



NITYA'S INSIGHT

*Update on availability of Cenvat credit on
GTA services in case of FOR sales*

September 11, 2018

Dear Reader,

This is to update you on a recent **CBIC Circular No. 1065 / 4 / 2018-CX** dated **June 8, 2018** ('Circular 2018'). The Circular is intended to issue clarifications in respect of the definition of 'place of removal' under the Central Excise Act, 1944 ('Excise Act') and the Cenvat Credit Rules, 2004 ('Credit Rules').

There has been a long history of disputes regarding availability of credit on GTA service from factory's premises to buyer's premises involving FOR terms of sales i.e. where the ownership in goods gets transferred at buyer's premises. The issue was largely settled by favourable clarifications issued vide **Circular 97 / 8 / 2007-CX** dated **August 23, 2007** ('Circular 2007') and **Circular 988/12/2014-CX** dated **October 20, 2014** ('Circular 2014') and several favourable juridical pronouncements of High Court and Tribunal.

The dispute resurfaced with the decision in the case of **CCE v. Ispat Industries, 2015 (324) ELT 670 (SC)**. In this case, the Supreme Court observed that the 'place of removal' refers to the premises of the manufacturer only and buyer's premises cannot be the place of removal. The terms of sale in this case were ex-works and the dispute was on inclusion of freight in assessable value for levy of excise duty.

In the recent Supreme Court decision in the case of **CCE v. Ultratech Cement Ltd., 2018 (9) GSTL 337 (SC)**, the terms of sales were FOR and the dispute was on availability of credit on GTA services. The Supreme Court held that credit is available upto the place of removal and denied credit on GTA service received from factory's premises to buyer's premises. The Court did not delve upon if the buyer premises can be place of removal or not.

Circular 2018 clarifies applicability of these decisions in different fact patterns and rescinds Circular 2007 and Circular 2014.

The Circular 2018 states that the place of removal shall be the manufacturer's premises [as observed in Ispat Industries (*supra*)] with an exception to this rule for FOR sales. In case of FOR sales where the ownership and risk remain with the seller till the goods are accepted by the buyer on delivery, the Circular clarifies that the place of removal shall be determined depending upon the facts of each case (based on the decisions in the cases of **CCE v. Emco Limited, 2015 (322) ELT 394 (SC)** and **CCE v. Roofit Industries Limited, 2015 (319) ELT 221 (SC)**).

To summarise, the Circular has clarified that in case of FOR sales, the place of removal will not be restricted to premises of manufacturer and will be decided based on legal position as on date. Importantly, the Circular does not specifically discuss the impact of Ultratech's decision but only highlights that the Court held that credit will not be available from place of removal to buyer's premises.

The Circular further clarifies that in case of export sales, place of removal will be port as clarified in **Circular No.999/6/2015-CX** dated **February 28, 2015**.

Lastly, Circular clarifies that new show cause notices issued on this point, the authorities cannot invoke extended period of limitation.

NITYA's Comments

The intent of the Circular is to clarify place of removal in case of FOR sales. Though the Circular does not directly say that place of removal shall be buyer's premises in such cases, it indirectly says so. By doing this,

the Circular goes beyond the decision of Supreme Court in the case of Ultratech Cement (*supra*). It is a settled principle that a Circular cannot override a Supreme Court decision. Consequently, the coming time will tell as to whether the authorities, Tribunals or Courts will follow Circular 2018 or not.

Hence, the only recourse available to industry is to file representation with the government and seek retrospective amendment in the Credit Rules to clarify that the place of removal shall be the buyer's premises in case of FOR sales.

We hope that you will find this update useful. For any clarification, please feel free to revert.

Regards,

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