IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD
[COURT NO. II]

Shri B.S.V. Murthy, Member (T)

Commissioner of Central Excise, Rajkot
Versus
Adani Pharmachem P. Ltd.

Final Order Nos. A/1387-1393/2008-WZB/AHD, dated 16-7-2008
in Appeal Nos. E/118-124/2008

Dr. M.K. Rajak, SDR, for the Appeallant
Shri P.V. Sheth, Advocate, for the Respondent

AIT Head Note: **where the sale is on FOB/CIF basis, the place of removal has to be the load port only. Further the definition of input services also has been defined to mean any service rendered in relation to outward transportation up to the place of removal. Since, input service includes services rendered for outward transportation up to the place of removal, all the service tax paid to facilitate goods to reach the place of removal has to be eligible for the benefit of CENVAT credit. Further the definition of input service also includes any service used for manufacture directly or indirectly in or in relation to the manufacture of final products and clearance of final products from the place of removal. There is no dispute that the CHA services are required to facilitate clearance of final products from the place of removal i.e. the load port** (Para 3)

O R D E R

In all these seven appeals filed by the Revenue, the issue is same and therefore all of them are taken together for disposal. The short issue involved in all these appeals is eligibility of service tax paid on CHA services rendered in the port to the exporter when the export has been made on FOB basis or CIF basis. The Commissioner (Appeals) has held that service tax paid on CHA services is admissible as CENVAT credit in these cases in view of the fact that the place of removal has to be considered as the port where the goods are put on board the ship or the aircraft as the case may be. He has relied upon the judgment of the Tribunal in the case of **M/s. Kuntal Granites Ltd. AIT-2008-496-CESTAT** [2007 (215) E.L.T. 515 (Tri.-Bang.)] wherein the place of removal in case of exports was held to be the load port. He has also relied upon the circular issued by the CBEC No.97/8/2007-S.T. dated 23-8-2007.

2. Heard the ld. Dr. M.K. Rajak on behalf of the Revenue and Shri P.V. Sheth, Advocate in respect of the respondents Sl. Nos. 4 to 6. Dr. Rajak cited the decision of this Tribunal in **M/s. Excel Crop Care Ltd.** reported in **AIT-2008-495-CESTAT** 2007 (7) S.T.R. 451 (Tri.-Ahd.) rendered on 30-4-2007 holding that the credit of duty paid on CHA services is not admissible as Cenvat credit. He also submitted that the activities at the load port have nothing to do with the manufacture of goods and their clearance since the clearance has already taken place in case of export goods at

the factory gate itself. On the other hand the ld. Advocate relies upon the decision of this Tribunal in **CCE, Rajkat v. Rolex Rings P. Ltd. AIT-2008-497-CESTAT** (Final Order Nos. A/341-342/WZB/ AHD/08 dated 29-2-2008 = 2008 (230) E.L.T. 569 (Tri.). He also cited the circular of the Board holding that the place of removal depends upon the facts as to whether the property or the ownership in the goods has passed to the buyer or not and in the case of FOB/CIF sale, the property passes only after the goods are loaded for the purpose of transportation or when the goods reached the destination as the case may be. At this stage, the ld. SDR submits that in view of the two conflicting decisions cited, the matter may be referred to the Larger Bench.

3. I have considered the submission from both the sides. There is no dispute that the goods have been sold on FOB/CIF basis. There is also no dispute that the service tax had been paid for the CHA services rendered. There are only two questions to be decided. The first is what would be the place of removal in such cases. I find that the clarification issued by the CBEC in the circular cited above is very relevant and therefore para 8.2 of the circular is reproduced below;-

> "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,-
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> "place of removal" means-
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> (i) a factory or any other place or premises of production or manufacture of the excisable goods;
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> (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty;
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> (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;
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> from where such goods are removed."
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> 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."

From the circular, it is quite clear that in case where the sale is on FOB/CIF basis, the place of removal has to be the load port only. Further the definition of input services also has been defined to mean any service rendered in relation to outward transportation up to the place of removal. Since, input service includes services rendered for outward transportation up to the place of removal, all the service tax paid to facilitate goods to reach the place of removal has to be eligible for the benefit of CENVAT credit. Further the definition of input service also includes any service used for manufacture directly or indirectly in or in relation to the manufacture of final products and clearance of final products from the place of removal. There is no dispute that the CHA services are required to facilitate clearance of final products from the place of removal i.e. the load port. Coming to the conflict between the two decisions Tribunal cited, it is noticed that the decision in the case of **M/s. Excel Crop Care Ltd. AIT-2008-495-CESTAT**was rendered on 30-4-2007 whereas the circular was issued by the CBEC on 23-8-2007 and therefore the Id. Member did not have the benefit of the Board's circular at that time. It is also noticed that in para 4, it has been stated in the order that "ld. SDR submits that input services, should be strictly construed as per the definition. The services rendered at port by CHAs are after clearance of the goods from the factory gate and hence cannot be treated as input services". From this it emerges that the Place of removal in that case, was factory gate. There is no doubt that in each and every case, it is necessary to consider as to exactly which is the place of removal before allowing the benefit of CENVAT credit. Therefore any decision rendered in an individual case cannot be applied to another case unless the facts happen to be same. Therefore the decision of the Tribunal in **M/s. Excel Crop Care Ltd.**'s **AIT-2008-495-CESTAT** case cannot be considered and applied to the cases under consideration now. On the other hand I find that the decision of the Tribunal cited by the ld. Advocate for the respondents is applicable on facts and this decision has also considered the decision in M/s. Excel Crop Care Ltd. and has distinguished the same. I am in full agreement with the decision cited by the Id. Advocate and in view of the discussions above, the appeals filed by the Department are without merit and accordingly are rejected.