

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 92 OF 2019

The Commissioner of Service Tax,
Mumbai-VII Commissionerate,
2nd Floor, M.S.E. B. Building,
Estrella Battery Compound,
Matunga Labour Camp, Mumbai-400019. ...Appellant

V/s.

M/s Tata Teleservices (Maharashtra) Ltd.
D-26/2, TTC Industrial Area MIDC,
Sanpada P. O. Turbhe-Navi Mumbai
Pin Code – 400 0703. ...Respondent

Ms. P. S. Cardozo wit Ms. Sangeeta Yadav for Appellant.
Mr. Prasad Parajape i/b Lumiere Law Partners for Respondent.

**CORAM : DHIRAJ SINGH THAKUR &
ABHAY AHUJA, JJ.**

PRONOUNCED ON: 15th FEBRUARY 2023

JUDGMENT:-

1. This is an appeal preferred under Section 35G of the Central Excise Act, 1944 (“Excise Act”) by Commissioner of Service Tax, Mumbai-VII Commissionerate impugning the order of the CESTAT bearing No. A/546-558/15/STB dated 16th March 2015 passed in appeal no. ST/17/11-MUM filed by the Respondent herein, whereby the appeal of the Respondent – Assessee was allowed.

2. The Respondent assessee-M/s Tata Teleservices (Maharashtra) Ltd., was registered with the Service Tax Department, Mumbai for providing taxable services under the category of 'Telecommunication Services', etc.

3. During the course of enquiry, it was observed that the assessee had taken Cenvat Credit on goods like angles, channels, beams falling under Chapters 72 and 73 of the Central Excise Tariff Act, 1985 (the "Tariff Act") used to erect towers for installing transmission equipment. Similarly Cenvat Credit was also being availed on pre-fabricated buildings, shelters, PUF panels falling under Chapter heading 9406, which were used for housing/storage of generating sets and other components/equipments/spares etc.

4. According to the Revenue, since the telecom towers erected at site and affixed to earth were not goods, the activity of erection of towers did not amount to manufacture. That as the towers so erected were neither excisable goods nor any output service defined under the provisions of the Finance Act, 1994, they attracted neither levy of Central Excise Duty under the provisions of Central

Excise Act, 1944 nor Service Tax under Finance Act, 1994. Any input or material used for erection of towers were not an input in terms of the provisions of Cenvat Credit Rules. The availment of Cenvat Credit by the notice on materials such as angles, channels, beam etc. therefore, appeared irregular and incorrect.

5. The Respondent had also availed Cenvat Credit on prefabricated buildings shelters, PUF Panels as well. The prefabricated buildings and panels were used for storage of goods/equipments relating to telecom. The prefabricated structures had been installed to house the base trans-receiver stations (BTS) to provide shelter and protection to the base station equipment. These structures did not appear to be capital goods as defined in the Cenvat Credit Rules. Availment of Cenvat credit paid on those goods also appeared to be proper.

6. Rule 2(a) of Cenvat Credit Rules defines “Capital Goods” as under:-

(A) The following goods namely:-

(v) All goods falling under chapter heading 82,84,85,90 heading No. 68.02 and sub heading 6801.10 of the First

Schedule to the Excise Act.

(vi) Pollution Control Equipments.

(vii) Components, spares and accessories of the goods specified at (i) and (ii).

(viii) Moulds and Dies, jigs and fixtures.

(v) Refractory and Refractory materials.

(viii) Tubes and pipes and fitting thereof and

(ix) Storage Tank.

USED

(3) In factory of the manufacturer of the final product, but does not include any equipment or appliance used in any office, or

(4) For providing output services.

7. The towers were erected to hoist Antennas at Cell Sites. The goods used in the erection of Tower falling under the Chapter Nos. 34, 37, 39, 40, 45, 49, 58, 72, 73, 76, 82, 83, 94 and 99 of the Central Excise Tariff Act, 1985 (CETA). Goods classifiable under these chapters of the Tariff Act, according to the Revenue are not covered under “Capital Goods” for the purpose of Cenvat Credit as defined in Cenvat Credit Rules (CCR) in terms of Section 2(a) of the

CCR. That availment of Cenvat credit of duty on the goods used for erection of Telecom Tower under the category of “Capital Goods” is not in accordance with the provisions of CCR.

8. The definition of “input” according to the Revenue means all goods except Light Diesel Oil, Speed Diesel Oil or Motor Spirit commonly known as Petrol or Motor Spirit used for providing any output service. The definition of “input” does not include items like angles, channels, beams used to erect the tower, an activity which does not amount to manufacture. As the tower in itself is not an excisable good, it cannot be treated as an “input” for availing the cenvat credit. Similarly the prefabricated building/structures used for storage of equipment do not have nexus with provision of “Telecom Service” and therefore, do not appear to fall under the category of “input” used for providing the telecom service. Cenvat credit wrongly taken is not admissible in terms of Rule 2(a) of the Cenvat Credit Rules.

9. Since it appeared to the Revenue that the assessee had wrongly availed the cenvat credit to the tune of Rs. 5,75,93,284/- for the period from April 2004 to December 2007 and utilized it

wrongly towards payment of service tax and education cess on the output services and thereby contravened the provisions of Rule 3(1) (ix) and Rule 3 (4) (e) of the Cenvat Credit Rules, 2004, the assessee was served with a Show Cause Notice dated 22.01.2009 by the Commissioner of Service Tax, Mumbai, thereby calling upon them to show cause as to why:-

(a) Cenvat credit of Rs. 5,75,93,284/- for the period from April, 2004 to December, 2007 taken by them should not be disallowed and recovered from them under the provisions of Section 11A of the Central Excise Act, 1944, read with Rule 14 of the Cenvat Credit Rules, 2004 and proviso to Section 73 of Finance Act, 1994;

(b) penalties should not be imposed and recovered from them under the provisions of Rule 15 of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 and Section 11AC of the Central Excise Act, 1944

(c) Interest should not be charged and recovered.

10. Several other Show Cause Notices i.e. (i) dated 25.03.2009 for the period from January, 2008 to September, 2008 for denial of Cenvat credit of Rs. 46,09,884/-, (ii) dated 19.10.2009 for the period from October, 2008 to March, 2009 for denial of Cenvat

credit of Rs. 5,94,496/-, (iii) dated 09.09.2010 for the period from April, 2009 to March, 2010 for denial of Cenvat credit of Rs. 8,36,627/- were also issued to the assessee on similar issue. The Appellant craves leave to refer to and rely upon the copy of said Show Cause Notices as and when produced before this Hon'ble Court.

11. The said Show Cause Notices were adjudicated by the Commissioner, Service Tax-II, Mumbai vide Order in Original No. 12-15/S.T.-II/K.K. S./2010 dated 07.10.2010, wherein it was held that the service rendered by the assessee clearly falls under the category of Erection, Commissioning and installation service. The adjudicating authority confirmed the demand in the Show Cause Notice along with interest and also imposed penalty on the Respondent herein.

12. Aggrieved by the Order in Original No. 12-15/S.T.-II/K.K. S./2010 dated 07.10.2010 passed by the Commissioner, the Respondent herein filed an Appeal No. ST/17/11-MUM before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Mumbai.

13. The Tribunal vide impugned order No. A/546-558/15/STB dated 16.03.2015 confirmed the demand within limitation period, however, set aside the demand for extended period. The CESTATE observed that issue was of interpretative nature i.e. as to eligibility of Cenvat credit or otherwise on the towers and building and had to be settled in the hands of the Hon'ble High Court, the assessee could have entertained a bonafide belief. The CESTAT set aside the penalties on the assessee by invoking Section 80 of the Finance Act, 1994.

14. Aggrieved by the order of the CESTAT, Mumbai, the Revenue is in appeal proposing the following as substantial questions of law:-

A. Whether in the facts and circumstances of the case and the applicable law, the CESTAT order deserves to be set aside for rejection of applicability of extended period of limitation: (i) even while the assessee had ignored the onus of self-assessment in a diligent manner, (ii) acted in gross contravention of the provisions of the Cenvat Credit Rules, 2004, with intent to evade service tax by way of illegally availing Cenvat credit in respect of ineligible goods and (iii) The assessee has failed to establish the bonafide basis of their purported belief.

B. Whether it is open to CESTAT to read into the provision of proviso to Section 73(1) and Section 78 of the Finance Act, 1994. The purported factor 'interpretative nature of an issue' to reject the extended period of limitation, and to

hold that there was no contravention of kind stipulated therein.

C. Whether the CESTAT was right at holding the matter as under dispute / purporting to be of interpretative nature even after the CBEC, vide Circular 137/315/2007-CX. 4 dated 26.02.2008 had specifically informed that goods of such nature were not eligible for Cenvat credit in as much as the same was not 'inputs' and the same was not used for providing taxable service. The assessee didn't contest/protest such circular before departmental authorities.

D. In the light of specific exclusion of the goods from the scope of the term 'inputs' by virtue of notification 16/2009-C.E. (N.T.) dated 07.07.2009, whether it was open for the CESTAT to still hold it as an issue of interpretation and refuse to apply the clause pertaining to 'Contravention of the law with intent to evade payment of Service Tax' and thereby leave the assessee scot free.

E. Whether it is legal on the part of the CESTAT, to grant/to extend the benefit of Section 80 merely on the plausibility that the assessee 'could have entertained a bonafide belief' without itself determining that such belief was indeed 'bonafide belief' or when the assessee could not prove that there was reasonable cause for the failure.

15. On 14th January, 2020 following order came to be passed by this Court:-

“ A common order was passed by the Customs, Excise & Service Tax Appellate Tribunal disposing of group of appeals. The learned counsel appearing for the Respondent pointed out the order of this Court dated 2 April 2018 passed in Central Excise Appeal No. 6/2017 in one of the appeals of the group; wherein similar questions of law similar to the present appeal were raised contending that by the aforesaid order, this Court

dismissed the said appeal confirming the order of the Tribunal.

2. The learned counsel for the Appellant seeks to canvass that dismissal of Central Excise Appeal No. 6/2017 would not automatically means that the present appeal does not give rise to any substantial question of law. However, we note that questions of law framed in the present appeal and the Central Excise Appeal No. 6/2017 are the same. If it is the endeavour of the Appellant to distinguish this appeal by presenting reframed questions of law, the same shall be done by the concerned Officer by filing an affidavit. Stand over to 4 February 2020."

16. In pursuance of the aforesaid order the Appellant-Revenue filed the following affidavit dated 7th February 2020:

"I, Swati Shiwam, 39 years of age, Indian inhabitant working as Joint Commissioner, CGST & C. Ex, Belapur, do hereby solemnly state as under:-

On 14th January 2020, when the above appeal was argued, it was pointed out on the behalf of Respondent herein that the order passed by Hon'ble High Court in C.E.X.A. no. 6/2017 and the substantial question of law raised therein were similar to the substantial question of law raised in the present appeal and therefore the order of dismissal of the C.E.X.A. no. 6/2017 would squarely apply in the present appeal since the substantial question of law raised in the present appeal were similar to those raised in C.E.X.A. no.6/2017. However the counsel of the Appellant Revenue pointed out to the court that while invoking extended period of limitation, no comparisons or similarities could be drawn and it is the conduct of the parties which determines whether the extended period of limitation under Section 73(1) should be invoked or not.

In the light of submissions, this Hon'ble High Court by and order dated 14th January 2020 allowed the

Appellants to distinguish this appeal by presenting reframed questions of law by the concerned officer by filing an affidavit. I say that on examining the substantial questions of law as framed in C.E.X.A. no. 6/2017 in the light of the Show Cause Notice issued in the facts and circumstances of that case, the questions of law framed from Serial No.A,B,C and D were completely unnecessary. The reason being that the Show Cause Notice dated 27.09.2011 bearing No. V/ST/Dn-V/Bel/Gr-VI/Misc/09-10/600 which was issued to Reliance Communication limited, the assessee in C.E.X.A. no. 6/2017 was within the limitation period covering the period April 2010 to March 2011. In its order dated 16.03.2015, the Hon'ble Tribunal also in Para 33 has upheld the demands which are within the limitation period and has mentioned therein that:

“As regards the demands which are within the limitation period; on merits the issue is covered against the Appellants, demands in respect of Show-Cause Notices which are within the limitation period are liable to be upheld and the impugned order to the extent are sustainable. The demands within the limitation period as confirmed are upheld along with interest.”

The same has been summed up in Para 35(i) as under:

“(i) The confirmation of demand of ineligible Cenvat credit and interest thereof on towers and pre-fabricated buildings within the limitation period are upheld in respect of all the Appellants”

Since the Show Cause Notice for the demand issue in C.E.X.A. no. 6/2017 was well within time, there was no need whatsoever to frame substantial questions of law on extended period of time mentioned in Para 5 A, B and D since the extended period was not invoked at all. Similarly since the main issue in the appeal with regard to admissibility of CENVAT credit on Towers, prefabricated buildings, shelters, PUF panels etc. was also decided by Tribunal in favour of Revenue, it was not necessary to frame a substantial question of law on the said issue as

mentioned at Para 5 (C). The only relevant issue was with regard to the penalties under section 76 and 77 of The Finance Act 1994 read with Rule 15 of Cenvat Credit Rules 2004 which were imposed on the assessee i.e. M/s Reliance Communication under C.E.X.A. no. 6/2017. These penalties were disallowed by the Tribunal in its order dated 16.03.2015 in Para 35(iii). Therefore only substantial questions of law mentioned in para 5 (E) of CEXA no. 6/2017 was relevant and necessary. The said error happened because many excise appeals arising of the same tribunal order 16.03.2015 were filed together/simultaneously by the Revenue. Another unfortunate coincidence was implementation of GST with which the department was preoccupied. The implementation of GST not only brought into existence a new tax regime but also a complete jurisdictional restructuring of the various Commissionerates because of which the matters were transferred from old to new Commissionerates. As a result of this, the officers who were conversant with the case were also transferred. Hereto annexed and marked as Annexure 1 is copy of Show Cause Notice dated 27.09.2011 bearing No. V/ST/Dn-V/Bel/Gr-VI/Misc/09-10/600.

In the light of facts herein above, it would not be proper to refer and rely upon order dated 02.04.2018 passed by this Hon'ble Court in C.E.X.A. no. 6/2017 since the issues are completely different as borne out by the Show Cause Notice dated 27.09.2011 bearing No. V/ST/Dn-V/Bel/Gr-VI/Misc/09-10/600 issued in CEXA no. 6/17. It is pertinent to note that the show cause notice in the present appeal i.e. 92 of 2019 pertains to the extended period and the penalties which follow which were both set aside by the Tribunal against which the present appeal is filed. It is important to note that it is the show cause notice that is germane to all the consequent proceedings that follow.

I further say and submit that the invoking of the extended period of limitation can be in the circumstances mentioned in section 73(1) i.e. fraud, collusion, willful mis-

statement, suppression of fact or contravention of any provisions, of the Finance Act 1994. The show cause notice in the present case mentioned clearly in para 9 that the noticee has suppressed the fact of availment of Cenvat credit on the items / goods mentioned as the same is not evident from the ST Returns. It is important to note that there was an audit of the assessee in September 2007 when various irregularities were noticed and thereafter a letter dated 1/2/2008 was issued to the Respondent assessee seeking information on wrongful availing of Cenvat credit. The extended period of limitation is therefore rightly invoked.

In view of what is mentioned herein I say the order dated 2/4/18 in CEXA no. 6 of 17 has no applicability to the facts of this case and cannot be a determining factor in the present appeal.”

17. In reply to the said affidavit, the following affidavit dated 6th April, 2022 on behalf of the assessee was filed on 24th June 2022:-

“I Sanjeev Mehra, Authorised Signatory of the Respondent above named having Corporate Office at D-26, TTC Industrial Area, MIDC Sanpada P.O., Turbhe, Navi Mumbai 400 703 do hereby solemnly affirm and state on oath as under:-

1. I am fully conversant with the facts of the present appeal and am authorized to depose this affidavit on behalf of the Respondent. Nothing contained in the Reply affidavit dated 07 February 2020 filed by the Appellant Revenue shall be deemed to be admitted unless specifically admitted and even if not specifically denied, herein.

2. I say that the present appeal is filed by the Appellant Revenue against the Order No. A/546-558/15/STB dated 16 March 2015 of the Ld.

Appellate Tribunal to the extent that the demand for the extended period of limitation and the penalties imposed on the Respondent is dropped.

3. *I say that when the Respondent were opposing admission of the present appeal on 14 January 2020, it was submitted that the ratio and the reasoning in Order dated 02 April 2018 passed by this Hon'ble Court in Central Excise Appeal No. 6/2017 issued in the case of Commissioner of Service Tax, Mumbai VII vs. Reliance Communication Ltd. will squarely apply to the facts of the present case and that it is also arising out of the same impugned Order dated 16 March 2015 of the Ld. Appellate Tribunal (as stated above). Hereto annexed and marked as "**Exhibit I**" is a copy of the said Order dated 02.04.2018.*

4. *I say that vide Order dated 14 January 2020 issued in the present appeal, this Hon'ble High Court observed that question of law framed in the present appeal and the Central Excise Appeal No. 6/2017 are the same. This Hon'ble Court further observed that if it is the endeavor of the Appellant to distinguish this appeal by presenting reframed question of law, the same shall be done by the concerned Officer by filing an affidavit.*

5. *Pursuant to the above Order of this Hon'ble High Court, an affidavit dated 07 February 2020 has been filed on the behalf of the Appellant by one Ms. Swati Shiwam, Joint Commissioner, CGST & C. Ex., Belapur and in reply thereto I am filing the present courtner-affidavit.*

6. *I say that due to nationwide lock down imposed from March 2020 in the wake of Corona pandemic I could not file this rejoinder earlier and request leave of this Hon'ble Court to condone the delay, if any, in filing this rejoinder affidavit. The facts stated herein are relevant and crucial to decide the present appeal and hence the same may kindly be permitted to be taken on record.*

7. I say that the attempt by the Appellant to distinguish the ratio and reasoning in the Order dated 02 April 2018 of this Hon'ble High Court is futile and the same would apply in full force to the present appeal as well, for the following reasons.

a) The Appellant's endeavour today to find errors in Order dated 02 April 2018 of this Hon'ble Court is of no avail as they have, to the best of the Respondent's knowledge, never applied for review, recall or modification of the Order dated 02 April 2018. At least the Reply Affidavit dated 07 February 2020 does not make a mention of that.

b) Without prejudice to the above, this Hon'ble High Court has examined the Order dated 16 March 2015 of the Learned Tribunal involved many Appellant before it including the present Respondent and also the Respondent (Reliance Communications Ltd.) in CEA No. 6 of 2017.

Paras 8.1 and 13 of the Order dated 16 March 2016 of the Learned Tribunal suggests that the present Respondent agitated the issue of limitation before the Ld Tribunal. As also, Paras 8.3 and 15 would indicate that even Reliance Communications Ltd had agitated the issue on limitation before the Ld. Tribunal

d) After examining submissions of all the Appellants before the Ld. Tribunal, in Paras 30 to 34 gave a categorical finding to hold that issue of limitation in favour of all the Appellants before it.

e) In Para 3 of this Hon'ble Court's Order dated 02 April 2018, paras 32 to 34 from the Ld. Tribunal's Order have been reproduced and specifically approved in Para 4 of this Hon'ble High Court's order.

f) Therefore, even assuming that in CEA 6 of 2017

the issue of limitation was not involved, the approval by this Hon'ble High Court to the findings of the Ld. Tribunal's order on limitation will be binding on all the parties today.

8. *I say that the fact that Reliance Communications Ltd. were issued multiple show cause notices including invoking extended period of limitation is evident from Para 3.2 of the show cause notice dated 27.09.2011 (for the period April 10 to March 11) attached to the reply affidavit. It can be seen that other 4 show cause notices were issued to Reliance Communication Ltd. for the period 2004-05 till March 2010. Of the above, 1st show cause notice covering the period 2004-05 to December 2007 was issued on 20 January 2009 invoking the extended period of limitation. The other 4 show cause notices appear to have been issued within the normal period of limitation.*

9. *Without prejudice to the above, I say that in Para 2 this Hon'ble High Court in its Order dated 02 April 2018 has observed that issue under consideration is a debatable issue. This Hon'ble High Court has further observed that in spite of an earlier authoritative pronouncement of this Court, the matter was again debated and brought before this Court and finally settled.*

10. *I say that this Hon'ble Court has observed that bearing in mind the debatable legal issue of interpretation, the Ld. Appellate Tribunal has dropped the demand pertaining to the extended period of limitation and the penalty imposed. I submit that if that be the case the chare of suppression cannot survive and the present appeal be dismissed.*

11. *I say and submit that the above Order dated 02 April 2018 of this Hon'ble High Court in the connected proceedings is squarely applicable to the facts of the present case and the grounds stated in the affidavit contending that the above judgment dated 02 April 2018 cannot be relied upon and are untenable in law.*

12. I say that the Appellant in the Affidavit dated 07 February 2020 has further stated that “the show cause notice in present appeal clearly mentioned at paragraph 9 that notice has suppressed the fact of availment of Cenvat credit on the items/goods mentioned as the same is not evident from ST return. It is important to note that there was an audit of assessee in September 2007 when various irregularities were noticed and thereafter a letter dated 01.02.2008 was issued to the Respondent assessee seeking information on wrongful availing of Cenvat credit. The extended period of limitation is rightly invoked.”

13. In relation to the aforesaid, I say that the aforesaid contention is factually incorrect. The Ld. Appellate Tribunal while setting aside the demand for extended period, in the impugned order dated 16 March 2015 in Paras 30 and 31 has categorically observed that 1) assesses filed periodical returns disclosing particulars required to be disclosed; 2) it was for the Revenue to call for additional information if they had queries; 3) audits were conducted by the Revenue and it did not find any error; 4) issue is of interpretation. None of the above has been denied by the Appellant Revenue with corroborative evidence.

14. Further, the Ld. Tribunal also relied upon the judgment of this Hon’ble Court in *Rajkumar Forge Ltd Vs. UOI-2010 (262) ELT 155 (Bom)* to set aside the demand for extended.

15. I say that on the same issue the Hon’ble Delhi High Court in a subsequent Order has taken a divergent view. By relying upon the judgment of the Hon’ble Supreme Court in the case of *Commissioner of C. Ex. Ahmedabad Vs. Solid & Correct Engineering Works, 2010 (252) ELT 481 (S.C.)*, the Hon’ble Delhi High Court in the case of *Vodafone Mobile Services Ltd. Vs CST, Delhi, 2018-TIOL-2409-HC-DEL-ST* has allowed the credit of the tax paid on inputs, input services and capital goods used in the

erection of towers.

16. I say that once two Hon'ble High Courts have taken a divergent view on the same issue, it further substantiates the submission that the issue involved is debatable and involving interpretation of law. Reference in this regard is made to the following judgments:

i. Jaiprakash Industries Ltd Vs. C.C.E. Chandigarh, 2002 (146) E.L.T. 481 (SC).

ii. Commissioner v. Wonderax Laboratoreis (I) Pvt. Ltd., 2010 (255) E.L.T. 60 (Del.) -Affirmed by Supreme Court - 2010 (255) E. L.T. A16 (SC)

iii. Principal commissioner v. Diamond Power Infrastructure Ltd. - 2016 (44) S.T.R. J60 (Guj.)

iv. Commissioner of C. Ex. Jalandhar vs. Afcons Pauling Joint Venture, 2009 (242) ELT 352 (P&H).

17. I say and submit that admittedly, none of ingredients prescribed for invocation of extended period of limitation viz. Fraud, collusion, willful misstatement or suppression with an intent to evade tax are found in the present case and hence extended period cannot be invoked for confirming the demand against the Respondent.

18. I refer to the following judgments wherein it is held that extended period of limitation cannot be invoked and penalty cannot be imposed in cases which are debatable and involve interpretation of law.

i. Associated Pigments Ltd. vs Superintendent of Central Excise. 1993 (68) ELT 514 (Cal.)

ii. Union of India vs Bharat Aluminium Co. Ltd. 2012 (26) STR 101 (Chhattisgarh)

iii. Unifex Cables Ltd. vs. Commissioner of Central Excise, Surat-II, 2011 (271) ELT 171 (SC)

iv. Commissioner of C. Ex.vs Gujarat Narmada Fertilizers Co. Ltd., 2009 (240) ELT 661 (SC).

v. Union of India vs. Beryl Drugs Ltd., 2015 (322) ELT 261 (MP)

19. I say that, in any event the Ld. Appellate Tribunal in the impugned Order dated 16 March 2015 has also observed that issue of availment of credit on the towers and pre-fabricated buildings and shelters was disputed before various forum and hence all the Appellants before it could have entertained a bonafide belief that they are eligible for credit of duty paid on towers and pre-fabricated buildings and shelters. The said finding has been upheld by this Hon'ble Court.

20. In view of the above, I say and submit that the extended period of limitation and imposition of penalty was rightly set aside by the Ld. Appellate Tribunal after considering all the facts and arguments raised before it.

21. In aforementioned circumstances, I say and submit that the present Appeal is devoid of merits and should be dismissed.”

18. On 1st July 2022, the matter was heard and the arguments were concluded.

19. Mr. Prasad Paranjape, learned counsel for Respondent would submit that the matter is squarely covered by the decision of this Court dated 2nd April 2018 passed in CEXA no. 6 of 2017 and the same order be passed in the present case as well.

20. Learned counsel for the Appellants reiterated what is stated in the affidavit filed on behalf of the Appellant-Revenue and submits that the case at hand is distinguishable from the case of Central Excise Appeal No. 6 of 2017 and therefore the decision of this Court dated 2nd April 2018 cannot be applied to the facts of this case.

21. We have heard Ms. P. S. Cardazo learned standing counsel for the Appellant and Mr. Prasad Paranjape, learned counsel for the Respondents and with their able assistance we have perused the papers and proceedings and considered the rival contentions.

22. We observe that the impugned decision of the tribunal was a common order involving several telecom companies including the Respondent herein as well as Reliance Communication Limited, in respect of whom this Court dismissed the appeal being Central Excise Appeal No. 6 of 2017 on 2nd April, 2018. The issue involved in the group of appeals filed before the CESTAT was with regard to denial of cenvat credit to the telecom communication companies on the ground that cenvat credit availed on towers used to rendering telecommunication service is ineligible to cenvat credit as they are

immovable goods. On this issue, the tribunal sustained the demand of Revenue partially. The demand for duty and interest within the limitation period was sustained. Demand of ineligible cenvat credit issued beyond the period of limitation was dropped considering that the issue was a debatable issue.

23. From the perusal of the Tribunal order it emerges that the impugned order also refers to the case of Reliance Communication Limited, which was the subject matter of the decision of this Court dated 2nd April, 2018 in CEXA No. 6 of 2017. The said order is usefully quoted as under:-

“ We have heard both sides.

2. Revenue has filed this Appeal against the impugned order dated 16th March, 2015, essentially on a limited issue. Though it is proposing five questions as substantial questions of law, we find that, on the own showing of the parties, this was a debatable issue. Despite an authoritative pronouncement of this Court earlier, the matter was again debated, again brought before this Court and finally settled. Since what was cleared were not goods, but, an immovable property and, therefore, the credit for input tax could not have been availed off.

2 It is on this point that the Tribunal has sustained the demand of the Revenue partially. The demand for duty and interest within limitation period has been sustained. However, bearing in mind the debatable legal issue of interpretation, the has Tribunal dropped the penalty.

3 Paragraphs 32, 33 and 34 of the impugned order, which are at page 150 of the paper book, read as under:

“32 We find considerable force in the arguments raised by the learned Counsel on limitation; accordingly, we hold that the impugned orders that confirms and demands invoking extended period of Cenvat Credit availed and utilised by all Appellants herein, are liable to set aside and we do so.

33 As regards the demands which are within the limitation period; on merits the issue is covered against the Appellants, demands in respect of show-cause notices which are within the limitation period are liable to be upheld and the impugned order to the extent are sustainable. The demands within the limitation period as confirmed are upheld along with interest.

34 In our considered view, as the issue was of are interpretative nature i.e., as to eligibility of Cenvat Credit or otherwise on the towers and the building and had to be settled in the hands of the Hon'ble High Court, the Appellants could have entertained a bonafide belief. Hence, all the penalties imposed on all the Appellants herein are set aside by invoking the provisions of Section 80 of the Finance Act, 1994.”

4 Upon reading of these paragraphs, we do not find that there is any substantial question of law, which enables us to entertain this Appeal. The matter has been decided in the light of the peculiar facts and circumstances of the present case. For these reasons, we are not inclined to entertain this Appeal. The view taken by the Tribunal cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. The Appeal is devoid of merits and the same is dismissed. No costs.”

24. We also observe that the very same questions as in this case

had arisen in the case CEXA 6 of 2017, with respect to the impugned common decision by the Tribunal and this Court as set out above has dismissed the appeal. This Court having already rendered its decision on the Tribunal order impugned herein, we are not persuaded to take any other view. The affidavit filed on behalf of the Revenue does not elicit any distinguishing feature. Learned Counsel for the Revenue has also not brought any material on record to demonstrate that the decision dated 2nd April 2018 in CEXA 6 of 2017 has been a subject matter of any further challenge.

25. Learned counsel for the Appellant-Revenue has not been able to demonstrate any material difference or distinguishing feature in the facts of this case and in CEXA no. 6 of 2017 to warrant our interference. There being neither any perversity nor any error on the face of the record, the appeal does not raise any substantial question of law. The same is therefore dismissed. No costs.

(ABHAY AHUJA, J.)

(DHIRAJ SINGH THAKUR J.)

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signed by
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YOGESH
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