AUTHORITY FOR ADVANCE RULINGS
(Central Excise, Customs and Service Tax)
Hotel Samrat, 4th Floor, Kautilya Marg, Chanakyapuri
New Delhi
Present:
Justice V.S. Sirpurkar (Chairman)
Shri S.S.Rana (Member)
Shri R.S.Shukla (Member)

The 22nd day of January, 2016

Ruling No. AAR/CE/ 03 /2016
in
Application No. AAR/44/CE/21 /2013

Name & address of the applicant : M/s Indus Towers Limited, Building No.10 Tower A, 4th Floor, DLF Cyber City, Gurgaon(Haryana)-122002

Commissioners concerned :
1. The Commissioner of Central Excise,Delhi-1 C.R.Building, I.P Estate, New Delhi-110109
2. The Commissioner of Central Excise, Hyderabad-1, Opp. L.B. Stadium, Basheerbagh, Hyderabad-500004
3. The Commissioner of Central Excise, Kolkata-700001
4. Commissioner of Central Excise, Jaipur-II New Central Revenue Bldg., Statute Circle, 'C' Scheme, Jaipur-302005

Present for the applicant : Shri Tarun Gulati, Advocate,

Present for the Department : Shri Amresh Jain(AR)

Ruling

M/s Indus Towers Limited (hereinafter also referred to as 'applicant'), a Public Limited Company incorporated under the Companies Act, 1956, is engaged in business of providing telecommunication infrastructure support services to mobile telecom operators in India. Applicant submits to be registered under the category of

“Business Support Services” and was formed with the main object of sharing passive telecommunication infrastructure support services among various telecom service providers by avoiding the need to set up individual telecom tower by each telecom operator. This concept was mooted and promoted by the Ministry of Telecommunications, Government of India, with an objective of reducing the number of towers and thus optimizing the capital and operational expenditure of the telecom operators with an overall objective of reducing call rates for end customers. Applicant is registered with the Department of Telecommunication (DoT) as service provider for providing passive telecommunication infrastructure support services. In order to carry out its operations (i.e. provision of telecommunication network infrastructure services), the applicant purchases various machines/ equipments in bulk quantities throughout the year which are used at telecom sites across India. Some of the machines/ equipments which are purchased by the applicant are Diesel Generators (DG) Sets, Air Conditioners (AC), Batteries, Power Management Systems, Towers and Shelters. The aforementioned equipments are used to provide 24x7x365 power supply at desired current and voltage levels (at -48 DC current levels) to customers’ transmission/ telecommunication equipments and to maintain the temperature below 35 degrees Celsius inside the shelter. To ensure that the operations of the Company are not disrupted, the aforesaid equipments are required to be maintained in good working condition at all times. Since the above mentioned equipments are key equipments to render services to the customers, these equipments require regular technical & mechanical repairs & maintenance over the period. In general, applicant will replace or repair one or more of the following parts in Diesel Generator (DG) sets and Air Conditioners (AC):-

Parts of Diesel Generators:- AC alternator, voltage regulator, cooling and exhaust system, lubrication system, battery charger, control panel, starter motor, fuel tank, charging alternator, piston, fuse, MCB, switch and other small components.

Parts of Air Conditioner:- compressor, condenser motor, cooling coil, fan meter, evaporator coil, condenser coil, filter etc.

2. Applicant submits that in view of the high utilization of the aforesaid equipments at the sites and to reduce the operational cost and capital investments, applicant

proposes to undertake repair and maintenance of the said equipments so that the same can be re-used without requiring replacement in all cases. The equipments repaired are generally 3-7 years old or are damaged due to transportation or due to fire / floods / rains or are not working efficiently due to any technical defect etc. The aforesaid repairs and maintenance activities can be performed by applicant itself in-house at its warehouse or third party service providers who could be individuals, partnership firms or companies at applicant's warehouse or at their own repair facilities.

3. Applicant has summarized the activities proposed to be carried out by the applicant of repair and maintenance of the equipments hereunder:-

I. The equipments which require repair and maintenance shall be transferred from the applicant's telecom sites to the warehouse. Both the site and the warehouse are registered under a single centralized registration for Service Tax purposes.

II. The said equipments shall be examined at the warehouse to ascertain whether same can be repaired at a reasonable cost.

III. Post inspection/ testing, if the equipment is found to be non-repairable or repair costs are likely to exceed the potential benefits, the parts in good working condition may be extracted and stored in the warehouse of the applicant for being used in repairs and replacements.

IV. Post inspection of the equipments, the defective parts and spares of the equipments are identified. The defective parts identified shall be either repaired or replaced with new parts or usable parts extracted from irreparable equipments which will depend upon the condition of the defective parts.

V. The identity of the original equipments will remain the same i.e. the original functionality of the equipments does not change and no new product emerges or is manufactured or formed out of the repairs and maintenance activities. The activity would merely entail repairing of the equipments so as to make them functional for re-use in services rendered by the applicant to its customers.

VI. The parts not available in-house shall be procured by the applicant from third party vendors on payment of appropriate excise duty as applicable.

VII. Once the equipments are repaired and certified to be in good working condition, the same shall be sent to the site for use in rendering services.

VIII. Applicant proposes to repair its equipments and does not propose to repair any third party equipments.

4. Activity proposed to be undertaken by applicant can be defined as under:-

- The applicant will undertake repairs of its own equipments only.
- The applicant will use the repaired equipments for its own business operations of rendering passive telecom infrastructure services liable to Service Tax.
- Technical examination/ inspection of condition of equipments at applicant's warehouse.
- Identification of defective parts in the equipments.
- Procurement of new parts either from vendor or from stores or retrieval of a part in working condition from irreparable equipments lying with the applicant as scrap.
- Replacement of defective parts and/or performance of engineering and other technical services to put the equipment in working condition.
- Re-testing of the equipment to ensure the functionality of the equipment as per required performance standards.
- For safe transportation and protection from heat, water and dust, the tested equipment will be wrapped in suitable containers/bags/boxes.

5. Applicant submits that the following activities will not be performed as part of the aforesaid business activities

- The applicant will not be branding /re-branding the repaired product as its own.
- The applicant will not put its own logo or trade name on the repaired product (other than for transportation and identification for fixed assets tracking) for marketing or brand promotion.
- No new product or article will be manufactured as part of the aforesaid repairs activities.

6. Following issues are raised by the applicant for determination by the Authority;

Whether in the facts and circumstances of the applicant's case, the activities of repair and maintenance proposed to be undertaken by the applicant amounts to manufacture within the meaning of Section 2(f) of the Central Excise Act, 1944.

7. Applicant submits that term 'manufacture' has been defined under Section 2(f) of the Central Excise Act, 1944 (Excise Act). Under Section 3 of the Excise Act, an Excise Duty is levied on manufacture of goods undertaken in India. H'ble Supreme Court in the case of J. G. Glass has laid down the following two-fold test for deciding whether the process amount to 'manufacture'. First, whether by the said process a different commercial commodity comes into existence or whether the identity of original commodity ceases to exist. Secondly, whether the commodity which was already in existence will serve no purpose but for the said process. In other words, whether the commodity already in existence will be of no commercial use but for the said process. Further, in various judicial precedents, the following principles have been laid down by the Courts in order to determine whether an activity amounts to manufacture or not.

- An activity would amount to manufacture in case the same results into a new commercial product i.e. a new article comes into existence as a result of the manufacturing activity.
- Manufacture can be said to have taken place, when after process, a new different article emerges having a distinct name, character or use.
- Manufacture should result in loss of original identity of the product.

8. Applicant submits that activities involving mere repair of goods (where there is no change in identity of products) would not amount to manufacture. Further, the proposed activities of repair and maintenance are not in the nature of 'manufacture' and thereby should not be eligible to Excise Duty on account of the following reasons:

a) The applicant is only proposing to carry out repair / replacement of certain parts whereby the equipments shall retain its original identity.

b) Repair proposed to be undertaken by the applicant shall not change the functionality of the original equipments.

9. Revenue agreed with the applicant that activities involving mere repair of goods (where there is no change in identity of products) would not amount to manufacture. As this issue was not seriously opposed by the Revenue as also the second related issue i.e. in the event of aforesaid activities of repair and maintenance amount to manufacture then the basis of valuation for the purpose of excise duty, we vide Misc. Order No. AAR/44/ST/01/2015 dated 27.03.2015 admitted the application only on the basis of third question relating to CENVAT. Applicant vide written submissions dated 05.08.2015 requested this Authority to record a finding on the first two questions, as Revenue is not opposing these two issues and these stand in favour of the applicant.

10. It is noticed that four Commissionerates i.e. Commissioners of Central Excise, Delhi-I, Hyderabad-I, Kolkata-IV and Jaipur-I were to reply to the application filed by the applicant. Only two Central Excise Commissionerates i.e. Hyderabad-I and Jaipur-I replied to said first question raised by the applicant stating that the activities involving mere repair of goods do not appear amounting to manufacture within the meaning section 2(f) of the Central Excise Act, 1944. In view of above, we hold

In the facts and circumstances of the applicant case, the activity of repair and maintenance proposed to be undertaken by the applicant will not amount to manufacture within the meaning of section 2(f) of the Central Excise Act, 1944.

11. Second issue raised by the applicant is *whether in the facts and circumstances of the case and in the event the aforesaid activities of repair and maintenance amount to manufacture, then the basis for arriving at value for purpose of Excise Duty under the Central Excise Act, 1944 and Rules made there-under.*

Since the activities of repair and maintenance have been held as not amounting to manufacture, the second issue raised by the applicant becomes infructuous.

12. Third issue raised by the applicant is *whether in the facts and circumstances of the case, the applicant is eligible to avail CENVAT credit of Excise Duty under the Central Excise Act, 1944 / Additional duty of Excise under Section 3(1) of the Customs Tariff Act, 1975 paid on parts and spares used for their replacement of the defective ones and Service Tax paid on inspection, certification, engineering services etc. for the aforesaid repair and maintenance activities and claim set off against the output service*

tax paid for rendering of passive infrastructure services by the Applicant to its customers.

13. It is noticed that third issue raised by the applicant has 2 parts;

a) Whether the applicant is eligible to avail Cenvat Credit on Service Tax paid on input service i.e. Certification, inspection and engineering service provided by third party vendor to the applicant for repair of capital goods, such as D.G. sets, Air Conditioners etc. used for providing output service.

b) Whether the applicant is eligible to avail Cenvat Credit on duty paid parts and spares used in repairing capital goods such as D.G. sets, Air Conditioners etc., used for providing output service.

14. As far as issue a) above is concerned, applicant submits that as per Rule 3(1) of Cenvat Credit Rules, 2004, a provider of output service shall be allowed to take credit of Service Tax leviable, paid on any input service received by the provider of output services. Applicant further submits that Rule 2(l) of Cenvat Credits Rules, 2004 define "input service" as any service used by a provider of output service for providing an output service; that input service bring within its ambit, certification, inspection and engineering services in relation to repair of D.G. sets, Air Conditioners etc. since it has been used by the applicant for providing output service.

15. It is observed that Revenue has accepted the contention of the applicant that they would be eligible to avail Cenvat Credit of Service Tax paid on inspection, certification and engineering service to be received from third party service provider for repair and maintenance activities for providing output service and utilize the same for payment of Service Tax on their taxable output service.

16. It is noticed that there is consensus with regard to issue a) above between the applicant and the Revenue. We also hold that as per Rule 3(1) read with Rule 2 (l) of Cenvat Credit Rules, 2004, applicant is eligible to avail Cenvat Credit on Service Tax paid on input service i.e. certification inspection and engineering service provided by third party vendor to the applicant for repair of capital goods, such as D.G. sets, Air conditioners etc.

17. As far as issue (b) above is concerned, applicant submits that they propose to procure parts from third party vendors, which shall be used for replacing the defective

parts of equipment during repair. Since the parts procured from third party vendors would form part of the repaired equipments which would be used by the applicant in provision of telecommunication infrastructure support services, the applicant should be entitled to avail CENVAT credit of Excise duty charged by the third party vendors.

18. Applicant submits that they are entitled to avail Cenvat Credit on the duty paid on parts and spares used for replacement of the defective ones with respect to goods such as D.G. sets, Air Conditioners etc. since they are capital goods within the meaning of Rule 2(a) (A)(i) of the Cenvat Credit Rules,2004. Therefore, its components, spares and accessories will be considered as capital goods in view of Rule 2(a)(A)(iii) ibid. Further, applicant will be eligible to avail Cenvat Credit under Rule 3 of Cenvat Credit Rules, 2004 for duty paid on capital goods.

19. Central Excise Commissionerate, Jaipur, inter alia, submits that the applicant can avail Cenvat Credit on duty paid on parts and spares used for repair and maintenance of equipment of telecom site; that applicant is not entitled to avail credit on works contract of building, a civil structure or part and laying of foundation or making of structure for support of capital goods. Central Excise Commissionerate, Hyderabad, inter alia, submits that since there is no manufacture of goods under Section 2(f) of Central Excise Act, 1944, the applicant is not entitled to avail Cenvat Credit. Central Excise Commissionerate, Kolkata, inter alia, submits that in terms of Para 3 of Departmental Instructions dated 08.07.2010, credit is not allowed on inputs used in repair and maintenance of DG sets, Air Conditioners, Batteries etc.

20. It is observed that Rule 2(a) of Cenvat Credit Rules, 2004 reads as under;

(a) "capital goods" means:-

(A) the following goods, namely:-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii);

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and

(vii) storage tank, and

(viii) motor vehicles other than those falling under tariff headings 8702,8703,8704,8711 and their chassis but including dumpers and tippers

used-

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(1A) outside the factory of the manufacturer of final products for generation of electricity for captive use within the factory; or

(2) for providing output service;

21. Rule 3 of Cenvat Credit Rules, 2004 reads as under,

(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the CENVAT credit of-

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance), Act 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001(14 of 2001);

(vi) the Education Cess on excisable goods leviable under section 91 read with Section 93 of the Finance (No.2) Act, 2004 (23 of 2004);

(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i)(ii)(iii)(iv)(v)(vi) and (via);

(viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty

(viii) the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);

(ix) the service tax leviable under section 66 of the Finance Act; and

(x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004)

"(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and

(xi) the additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005)

paid on –

(i) any input or capital goods received in the factory of manufacture of final product or by the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004.

22. It is observed from the perusal of Rule 3 ibid that a provider of output service shall be allowed to take credit of duty of excise and Additional duty of excise under Section 3(1) of the Customs Tariff Act, 1975 paid on capital goods received by the provider of output service. In the case before us, DG sets, Air Conditioners etc., fall under Chapter 85 and in view of definition of "capital goods" as enshrined in Rule 2 (a)(A)(iii), i.e. components, spares and accessories of goods inter alia specified under Chapter 85, will be covered under the meaning of "capital goods". Therefore, parts of DG sets, Air Conditioners etc will be "capital goods". Further, in terms of Rule 3 ibid, applicant who is provider of output service is allowed to take credit of duty paid on capital goods (parts of DG sets, Air Conditioners etc. in this case) received by the applicant.

23. It is noticed that the Central Excise Commissionerate, Jaipur have commented that applicant is not entitled to avail credit on Works Contract. The argument put forth is not tenable as the applicant does not propose to take Cenvat Credit on work contract. Further, Central Excise Commissionerate, Hyderabad opposed the application on the ground that as there is no manufacture of goods under Section 2(f) of Central Excise Act, 1944, applicant is not entitled to Cenvat Credit. The contention of the Commissionerate is not correct, as the applicant proposes to take Cenvat Credit as service provided under Rule 3 read with Rule 2 (a)(A)(iii) of Cenvat Credit Rules, 2004 and not as manufacturer. It is also noticed that Central Excise Commissionerate, Kolkata (IV), inter alia, submits that Cenvat Credit of Central Excise duty paid on inputs used / to be used for repair and maintenance of their various equipments like DG sets, Air Conditioners etc., would not be admissible to them in terms of para 3 of Departmental Instructions dated 08.07.2010 issued by the Board under F.No. 267/11/2010-CX 8, which reads as under;

3. It thus follows from the above judgements that credit on capital goods is available only on items, which are excisable goods covered under the definition of 'capital goods' under CENVAT Credit Rules, 2004 and used in the factory of the manufacturer. As regards 'input' they have to be covered under the definition of input under the CENVAT Credit Rules 2004 and used in or integrally connected with the process of actual manufacture of the final product for admissibility of cenvat credit. The credit on inputs used the manufacture of capital goods, which are further used in the factory of the manufacture is also available except for items like cement, angles, channels, CTD or TMT bars and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods. Further, credit shall not be admissible on inputs used for repair and maintenance of capital goods.

24. It is observed that Departmental Instruction dated 08.07.2010 is in respect of availability of Cenvat Credit on capital goods and inputs used in the manufacture of final product or input used in the manufacture of capital goods, which are further used in the factory of manufacturer and not on availability of Cenvat paid on capital goods by provider of output service. Therefore, this objection raised by the Revenue is also not tenable.

25. We have agreed with the applicant in respect of first two issues raised. As far as third issue is concerned, we rule as under;

The applicant is eligible to avail Cenvat Credit of Excise Duty under the Central Excise Act, 1944 / Additional Duty of Excise under Section 3(1) of the Customs Tariff Act, 1975 paid on parts and spares used for their replacement of the defective ones and Service Tax paid on inspection, Certification and engineering services etc. for the aforesaid repair and maintenance activities and claim set off against the output service tax paid for rendering of passive infrastructure service by the applicant to its customers.

Sd/-	Sd/-	Sd/-
(S.S.Rana)	**(V.S.Sirpurkar)**	**(R.S.Shukla)**
Member(R)	**Chairman**	**Member(L)**