



GTA Vs GTO and Cenvat Credit

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In this article we look at the scope of Negative List entry on Transportation of Goods by Road Service. The eligibility of cenvat credit of service tax paid on GTA services is also discussed.

Introduction

In the normal course the service provider is liable to service tax. In case of certain specified services, the service receiver is liable to service tax. One such service where the specified service receivers are liable is transport of goods by road service[GTA service].In this article the paper writers have examined when service tax is leviable on GTA service and eligibility of credits of service tax paid on GTA service.

Negative list entry for Transport of Goods by Road Service

Under negative list based taxation, there is an entry which excludes from the service tax levy-

Section 66D(p) services by way of transportation of goods-

(i) by road except the services of-

(A) **a goods transportation agency**; or

(B) a courier agency;

As per above, all services of transport of goods by road [except GTA or courier agency] is covered in negative list and is not liable to service tax.

What is Goods Transport Agency?

As per Section 65B(26) goods transport agency means any person who provides service in relation to transport of goods by road and issues a consignment note by whatever name called.

The basic scheme of taxable service category of Goods Transport Agency (GTA service) is that the GTA would be preparing the consignment note and invoice containing details as required.

The consignment note is generally issued as an acknowledgement for the receipt of goods and underwriting to deliver the goods for the person who produces such document. This is in fact considered to be a negotiable instrument also. Therefore this document is coupled with certain obligation and when such obligations are absent there is no requirement of issuing such a document. When such document is not issued, the **person may not be considered as goods transport agency** in terms of the statute.

Explanation to Rule 4B of Service Tax Rules, defines consignment note as follows:

Explanation.- For the purposes of this rule and the second proviso to rule 4A, *“consignment note” means a document, issued by a **goods transport agency** against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.*

In other words to attract service tax liability, the service has to be provided by a Goods Transport Agency in relation to transportation of goods by road and a consignment note has to be issued containing all the particulars as set out in explanation to Rule 4B.

GTA vs GTO

The transport booking agents (including the owners who are acting as such agent) are brought into service tax net and not the truck owners or truck operators, who just provide the service of transportation in direct contract with the service receiver.

This view has found support in a number of decisions, it is decided that the freight amount paid to Goods Transport Operators / Individual Truck Operators are not liable under Goods Transport Operators.

There was a decision in KMB Granites 2010 (19) S.T.R. 437 (Tri. - Chennai) affirmed in 2013 (32) STR J205 (Madras High Court) where Tribunal held that transport undertaken by individuals owning operating lorry and trucks are not liable to Service Tax.

In the case of same party, in another proceeding where there was no representation done, in KMB Granites 2014 (35) S.T.R. 63 (Mad.) where examined whether individual can be commercial concern. The Tribunal Order set aside, holding the individual operator would also be covered in GTA.

They have not looked at the booking agent concept at all. In case of GTA there is agent and in case of GTO [which is not liable to service tax] there is no agent. In its anxiety to tax the GTA services, it seems to have forgotten a fundamental requirement to levy service tax that is GTA is a person who provides service in relation to transport of goods by road **and issues consignment note**. In our view the decision maybe *per incuriam*[some relevant aspects not advanced] and maybe infirmed to that extent as it does not base on established decisions.

Who is liable to pay the service tax liability on GTA service?

In respect of GTA service, where the person liable to pay the freight, either himself or through agent, is also liable to pay service tax on 25% of the amount charged[wef 1.4.15 on 30% of amount charged] being one of the following:

- a. factory registered or governed under Factories Act,
- b. body corporate established by or under any law,
- c. society registered under the Societies Registration Act or any other law for time being in force in India,
- d. co-operative society established by or under any law,
- e. registered dealer of excisable goods,
- f. partnership firm registered or not under any law including association of persons.

But when the service receiver is not covered in the specified list, the service provider (GTA) would have to pay service tax. The GTA is therefore liable to discharge tax in case of individual/unregistered firm/HUF/Governmental agency being person liable to pay freight.

GTA on Outward Freight and cenvat credit

The extent to which the assessee can avail cenvat credit on input services is subject to litigation especially on account of the concept of transportation from/to place of removal.

The outward transportation of finished goods **from place of removal** is covered by definition of 'input service' upto 31.03.2008. From 01.04.08 the clearance of final products from the place of removal was replaced by clearance of final products **up to the place of removal** in the first limb of the definition.

Next we analyse whether the cenvat credits of ST paid on GTA services can be availed by a manufacturer of dutiable goods or provider of taxable services. For this we examine definition of input service as per Cenvat Credit Rules.

Input service definition – “Means & includes”

The definition of input service as per section 2 (I) of CCR– means any service ... used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products AND CLEARANCE OF FINAL PRODUCT upto the place of removal, and INCLUDES services usedinward transportation of inputs or capital goods and outward transportation upto the place of removal.....

GTA services are used for clearance of the final product by the manufacturer. Further the use of the word includes does not disentitle other services. Cenvat being a beneficent scheme [well settled law], credits need to be enabled and not disabled.

We draw strength from the decision of Parth Poly wovens P Ltd. 2011-TIOL-891-HC-AHM-ST Gujarat High Court when the definition was “from the place of removal”. Further after the definition was changed to “upto the place of removal” a 2014 decision in Ellora Times – 2014 (3) TMI 567 – Again of Gujarat High Court where the High court has rightly stressed that the use of term “includes” makes the entry exhaustive. In both these decisions the High court has rightly said that the use of term “includes” makes the entry exhaustive and does not oust any activity from the main body.

On this reasoning the outward GTA credit was not and is not excludible right from earlier days till date.

Interpretation of From &Upto the Place of Removal

In the input services definition till 1.4.2008, that there was no restriction on availment of the cenvat credit on the outward transportation of finished goods. The outward transportation of finished goods **from place of removal** was covered by definition of 'input service' upto 31.03.2008.

From 01.04.08 the clearance of final products from the place of removal was replaced by clearance of final products **up to the place of removal**. Further the **place**

of removal is site of customer where **the sale** takes place at the site of the customer. The term 'sale' and 'place of removal' is not defined in the CCR. Whenever a term is not defined in CCR, then the relevant definitions to be referred from CE Act.

A new sub-rule (qa) has been inserted in Rule 2 of the Credit Rules to introduce the definition of 'place of removal' as provided under Section 4(3)(c) of the Excise Act defined as under -

(c) "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) 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;

Further the definition of 'sale' under Central Excise Act would be relevant. As per Section 2(h) of CE Act "sale" and "purchase", with their grammatical variations and cognate expressions, mean **any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;**

On a conjoint reading of the above definitions of sale and place of removal, that in case of a sale from a depot **or any other premises (from where the possession of excisable goods is transferred for consideration by manufacturer,** after their clearance from the factory), the determination of the 'place of removal' would be that location outside the factory. Then it can be inferred that location of customer's site where the possession of the goods is handed over for a payment after the clearance from factory and where such sale takes place is the place of removal.

Accordingly, when the factory gate is not the place of removal, then the destination of customer at which the goods are handed over would be treated as the place at which the transfer of ownership takes place. There could be situations where the sale by the manufacturer / consignor said to have taken place at the destination point because of the terms of the sale contract / agreement for the following reasons:

(i) The ownership of goods and the property in the goods remains 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 bears the risk of loss of or damage to the goods during transit to the destination; and

(iii) The freight charges are an integral part of the assessable value of the goods.

Also when as per PO terms, the payment also made at customer site after safe receipt and exam of the goods, the customer site could be said to be place of removal.

This is also supported in the Master Circular issued under Service Tax vide Circular No. 97/8/2007-S.T., dated 23-8-2007, with reference to availability of Cenvat credit on 'outward transportation'. Board vide Circular No. 988/12/2014-CX dated October 20, 2014 has clarified that 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.

Judicial Decisions

In Gujarat Ambuja Cement Ltd. 2009-TIOL-110-HC-P&H-ST where assessee availed credit for duty paid on outward freight which was disallowed by revenue. It was held by High Court that assessee is eligible for Credit.

In New Allenberry Works Vs CCE CENVAT - 2014-TIOL-724-CESTAT-DEL the question was whether credit of service tax can be taken for the outward freight in respect of excisable goods delivered at the premises of buyer for period November, 2009 to March, 2010. Held that where the place of delivery of the goods is the customer premises and the freight is borne by the manufacturer, the place of removal has to be held as the customer's factory gate in view of Punjab & Haryana HC decision in Gujarat Ambuja Cement Ltd. The amendment to definition of 'input service' w.e.f 01.04.2008 would not make any difference where the sales are on FOR basis and there was no reason to deny CENVAT credit and appeal allowed: DELHI CESTAT.

In Ultratech Cement Ltd. vs. CCE, Raipur, 2014-TIOL-478-CESTAT-DEL, Tribunal ruled that in cases where the duty on the final product is levied at a specific rate or on ad-valorem rate but the value determined on the basis of MRP under Section 4A or on tariff value fixed under Section 3 (2), the place of removal would be the factory gate. This judgment was reversed by the Chhattisgarh High Court in Ultratech Cement Ltd. vs. CCE, Raipur reported in 2014-TIOL-1437-HC-CHHATTISGARH-CX.

Also in Ultra Tech Cement Ltd. Vs. C.C.Ex. and ST, Rohtak [2014-TIOL-1934-CESTAT-DEL]has again held that Cenvat credit on outward transportation is allowed when the sales are made on FOR destination basis and place of removal would be customer's premises.

The place of removal would depend upon the specific transaction in issue and where the removal is pursuant to sales on FOR basis, with the risk in the goods manufactured being borne by the manufacturer till delivery to the customer at its premises and where the composite value of sales include the value of freight involved in delivery at the customer's premises, the place of removal would not be at the factory gate, but at the customer's premises.

Conclusion

In conclusion,there was no restriction as per law as the word 'includes' in input services definition does not disentitle credit on outward GTA. Further as per PO terms in the case of manufacturer [supported by case laws], where the removal (sale completion) is ONLY at the customer's premises therefore such credit on outwards GTA are eligible to be availed.

The manufacturer could opt to take such outwards GTA credits under intimation to department by means of letter and seek confirmation of understanding on eligibility to said credits. Industries & Taxable service providers can avail the credit for the past years if they had either not availed or reversed the GTA credit in past years. Wherever objected by department, reverse under protest. They can avail once again when clarity emerges by way of any definitive decision of Apex Court in this regards.