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CENVAT CREDIT ON GTA OUTWARD – SC APPLIES THE BRAKE

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It seems that the Hon'ble Supreme Court has rejected the review petition filed against its decision, reported as CCE Vs Ultratech Cement Ltd – 2018-TIOL-42-SC-CX, holding that cenvat credit of Service Tax paid on Goods Transport Agency services, for transporting the goods upto customers' premises is not entitled for cenvat credit, sending shockwaves throughout the country.

Let us make an attempt to analyse the effect of this judgement.

Prior to 01.04.2008, the term "input service" is defined in Rule 2 (l) of the Cenvat Credit Rules, 2004 (hereinafter referred to as CCR), which read as,

"input service" means any service, -

(i) used by a provider of taxable service for providing an output service, or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.

The following amendment has been made with effect from 01.04.2008, vide Notification 10/2008 CE NT Dt. 01.03.2008.

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One of the important services used by manufacturing units is the services of Goods Transport Agencies (GTA) to transport their final products, from their factory of manufacture, to the premises of their depots, consignment agents; from the premises of such depots and consignments to the customers' premises; and transportation from the factory premises to the customers' premises directly, etc.

The issue as to whether the service tax paid on such GTA services (which is normally paid by the manufacturer himself under reverse charge) is entitled for cenvat credit or not has always been engaging the attention of all concerned.

For the period prior to the above amendment, the issue has been settled in favour of the assesses, by many judgements, of which the decision of the Hon'ble High Court of Karnataka in CCE Vs ABB Ltd {201-TIOL-395-HC-Kar-ST }, can be quoted, wherein it has been held, that the expression "clearance of the final products from the place of removal" would cover such transportation services upto the customers' place, and the same cannot be restricted by the expression "outward transportation upto the place of removal". The judgement has also made it clear that the position post 01.04.2008 is not examined in the judgement.

So, when the definition has been amended from 01.04.2008, restricting the credit entitlement only for "clearance of final products upto the place of removal" read with "outward transportation upto the place of removal" it becomes necessary to understand the meaning of the term "place of removal" as credit in respect of transportation services availed only upto such place of removal can be availed.

The term "place of removal" is defined in Section 4 (3) (c) of the Central Excise Act, 1944 as

"place of removal" means -

- (i) a factory or any other place or premises of production or manufacture of the excisable goods;
- (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
- (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

The following clarification has been issued vide the Master Circular, bearing No. 97/8/2007 Dt. 23.08.2007

(b) **Issue** : Whether a consignee can take credit of the amount paid as service tax either by himself (as consignee) or by the consignor or by the Goods Transport Agency?

Comments : As per Rule 3 of the Cenvat Rules, 2004, Cenvat credit of, inter alia, service tax leviable and paid on any 'input services' can be taken. The rule does not distinguish as to who (i.e. the GTA, the consignor or the consignee himself) has paid the aforesaid tax. The only condition required to be satisfied is that the consignee must be a manufacturer of excisable goods or a provider of taxable service and the service must be in the nature of 'input service' for such activity. In case of inward transportation of inputs or capital goods, such service (being specifically mentioned under the definition of 'input service') would qualify to be called as 'input service' and, thus, the service tax paid (by any of the persons mentioned above) on it would be eligible as credit to the receiver if he is either a manufacturer of excisable goods or a provider of taxable service.

(c) Issue : Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?

Comments : This issue has been examined in great detail by the CESTAT in the case of M/s Gujarat Ambuja Cements Ltd. v. CCE, Ludhiana [2007 (6) S.T.R. 249 (Tri-D)]. In this case, CESTAT has made the following observations :-

"the post sale transport of manufactured goods is not an input for the manufacturer/consignor. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws' scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions".

Similarly, in the case of M/s. Ultratech Cements Ltd v. CCE., Bhavnagar - 2007 (6) S.T.R. 364 (Tri.) = 2007-TOIL-429-CESTAT AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of the relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer/consignor can take credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.

8.2 In this connection, the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions. The phrase 'place of removal' has not been defined in Cenvat Credit Rules. In terms of sub-rule (t) of Rule 2 of the said rules, if any words or expressions are used in the Cenvat Credit Rules, 2004 and are not defined therein but are defined in the Central Excise Act, 1944 or the Finance Act, 1994, they shall have the same meaning for the Cenvat Credit Rules as assigned to them in those Acts. The phrase 'place of removal' is defined under section 4 of the Central Excise Act, 1944. It states that, -

"place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed."

It is, therefore, clear that for a manufacturer/consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, sale from a non duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the 'place of removal' does not pose much problem.

However, there may be situations where the manufacturer/consignor may claim that the sale has taken place at the destination point because in terms of the sale contract/agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step; (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under Section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place.

Thus, if the following three conditions are satisfied, cenvat credit of service tax paid on outward transportation can be availed as cenvat credit, as per this circular.

(i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step;

(i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step;

(iii) the freight charges were an integral part of the price of goods.

The crux of the above clarification is as to the scope of the term “place of removal”. Once the term “place of removal” is thus understood, cenvat credit is entitled for transportation “upto such place of removal” from 01.04.2008. If buyers’ place can be considered as place of removal, then credit for GTA services upto buyers’ place is entitled.

Since the above clarification has not overcome the practical difficulties in determining the eligibility of cenvat credit of service tax paid on outward transportation, the CBEC came out with another circular No. 988/12/2014 Dt. 20.10.2014. This circular, after dealing with various caselaws and previous circulars, has concluded as below.

It is reiterated that the place of removal needs to be ascertained in term of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of transport, inclusion of transport charges in value , payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. The place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.

The crux of the above discussions is to the effect that if the transfer of property over the goods happens at the buyers' place, in terms of the provisions of the Sale of Goods Act, 1930, then such buyers' place would be the place of removal and hence any service tax paid on GTA services availed for transporting the goods till the buyers' premises would be entitled to cenvat credit.

Now comes the decision of the Hon'ble Supreme Court in Ultratech case. After taking note of the CBEC Circular dated 23.08.2017, clarifying that the buyers' place can be treated as the place of removal, the Court made the following observations.

11. As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd. and M/s. Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions which were mentioned explaining the 'place of removal' as defined under Section 4 of the Act, there is no quarrel upto this stage. However, the important aspect of the matter is that Cenvat Credit is permissible in respect of 'input service' and the Circular relates to the unamended regime. Therefore, it cannot be applied after amendment in the definition of 'input service' which brought about a total change. Now, the definition of 'place of removal' and the conditions which are to be satisfied have to be in the context of 'upto' the place of removal. It is this amendment which has made the entire difference. That aspect is not dealt with in the said Board's circular, nor it could be.

12. Secondly, if such a circular is made applicable even in respect of post amendment cases, it would be violative of Rule 2(l) of Rules, 2004 and such a situation cannot be countenanced.

13. The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency service availed for transport of goods from place of removal to buyer's premises was not admissible to the respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing Officer is restored.

It is quite unfortunate that the Hon'ble Apex Court has not noticed that the clarification contained in the circular has got nothing to do with the amendment. The circular only clarifies that the buyers' place can become place of removal if the three conditions are satisfied. If these three conditions are satisfied, then buyers' place would be the place of removal and even after the amendment, credit would be allowed, for clearance of final products upto the place of removal" and the GTA services availed for transporting the goods from the factory or depot, to the buyers' place could be covered within the expression "for clearance of final products upto the place of removal". Hence, with due respect, the conclusion of the Hon'ble Apex Court that the said clarification is not relevant after 01.04.2008, appears to be erroneous. Further, it has not been brought to the notice of the Hon'ble Apex Court that the instructions issued on 23.08.2007 were also reiterated on 20.10.2014, i.e. after the amendment made from 01.04.2008.

Now, since the review petition has also been dismissed by the Hon'ble Supreme Court, we have to accept the law of the land that after 01.04.2008 cenvat credit for service tax paid on outward transportation from factory or depot, to the customers' place is not entitled for cenvat credit. Already almost at all places, the department has been issuing demand notices in this regard the issues are pending at various levels and they are bound to be decided against the assesses, by following the above judgement of the Hon'ble Supreme Court in Ultratech, supra.

The only hope is appealing to the Government, to bring in some retrospective amendment allowing such credit. The issue could have been made simple if it is provided that service tax paid on transportation services would be entitled for cenvat credit, wherever such cost of transportation is also part of the assessable value of the goods on which excise duty is paid and the same is not excluded from the assessable value, as per Rule 5 of the Central Excise (Determination of Value) Rules, 2000.

As per Rule 5 ibid, the cost of transportation from the place of removal to the place of delivery can be excluded. In other words, the cost of transportation upto the place of removal is includible in the assessable value and only the cost of transportation from the place of removal to the place of delivery can be excluded. If a composite price is charged for the goods, the said cost of transportation from the place of removal to place of delivery can be excluded for the purpose of determination of assessable value; and if freight is charged separately for transportation from the place of removal to the place of delivery, the same need not be included in the assessable value for payment of excise duty. Wherever no such exclusion has been claimed, it would mean that the place of delivery is treated as place of removal and the freight upto such place is part of the assessable value. If so, there is no reason as to why the service tax suffered on such freight should be denied the benefit of cenvat credit, as otherwise it only leads to cascading of taxes, which the cenvat credit scheme seeks to remedy.

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