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Dear Professional Colleague,

**Cenvat credit admissible on services of sales commission agent**

## **Background:**

Even though the definition of 'input services' given under Rule 2(l) of the Cenvat Credit Rules, 2004 ("the Credit Rules") covers the services of sales promotion in its inclusive part, eligibility to avail Cenvat credit on the services rendered by a commission agent has been disputed recently because of divergent judgments and views of the Department.

In this regard, the Hon'ble Punjab & Haryana High Court in the case of **Commissioner of Central Excise, Ludhiana Vs. Ambika Overseas [2012 (25) S.T.R. 348]** ("Ambika Overseas Case") has held that provisioning of services by the overseas commission agents for canvassing and procuring of orders is 'sales promotion' falling within the ambit of definition of input service under Rule 2(l) of the Credit Rules and the assessee will be entitled to take Cenvat credit of Service tax paid by them as recipient of those services. Relevant extract of the case is reproduced hereunder:

*"...8. The Tribunal while affirming the order of Commissioner (Appeals) and adjudicating the issue in favour of the respondent had come to the conclusion that the activities in respect of which cenvat had been filed, were pre-removal activities and the same could not be held to be post-removal. It was further observed that canvassing and procuring orders were in relation to 'sales promotion' and would fall under sales promotion activities. These activities were, thus, included in the definition of input services and the assessee was entitled to benefit of cenvat credit of service tax....."*

*Further, the definition of the 'input services' includes services used in relation to 'sales promotion' and these activities can rightly be described as sales promotion activities. Sales promotion activities undertaken at given point of time also aims at sales of goods which are to be manufactured and cleared on future....."*

*(Emphasis supplied)*

Further, the Central Board of Excise and Customs ("CBEC") vide **Circular No. 943/04/2011-CX dated April 29, 2011** had also clarified that Cenvat credit on account of commission on sales is appropriately covered under definition of 'input service' as defined under Rule 2(l) of the Credit Rules:

<p>"5 Is the credit of Business Auxiliary Service (BAS) on account of sales commission now disallowed after the deletion of expression "activities related to business"?</p>	<p>The definition of input services allows all credit on services used for clearance of final products up to the place of removal. <b><u>Moreover, activity of sale promotion is specifically allowed and on many occasions the remuneration for same is linked to actual sale. Reading the provisions harmoniously it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis.</u></b>"</p>
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However, the Hon'ble High Court of Gujarat in the case of **Commissioner of C. Ex., Ahmedabad-II Vs. Cadila Healthcare Ltd. [2013 (30) S.T.R. 3 (Guj.)]** ("Cadila Healthcare case"), held that the agents are

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directly concerned with sales rather than sales promotion, thus the services provided by them is not covered in main or inclusive part of definition of input service in Rule 2(l) of the Credit Rules. Relevant extract of the judgment is reproduced hereunder for the ease of reference:

*“.....The term input service as defined in the rules means any service used by a provider of taxable service for providing an output service or 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 various activities of the description provided therein including advertisement or sales promotion. Thus, the portion of the definition of input service insofar as the same is relevant for the present purpose refers to any service used by the manufacturer directly or indirectly in relation to the manufacture of final products and clearance of final products from the place of removal. Obviously, commission paid to the various agents would not be covered in this expression since it cannot be stated to be a service used directly or indirectly in or in relation to the manufacture of final products or clearance of final products from the place of removal. The includes portion of the definition refers to advertisement or sales promotion. It was in this background that this court has examined whether the services of foreign agent availed by the assessee can be stated to services used as sales promotion. In the absence of any material on record, as noted above to indicate that such commission agents were involved in the activity of sales promotion as explained in the earlier portion of the judgement, in the opinion of this court, the claim of the assessee was rightly rejected by the Tribunal. Under the circumstances, the adjudicating authority was justified in holding that the commission agent is directly concerned with the sales rather than sales promotion and as such the services provided by such commission agent would not fall within the purview of the main or inclusive part of the definition of input service as laid down in Rule 2(l) of the Rules”*

(Emphasis Supplied)

Thus, the matter of availing Cenvat credit on services of sales commission agents has been a subjective issue mainly due to the judgment in Cadila Healthcare case, which came as a setback for many manufacturers availing Cenvat credit on the services of commission agents. Further, since the judgments in both the cases (i.e. Cadila Healthcare case and Ambika Overseas Case) were given by the Hon’ble High Courts, none of them could be said to have binding precedent. In view of continued litigation, all the eyes were awaiting decision of the Hon’ble Apex Court to finally have a settled legal jurisprudence.

## **CG removes the mist to allow Cenvat credit on services of commission agents:**

The Central Government (“CG”) vide **Notification 02/2016-CE (NT) dated February 3, 2016 (“the Notification”)** had amended the definition of ‘input services’ under Rule 2(l) of the Credit Rules to insert following explanation after sub-clause (C):

*“Explanation. -For the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis.”*

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**Conclusion:** Thus, Cenvat credit may be availed on services of sales commission agents also. Further, with the insertion of stated explanation, it may be contended by the assesseees that the insertion of said explanation is clarificatory in nature, which would have retrospective effect.

*Hope the information will assist you in your Professional endeavours. In case of any query/information, please do not hesitate to write back to us.*

Thanks & Best Regards,

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