S.T.R. 275 (Del.)

the Project Development Company/Joint Venture Company nor is there any finding in this regard in the impugned order; and

(iv) The development of immoveable property is in no manner identified with the appellant, which is also an essential requirement of the charging provision. The appellant, in fact, is a known as a 'telecommunication service provider' and not as "developer of immovable property".

CENVAT Credit

(v) The entire CENVAT credit of Rs. 4,99,32,736/- crores has been denied to the appellant on the ground that the credit was claimed on purchase of towers falling under Chapter Heading 73 which is not specifically provided in rule 2(a) A of the CENVAT Rules. However, this CENVAT credit amounting to Rs. 4,90,91,607/- also consisted of goods falling under Chapter 84 and 85. Complete details with duty payments documents had been furnished to the adjudicating authority but the same have not been considered;

(vi) Even in respect of goods falling under chapter 73, credit for goods of the same nature was allowed to the appellant for the year 2007-08;

(vii) Towers are essential for providing output service and telecom service is not possible without the use of towers. Hence, the towers will fall within the meaning of capital goods. In this connection reliance has been placed on the decision of the Delhi High Court in **Vodafone Mobile**

Services Limited vs. **Commissioner of Service Tax, Delhi**[12] decided on 31.10.2018; and

Service tax on provisions of POP

(viii) The show cause notice alleged service liability of Rs. 12,56,342/- on the amount of Rs. 1,01,64,597/- which was charged by the appellant against POP service to **M/s Bharti Airtel**. This amount was charged for the whole of the year 2007-08, but this service could have been subjected to service tax under section 65(105)(zzzx) only w.e.f. 01.06.2007. The service tax liability on pro rata basis would, therefore, come to only Rs. 10,46,952/-.

10. Learned counsel for the appellant also submitted that the extended period of limitation contemplated under the proviso to section 73 (1) of the Finance Act could not have been invoked in the facts and circumstances of the case and that neither penalty could have been imposed under section 77 of the Finance Act nor interest could have been charged under section 75 of the Finance Act.

11. Dr. Radhe Tallo learned Authorized Representative of the Department, however supported the impugned order. In this connection learned Authorized representative pointed out that the Commissioner committed no error in confirming the demand on the amount received by the appellant against development compensation charges and POP charges, and that the appellant had wrongly availed and utilized CENVAT credit. Learned Authorized Representative also

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12. CEAC 12/2016

pointed out that the extended period of limitation was correctly invoked in the present case.

12. The submissions advanced by the learned counsel for the appellant and the learned Authorized Representative for the Department have been considered.

13. The three issues shall be separately dealt.

Compensation received for the 'right to develop' the land.

14. To appreciate this issue, it would be appropriate to refer to the relevant clauses of the Project Agreement executed between the appellant, the Project Development Company and the Joint Venture Company.

15. The Project Agreement made on 7.8.2007 is between MTNL, the Joint Venture Company and the Project Development Company. Clause **E** of the Agreement, which deals with the transfer and rights and obligations, is as follows:

> "E MTNL has executed this agreement to transfer and assign to the Joint Development Partner/PDC its rights and obligations with regard to designing, planning, financing, marketing, development of buildings/Developed units, provision of necessary infrastructure & services operation & maintenance of services & infrastructure, administration and management of the 'Project' upon the terms as set out in the Agreement herein."

16. The obligations of MTNL are contained of paragraph 3 of the Project Agreement and are reproduced below:

MTNL's Obligation

> "3.1 Subject to the provisions of this Agreement, MTNL shall execute a Power of Attorney in the format specified in Schedule 1: Power of Attorney in favour of the PDC on the Effective Date so as to empower the PDC to undertake and execute the Project in

accordance with the terms and conditions mutually agreed between the Parties. Notwithstanding anything contained herein, the grant of concessions by MTNL to Project Development Company is for the Concession Period of 50 years or during the validity of the existing terms of lease in favour of MTNL, whichever is earlier for a limited right to develop the Project land.

3.2 On completion of the development of the Project as per the Developmental Guidelines agreed to in Schedule 2, MTNL/Project Company shall execute Tripartite License Agreement with Persons/prospective Unit Holders on request from the PDC as per the process duly and mutually agreed upon.

3.3 Peaceful Permission and License. MTNL, during the period of concession with the PDC and/or JDP having/continuing to perform its duties and obligations, hereby unconditionally warrants that MTNL shall not interfere with the exercise of contractual rights by the PDC/JDP including rights of permissive use, easements, use of common areas, rights, benefits and privileges granted to the PDC/JDP under the terms of this Agreement."

17. "Concession" has been definition in clause 1.1.9 of the Project Agreement and it is reproduced below:

"1.1.9 "Concession" means the bundle of rights granted to the PDC as associated with the Project including the right to develop, build and receive share of revenues/Charges generated for a limited period being the "Concession Period" that shall be Fifty (50) years from the effective dated. However, the use of the term concession does not create or deem to create any rights whatsoever in the Project Land to the benefit of or in favour of the JDP or the PDC, provided that the PDC or the JDP, subject to the first charge of MTNL for License Fee due and payable at relevant times, shall be entitled to create a charge, lien or pledge in favour of third parties in respect of the various Charges receivable by it pursuant to and in accordance with the terms and conditions of this Agreements."

18. In consideration of these rights, the commercial consideration for the appellant is contained in paragraph 4 of the Project Agreement and in short is as follows:

(a) **Development compensation charges:** Payment of money as consideration towards right to develop the project.

(b) **Concessional constructed built-up area:** The JV is to hand over to the Assessee, constructed built-up area of 25.2% in the knowledge park which was to be constructed by the JV.

(c) **Licence Fee:** Rs. 1/- per sq. ft. per month for total built up area, payable till the end of concession period.

(d) **50% discount on usage of common amenities** to be provided by the JV to the Assessee.

19. The Commissioner confirmed the demand of service tax on Development Compensation and POP charges and also held that the appellant had wrongly availed and utilized CENVAT credit against capital goods falling under Chapter 73.

20. In regard to the service tax liability fastened upon the appellant on the amount received towards Development Compensation Charges, the Commissioner observed as follows:

> **15.3 Upon perusal of the above clauses, I observe that in terms of clause E of the agreement, MTNL has "transferred and assigned its rights and obligations" to JDP** with regard to designing, planning, financing, marketing, development of buildings/ developed units, provision of necessary infrastructure & service, operation and maintenance of services, administration and management of the project. Further, as per the clause 1.9.9 of the agreement, MTNL had given concession to the JDP, which means the bundle of rights granted to the PDC as associated with the project including the right to develop, build and receive share of revenues/ charges generated for a limited period being the concession period that shall be fifty years from the effective date. However, the use of term concession does not create any rights whatsoever in the Project Land to the benefit of or in favour of the JDP or PDC provided that the PDC or JDC, subject to the first charge of MTNL for license fee due and payable at relevant times, shall be entitled to create a charge, lien of pledge in favour of third parties in respect of the various charges receivable by it pursuant to and in accordance with the terms and conditions of this agreement. **Against these rights, the commercial consideration has been received by the MTNL as per the clause 4 of the agreement** which inter alia comprises of Development Compensation Charges(DCC) (Clause 4.2.1) amounting to Rs. 48.12 Crore; Concessional Constructed Built up area (Clause 4.3.1 to 4.3.3) of 25.2% as per MTNL's preference; License Fee (Clause 4.4) of Rs. 1 per Sqft per month for total build up area (net of concessional area) to be paid quarterly in advance which shall be indexed @ 15% every fourth year till the end of concession period; and 50% discount on usage of common amenities (clause 4.6) like auditorium, conference/ meeting hall etc. that are developed as per the project, as and when the same are made available for use.
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> 15.4 *******
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> The definition of 'Franchisee Services' as stated above apparently indicates that "where rights are granted to 'undertake any process

identified with franchisor' it will constitute as a Franchisee Agreement". The term 'any process indentified' makes it abundantly clear that the Franchisee Agreement need not be specifically related to the business of the Franchisor. If right to undertake any activity, which is to be undertaken by the Franchisor, is granted to the Franchisee by way of an agreement then it would amount to Franchisee Agreement and would be taxable under Franchisee Services. **Hence, the contention of the party that as per Section 65(105)(zze) only those franchise services are taxable which are rendered by the franchisee to the outsiders on behalf of franchisor which are otherwise rendered by the franchisor is not acceptable.**

15.5 With regard to control of JDP/PDC over 74.8% of the built-up area, Concessional Constructed Built up area to MTNL, License Fee to be paid to MTNL, 50% discount to be given on usage of common amenities etc. are terms of the agreement which is for the parties to decide. A Franchisee Agreement may contain any terms and condition based on which the two parties wish to enter into an agreement. Further, the quantum and form of consideration is also for the parties to decide. It is a settled proposition of law that the entire agreement and the pith and substance of the agreement would prevail over its form. Merely because the major control over the built-up area would be that of JDP/PDC, it does not take away the essence of the Franchisee Agreement. **Since, the rights of the noticee, i.e. MTNL in respect of the said land and its development have been transferred to JDP/PDC and the JDP/PDC is undertaking the process identified with MTNL, it clearly amounts to a Franchisee Agreement and hence consideration received for the same is taxable under the head 'Franchisee Services'.** Thus, I am of the considered view that the aforesaid activities are taxable events and would fall in the ambit of 'Franchisee Service' as defined under Section 65(105)(zze) read with Section 65 (47) of the Act ibid. Accordingly, the Noticee is liable to pay service tax of Rs. 5,94,76,320/- calculated @12.36% on the taxable value of Rs. 48.12 Crore received as Development Compensation Charges.

(emphasis Supplied)

21. In regard to the wrong availment of CENVAT credit by MTNL, the Commissioner observed as follows:

16.5 From the above definition, it is clear that the towers classifiable under Chapter Heading 73 do not qualify as capital goods for which Cenvat credit is admissible for availment and utilization. As per the Noticee, the said towers are covered in the definition of capital goods as per Rule 2(a)A(iv) of Cenyat Credit Rules, 2004 which makes 'moulds and dies, jigs and fixtures' a part of capital goods. It is the case of the Noticee that the said towers are "fixtures and hence, are liable to be considered as capital goods. Though the said Rule includes fixtures' but the term 'fixture' cannot be read in isolation
and has to be considered in the light of 'moulds and dies, jigs and fixtures. The interpretation rule of Noscitur a sociis' applies here as per which the word 'fixture should be considered in the context in which it is used, i.e. according to the other words used along with it. While including 'moulds and dies, jigs and fixtures' as capital goods, the intention of the legislation cannot be assumed to make all fixtures as part of capital goods but only those fixtures which are akin to 'moulds and dies, jigs and fixtures'. **Hence, the said towers in the present case cannot reasonably fall under the category of fixtures**

under Rule 2(a)A(iv) of Cenvat Credit Rules, 2004 and therefore, cannot be considered as capital goods.

16.6 Even if for the sake of argument, it is assumed that the towers are capital goods, then also Cenvat Credit availed and utilized in respect of the same cannot be accepted since it is Noticee's own admission vide letter dated 30.03.2009 that '**there is no use of towers and parts in the landline connections of MTNL Delhi and cenvat credit for towers and parts has been utilized only for capital goods and not for input services in CDMA unit'.** Since, the said towers are not used for providing any output service, the same cannot be considered as an input for the present case and therefore, cenvat credit in respect of the same is inadmissible.

16.7 Thus, I hold that the entire amount of Rs. 4,99,32,736/- taken as Cenvat credit against capital goods for the period 2004-05 to 2006-07 is inadmissible and recoverable along with interest under Section 73 & 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004.

(emphasis supplied)

22. In regard to the 'POP' charges, the Commissioner observed as follows:

17.3 Prima facie, I find that there is no dispute regarding the taxable element existing in the said activity under the provisions of the Finance Act, 1994. The stand of the Noticee that the balance amount of service tax, which is being disputed by the operator and the interest on the amount of Service Tax already paid will be deposited upon realization, cannot be accepted. Non-receipt of amount in respect of Service Tax or interest thereof cannot be taken as an excuse for delay in discharging their liabilities. It is a settled law that the amount of service tax is required to be deposited on the amounts received and where no amount for service tax in respect of services provided has been received, the value received is to be considered as 'cum tax value' in terms of Section 67 of the Finance Act, 1994 as amended. Section 67(2) of the Finance Act, 1994 reads as under:-

> "Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable services shall be such amount as, with the addition of tax payable, is equal to the gross amount charged".

Therefore, as per the said provision, the Noticee herein is liable to pay service tax on the balance amount on 'cum tax basis' along with interest. Due to a dispute between the Noticee and the said operator, the Government cannot be made to suffer. It is for the Noticee to recover the amount from its clients/customers. It is not the concern of the Department/Government whether the Noticee has received amount in respect of Service Tax and interest or not. Once the service tax liability is established, the service provider is bound to pay the same, even if the said payment is required to be made from his own funds. **In the present case, the service tax liability is not only established but is also accepted by the Noticee and therefore, it is neither justified nor correct on the part of the Noticee to defer payment on the ground that the same is not received by them.**

> 17.4 In view of the above, I hold that the balance amount of service tax and interest on the entire amount is liable to be paid by the Noticee. Further, I also hold that the service tax of Rs.10,46,952/- paid by the noticee stands appropriated against the demand under this head.
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> **(emphasis supplied)**

23. With effect from June 16, 2005, the definition of "franchise" under section 65(47) of the Finance Act is as follows:

> "65(47) "franchise" means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

24. A "franchisor" has been defined under section 65(48) of the Finance Act as follows:-

> "65(48) "franchisor" means any person who enters into franchisee with a franchisee and includes any associate of franchisor or a person designated by franchisee to enter into franchisee on his behalf and the term "franchisee" shall be construed accordingly."

25. The taxable service under section 65(105)(zze) of the Finance Act means a service provided or to be provided to a franchisee, by the franchisor in relation to franchise.

26. Under the definition, "franchise" means an agreement by which the franchisee is granted **representational right** to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved. Thus, if the condition relating to "representational right" is not satisfied the transaction would not be classified as a "franchisee" service. "Representational right" means that a right is available with the "franchisee" to represent the franchisor and in that case the

"franchisee" loses its individual identity and would be known only by the identity of the franchisor.

27. A perusal of the Project Agreement executed between MTNL, the Joint Venture Company and the Project Development Company would indicate that MTNL transferred and assigned to the Joint Venture Company its rights and obligation with regard to designing, planning, financing, marketing, development of buildings/ developed units, provision of necessary infrastructure, administration and management of the Project on the above said land upon the terms as set out in the Agreement. Under the Agreement, MTNL granted concession to the Joint Venture Company, namely the bundle of rights including the right to development, build and receive share of revenues/charges for a period of 50 years from the effective date. In consideration of these rights, MTNL was to receive:

(i) Development compensation charges i.e. payment of money as consideration towards the right to develop the project;

(ii) Concessional constructed built-up area i.e. the Joint Venture Company was to hand over to MTNL, constructed built-up area of 25.2% in the knowledge park which was to be constructed by the Joint Venture Company;

(iii) License Fee i.e. Rs. 1/- per sq. ft. per month for total built up area, payable till the end of concession period; and

(iv) 50% discount on usage of common amenities to be provided by the Joint Venture to the assessee.

28. The Delhi High Court in **Delhi International Airport** laid down the requirements for an agreement to be considered a "franchise" and the observations are as follows:-

> "7. Under a policy decision of the Government of India to privatise the Airports for their better management, the AAI issued Request for Proposals (RFP for short) offering a long term Operations, Management and Development Agreement (OMDA for short) to suitably qualified, experienced and resourced parties to design, construct, operate, maintain, upgrade, modernise, finance, manage and develop the Delhi and Mumbai Airports with an intention to provide world class airport management at both these airports.
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> 8. The consortium led by the GMR Group was selected by the AAI as the successful bidder to design, construct, operate, maintain, upgrade, modernise, finance, manage and develop the Delhi airport and the consortium led by the GVK Group was selected by the AAI as the successful bidder to design, construct, operate, maintain, upgrade, modernise, finance, manage and develop the Mumbai airport.
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> 12. Under Article 11.1 of the OMDA, in consideration of the Grant of Rights granted under Article 2.1.1 of the OMDA, the petitioners have to, *inter alia*, pay an Annual Fee to AAI. The Annual Fees payable to AAI is @ 45.99% in the case of DIAL & @ 38.7% in the case of MIAL, of the projected Revenue to be received by the petitioners.
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> 54. The question that arises for consideration is: whether the OMDA constitutes a franchise and if so, whether any service is being provided by AAI to the petitioners?
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> **55. For OMDA to constitute a franchise, it would have to satisfy the requirements of Section 65(47) of the Finance Act, which inter alia requires that the franchisees (Petitioners) should have been granted representational right by franchisor (AAI).**
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> **56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not ipso facto bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a "representational right".**
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> 57. The term "representational right" would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.
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> **58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor.** The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.
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> 61. **From the perusal of the terms and conditions of OMDA, it is clear that no representational right has been granted by AAI to the petitioners.** Clause 5.1 records that the rights and obligations associated with the operation and management of the

> Airports have been transferred to the petitioners. The petitioners are liable to perform all Aeronautical services, Essential Services and all other activities and services earlier undertaken by AAI. Under Clause 5.2, all existing contracts of AAI have to be novated or transferred to the petitioners so that AAI is released of all liabilities and obligations under the contracts and agreements. Contracts which cannot be transferred or novated would be performed by the petitioners as if the petitioners were the original parties to the contract and the petitioners have to indemnify the AAI of any liability or costs arising under them.
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> 66. **The petitioners, under the OMDA, had to develop, operate and manage the Airports. AAI handed over the demised premises** (under the lease deeds) **at the Airports to the petitioners. The petitioners have spent their own money for designing, developing, constructing, upgrading, modernizing, financing, etc., of the airports. The airports are being operated, maintained and developed by the petitioners in their own right and in their own name. The petitioners have been granted "exclusive right and authority" to undertake the functions mentioned in Para 2.1.1 and particularly those relating to operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the airport and to perform services and activities constituting aeronautical services and non-aeronautical services at the airport.**
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> 67. **It is clear that the petitioners do not undertake any process identified with AAI.** The petitioners run their own operations using their own processes, policies, methods, design, techniques, etc. The sole responsibility and liability for performances of the services is that of the petitioners. AAI has completely divested its rights (other than reserved activities) to build, operate and maintain the airport. Once the functions of AAI have been completely divested by it and assigned to the petitioners, there is no question of the petitioners representing AAI in performance of those functions. There is no representational right that has been assigned to the petitioners by AAI.
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> 69. **Clearly, as there is no representational right conferred by AAI on the petitioners, the OMDA cannot constitute a franchise in terms of Section 65(47) of the Finance Act. Further as no service is being provided by AAI to the petitioners, there cannot be said to be any taxable service in terms of Section 65(105)(zze)."**
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> **(emphasis supplied)**

29. The present Project Development Agreement is very similar to the Agreement that was analyzed by the Delhi High Court in **Delhi International Airport.**

30. The Mumbai Tribunal in **Global Transgene Ltd.** vs. **Commissioner of Central Excise Customs & Service Tax,**

Aurangabad[13] also observed that the foremost requisite for a service to qualify as a taxable "franchise" service is that the "franchisee" should have been granted a representational right and that in a franchisee transaction, the "franchisee" loses its individual identity and represents the identity of the franchisor to the outside world.

31. In **Tata Consultancy Services Ltd.** vs. **Commissioner of Central Excise and S.T. (LTU), Mumbai (Vice-Versa)**[14] the Mumbai Tribunal observed that the grant of a representational right would imply that the person to whom such rights have been granted undertakes the entire activity as if it had been undertaken by the person granting such rights.

32. In **National Internet Exchange of India** vs. **C.S.T-Delhi**[15], the Principal Bench at Delhi, after examining the definition of "franchise", observed as follows:-

> "Representational right permits the person to represent himself as someone else to the external world such that the external world feels that he is procuring goods or services from the brand owner which can be termed as franchise rights. **For the purpose franchise must surrender his own identity and in addition must step into the shoes of the franchisor."**
>
> **(emphasis supplied)**

33. In the decision of the United States District Court, D. South Carolina, Florence Division in **Englert, Inc.** vs**. Leafguard USA**[16] decided on December 14, 2009, the Court emphasized that there must be a significant control over the method of operation of the party for the agreement to be called a "franchise" agreement.

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13. 2013-TIOL-1259-CESTAT-MUM
14. 2019 (6) TMI 109-CESTAT MUMBAI
15. Vide Final Order No. 52638/2018 dated 27.07.2018
16. Civil Action No. 4:09-CV-00253-TLW. (D.S.C. Dec 14, 2009)

34. It was, therefore, imperative for the Department to establish that under the Project Agreement, MTNL had conferred a representational right i.e a right available with a Joint Venture Company (franchisee) to represent MTNL (franchisor). However, neither the show cause notice alleged that such a representational right was granted by MTNL to the Joint Venture Company nor any finding has been recorded by the Commissioner in the impugned order in this regard, though this issue was specifically raised by the appellant before the Commissioner. In the absence of such an essential requirement of the charging provision, service tax could not have been imposed.

35. In fact, a perusal of the Project Agreement indicates that the developer has not to represent itself as MTNL, nor has its identity as a Joint Venture Company been subsumed in the identity of the appellant. In the present case, the Project Agreement executed between MTNL and the Joint Venture Company is for development of the immovable property and is no manner identified with the appellant. The appellant is popularly known as a 'telecommunication service provider' and not as a 'developer of immovable property'. The essence of the Project Agreement is to grant development rights to the Joint Venture Company and there is nothing in the contract which may even remotely indicate that MTNL intends to do business through the developer.

36. It cannot, therefore, be said that any franchise service was rendered to the appellant. The confirmation of the demand cannot, therefore, be sustained.

CENVAT Credit

37. It is submitted that CENVAT credit of Rs. 4,99,32,736/- has been denied to the appellant on the ground that the credit was claimed on purchase of towers falling under chapter heading 73 and the same is not specifically provided in rule 2(a)A of the CENVAT Rules.

38. The case of the appellant is that CENVAT credit amounting to Rs. 4,90,91,607/- consisted of goods falling under Chapter 84 & 85 and though details were furnished by the appellant in respect of the capital goods on which the appellant had taken credit, the Commissioner did not consider the said details and assumed that whole of the credit related to items under Chapter 73.

39. The complete details alongwith the duty paying documents in respect of all the items have been attached as Annexure-6 to the Appeal Memo and it is stated that they were furnished to the Commissioner. It has also been stated that in respect of the items of Chapter 85 purchased during 2007-08, the show cause notice accepted that the CENVAT credit can be availed. Even in respect of goods falling under Chapter 73, it has been stated that CENVAT credit for goods of the very same nature was allowed to the appellant for the year 2007-08. It has also been submitted that towers are essential for providing output service, and the service of telecom is not possible without the use of towers. Hence, the towers fall within the meaning of capital goods. This is so because the said expression falls within clause (iii) as also (iv) of rule 2(a)(A) of the definition of capital goods contained in the CENVAT Rules.

40. The submissions advanced by the learned counsel for the appellant deserve acceptance. It is a fact that out of the total amount

of CENVAT credit of Rs. 4,99,32,736/- that has been disallowed claiming it to be for purchase of towers falling under Chapter 73. However, an amount of Rs. 4,90,91,607/- consisted of goods falling under Chapter 84 and 85 and, therefore, the appellant could avail the CENVAT credit. Even in respect of towers, the Delhi High Court in **Vodafone Mobile Services** observed that CENVAT credit is allowed to the telecommunication companies in respect of towers classified under chapter 73. It has been held that the said credit is available by considering the towers as capital goods and also as inputs. The relevant observations of the Delhi High Court contained in paragraphs 47 and 53 of the judgment are reproduce below:

> **"47. From the foregoing discussion, clearly towers and shelters support the BTS in effective transmission of the mobile signals and therefore, enhance their efficiency. The towers and shelters plainly act as components/ parts and in alternative as accessory to the BTS and would are covered by the definition of "capital goods".**
>
> 53. On examination of the definition and the decisions, the court is of the considered opinion that the term "all goods" mentioned in Rule 2(k) of the Credit Rules would cover all the goods used for providing Output Services, except those which are specifically excluded in the said Rule. Therefore, the definition is wide enough to bring all goods which are used for providing any output service. Further, from the decisions of the Supreme Court and other judgments referred to previously, 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 out the output services of the service provider on a commercial scale, it satisfies the functional utility test. In the facts of the present case, what emerges is that, BTS is an integrated system and each of its components have to work in tandem with each other in order to provide the required connectivity for cellular phone users and for efficient telecommunication services. **The towers and pre-fabricated shelters form an essential in the provision of telecommunication service.** The CESTAT–in the opinion of this court- failed to appreciate that it is well settled that the work "used" should be understood in a wide sense, so as to include passive as well as active use. The towers in CKD condition are used for the purpose of supplying the service and therefore, would qualify as 'inputs'. There is actual use of the tower and shelters in conjunction with the Antenna and the BTS equipment in providing the output service, which also includes provision of the Business Support Service. The CESTAT has failed to appreciate that the towers and the parts thereon and the pre-fabricated shelters are inputs, in accordance with the provisions of Rule 2(k) of the Credit Rules. The CESTAT has erred in holding that there is no nexus between the inputs and the output service. The CESTAT also failed to consider the decision of the AP High Court in the case of the M/s Indus Towers Ltd. v. CTO, Hyderabad (2012) 52 VSR

> 447,which clearly ruled that the towers and shelters are indeed used and are integrally connected to the rendition of the telecommunication services.
>
> **(emphasis supplied)**

POP Charges

41. The show cause notice alleged service tax liability of Rs. 12,56,342/- on the amount of Rs. 1,01,64,597/-, which amount was charged by the appellant against POP (a component of IUC charge) service provided to **M/s Bharti Airtel**. According to the appellant this amount of Rs. 1,01,64,579/- was charged by the appellant for the whole of the year 2007-08, but service tax on the service became payable under section 65(105)(zzx) w.e.f 01.06.2007 only and, therefore, the liability would be Rs. 10,46,952/-on a pro rata basis.

42. However, learned counsel for the appellant very fairly stated that details were not provided by the appellant to the Commissioner.

43. In such circumstance, the proper course would be to remit this issue to the Commissioner for a fresh decision and for this purpose the appellant may submit all the relevant documents within six weeks from today so as to enable the Commissioner to take an appropriate decision within the next three months.

44. Thus, for all the reason stated above, the impugned order dated August 29, 2014 passed by the Commissioner in so far as it confirms the demand of service tax on the compensation amount received by the appellant towards the development rights and denial of CENVAT credit is set aside. The confirmation of demand of service tax on POP charges is however, set aside with a direction to the appellant to submit a representation in regard to this aspect within a period of six

weeks after which the Commissioner shall take a decision within the next three months. The appeal is allowed to the extent indicted above.

(Order pronounced in the open Court on March 31, 2021)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Shreya/JB