आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH
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निवन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. STC/15-14/OA/2020

आदेश की तारीख़/Date of Order : - 18.06.2021
जारी करने की तारीख़/Date of Issue :- 21.06.2021

DIN-20210664WT0000666C50

द्वारा पारित/Passed by:- मारुत त्रिपाठी / *Marut Tripathi*
संयुक्त आयुक्त / *Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 08/JC/MT/2021-22

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।
This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील, इसकी प्राप्ति से दो महिनों के अन्दर आयुक्त (अपील), केन्द्रीयजी.एस.टी., केन्द्रीयजी.एस.टी.भवन, अंबावाड़ी, अहमदाबाद - 380015 को प्रारूप संख्या एसटी-4 (ST-4) में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच रूपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form ST-4 to the Commissioner(Appeals), GST Bhawan, Ambawadi, Ahmedabad-380015 within two months from the date of its communication. The appeal should bear a court fee stamp of Rs. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त(अपील) के समक्ष नियमानुसार पूर्व जमा की धनराशि का प्रमाण देना आवश्यक है I

An appeal against this order shall lie before the Commissioner (Appeals) on giving proof of payment of pre-deposit as per rules .

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या एसटी-4 (ST-4) में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील), नियमावली 2001 केनियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए । उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति

(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिस पर रू. 5.00 (पांच रूपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form ST-4 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.5.00.

विषय:- कारण बताओ सूचना/ The Show Cause Notice No. F.No.DGGI/AZU/Gr.C/36-15/2020-21 dated 30.05.2020 issued to M/s. Inos Technology, Pvt. Ltd, 452-455, C-Block, Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad 380 058.

Brief Facts of the case:

M/s Inos Technologies Pvt. Ltd, a company registered under the Indian Companies Act, 1956, having its registered office at 452-455, C-Block, Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad-380058, (hereinafter referred to as the assessee) is a Pvt Ltd Co, registered under Section 69 of the Finance Act, 1994 and were holding Service Tax registration number AACCI3445GSD001.

2. During the course of investigation initiated against the assessee covering the period from October 2014 to June 2017 by the officers of Directorate General of Central Excise Intelligence (now Directorate General of Goods and Services Tax Intelligence), Ahmedabad Zonal Unit, non-payment of Service Tax on Intermediary services was noticed.

3. It was gathered by the officers of Directorate General of Central Excise Intelligence (now Directorate General of Goods and Services Tax Intelligence) that M/s Inos had not paid service tax on commission income received from the foreign manufacturers by facilitating the sale of machineries which were manufactured by foreign manufacturers to Indian buyers as they mis-stated and mis-declared the commission income in their ST-3 Returns as "Export of Service" income and took exemption from paying Service Tax.

4. During the scrutiny of the Balance Sheet and Profit & Loss Account it was revealed that during the period from October 2014 to June 2017 M/s Inos had received "commission income" from its various overseas machinery manufacturer clients. On further verification of the ST-3 Returns it was revealed that M/s Inos had claimed exemption under "Export of Services" which is reflected in their balance sheet. Therefore, they did not discharge any amount of Service Tax on the 'commission income' received from their foreign clients' to the Government exchequers on the commission income received from overseas manufacturers of the machinery for selling their machinery in India. It was also revealed that M/s Inos had entered into written and verbal contracts with various overseas machinery manufacturers (Principals) for providing intermediary services to Indian clients. M/s.Inos vide their letter dated 03.02.2018 submitted sample copies of the agreement entered into by them with various foreign machinery manufacturers. The details of the agreements and their terms and conditions are as follow:

5. M/s Servolift Lifetime Solution entrusted M/s Inos (Agent) with sole agency for all products and/or sold by M/s Servolift Lifetime Solution in the territory of India. The salient features of the said agreement are as under:

(i) The Agent has to promote business in the territory and represent the interest of M/s Servolift Lifetime Solution. This duty applies to all the M/s Servolift Lifetime Solution products and to all customers in the whole territory.

(ii) The Agent shall undertake to visit all customers and potential customers in his territory on a regular basis. He further assists all M/s Servolift Lifetime Solution employees, who travel to his territory for customer meetings, negotiations or service activities, with the organisation of the journey (e.g. arranging meetings with customers, organizing hotel reservation and transport as well as obtaining travel visa.)

(iii) The Agent will regularly report in writing on his activities and performance and provide M/s Servolift Lifetime Solution with the respective documentation (amongst others in relation to the market and the competitive situation). In particular, he will immediately advise M/s Servolift Lifetime Solution as to any prospective business. On request, he will provide M/s Servolift Lifetime Solution with copies

of his correspondence with customers.

(iv) The Agent will carefully and regularly report on the financial capacity of the customers.

(v) Sub-agents can only be employed with the prior written consent of M/s Servolift Lifetime Solution.

(vi) M/s Servolift Lifetime Solution reserves the right to act in the agent's territory. In such cases M/s Servolift Lifetime Solution will regularly inform the Agent of the result of negotiations.

(vii) The Agent shall assist M/s Servolift Lifetime Solution related to patents and other industrial property rights as well as in defending M/s Servolift Lifetime Solution against unfair competition by third parties.

(viii) After conclusion of a transaction the Agent assists M/s Servolift Lifetime Solution with the processing of the contractually agreed services in the interest of M/s Servolift Lifetime Solution. He thereby assists both with the processing of orders as well as with respect to on-site activities (e.g. assembling and starting of the operation).

(ix) If any complaints are received, M/s Servolift Lifetime solution must be notified immediately and the Agent is obliged to secure any evidence in favour of Servolift.

6. COMMISSION INCOME TERMS AND CONDITIONS AS PER PARA "8" OF THEAGREEMENT ENTERED INTO BY M/S INOS WITH SERVOLIFT LIFETIME SOLUTION:

(i) The commission rates, unless restricted by the conditions set forth hereunder, arc ns follow:

a) 10% of the Net value of goods (after reduction of discount) for machines that arc manufactured by Servolift.

b) 5 % of the Net value of the goods (after reduction of the discount) for goods that are manufactured by third parties as well as cleaning equipment, containers and drums. The same applies to units of foreign manufacturers being purchased to complete the system (conemill, fork lifts, vacuum conveying systems, filter etc).

c) 10% of the Net value of goods (after reduction of discount) for spare parts.

d) The entitlement to commission arises upon delivery of the products and on invoicing the customer. The payment of commission is due 30 days after receiving the final payment from the customer. A commission invoice is to be send to Servolift.

e) Subject to binding foreign exchange regulations not providing otherwise, the commission amount will be paid in EURO.

7. On the analysis of the "activities" carried out by the assessee as spelt-out in the above mentioned commercial agency contract dated 16.01.2018, such as:

(i) Selling of products of Servolift Lifetime Solutions in India;

(ii) To promote business of Servolift in India;

(iii) To regularly report in writing on their activities and performance as *well* as financial capacity of the customers in India of Servolift.

(iv) To visit all customers and potential customers in India on a regular basis

(v) To assist all Servolift employees (to arrange travel, Hotel reservation, meetings) who travel to India for customer meetings;

(vi) Earned **Commission Income** for facilitating the deal between Servolift. and Indian Clients.

8. It appeared that M/s Inos is engaged in providing certain services which facilitate supply

of goods from Servolift Lifetime Solution (situated outside India) to their customers in the taxable territory (India). Even though, it is mentioned in the agreement that M/s Inos (The Agent) has to promote business in the territory and represent the interest of Servolift (The Principal). This duty applies to all the products of Servolift and to all customers in the whole Indian territory.

9. Thus, it appeared from the facts emanating from the agreement that while rendering the services described hereinabove, the assessee had acted as an Intermediary between Servolift Lifetime Solutions and their potential customers in India. Thus, the services so rendered appeared to be falling within the purview of definition of "Intermediary Services" Rule 2(fl of the Place of Provision of Service Rules 2012 as amended w.e.f. 1.10.2014.

10. M/s Inos were entered into agreement with Howorth Air Technology limited. This agreement came into force on 01.01.2018. The salient features and terms and conditions of this agreement are as follow:

(i) The principal appoints the Agent as its agent for the promotion of, and solicitation of customers for the product sub the Exclusive Territory and Non Exclusive Territory and the Agent to act in that capacity, subject to the terms and conditions of this Agreement.

(ii) Expect in respect of the Exclusive Territory nothing contained in this Agreement shall prevent the Principal from appointing any other person as its agent for the promotion of or solicitation of customers for the products in Non Exclusive Territory.

(iii) The Agent shall be entitled to describe itself as the Principal's Authorised sales Agent" for the Products.

11. DUTIES OF M/S. INOSAS PER PARA 4 OF THE AGREEMENT BETWEEN M/S INOS TECHNOLOGIES PRIVATE LIMITED AND HOWORTH AIR TECHNOLOGY LIMITED:

(i) *The* Agent shall use best endeavours to promote business and market the products to customers and prospective customers in the Territories and generally to assist the Principal (Foreign machine manufacturer) in sale of the products in the territories but Inos shall not be entitled to sell or enter into any contracts for sale of the products on behalf of Principal.

(ii) The Agent shall Conduct promotion and marketing of the products in the Territories with all due care and diligence and cultivate and maintain goods relations with actual and potential customers in the Territories, in accordance with sound commercial principles.

(iii) The representatives and employees of M/s Inos shall, at the expanse of the Agent, attend meetings with re[P]esentatives of the Principal and such actual or potential customer in the Territories as may be necessary for the performance of the duties of the Agent under his agreement.

(iv) The representative and employees of M/s Inos shall make such calls upon actual or products as the Agent may consider fit.

(v) The representative and employees of M/s Inos shall attend such trade exhibitions and other sales outside in the Territories as the Principal or the Agent may consider commercially suitable for the purposes of promoting the Products.

(vi) The Agent shall maintain an up to date list of customers of the Products in the Territories and supply a copy of that list to the Principal upon demand.

(vii) The Agent shall keep the Principal fully informed of the Agent's Promotional and marketing activities in respect of the products and when required provide the principal with a report of such activities.

(viii) The Agent shall keep the principal informed of conditions in the market for the Products in the Territories, and of competing products and the activities of the Principal's competitors in the Territories.

12. FINANCIAL INCLUSIONS AS PER PARA 7 OF THE AGREEMENT BETWEEN M/S INOS TECHNOLOGIES PRIVATE LIMITED AND M/SHOWORTH AIR TECHNOLOGY LIMITED:

(i) In consideration of the obligations undertaken by the Agent under the Agreement, the Principal shall pay the Agent commission as set out in the second schedule in respect of all products for which a contract for sale is made up by the Principal where all products are collectively purchased, shipped, engineered and installed in the Territories in respect of the sole efforts of the Agent pursuant to this Agreement.

(ii) In consideration of the obligations undertaken by the Agent under the Agreement, the Principal shall pay the Agent commission equal to the equitable percentage, determined at the sole discretion of the Principal on the basis of the Agent's efforts of the Net sales value of all Products for which a contract of sale is made by the principal where the Products are purchased, shipped, engineered and installed in different territories and in respect of which the Agent has exercised some effort.

(iii) For the purpose of establishing the amount of commission due to Agent the Principal shall within thirty days of end of each Quarter Year, send to the Agent a statement showing the aggregate Net sales value of each description of the products sold in the Territories by it directly during that quarter, pursuant to this Agreement, for which the Principal has received payment in full during that quarter together with the commission due to the Agent in respect of that Quarter. The Agent agrees that payments will be made as a percentage line with agreed milestone payments of each equipment contract.

13. SECOND SCHEDULE OF THEAGREEMENT BETWEE[N] M/S INOS TECHNOLOGIES PRIVATE LIMITED AND M/S HOWORTH Alp, TECHNOLOGY LIMITED:

The Commission:

Commission will be earned on orders taken by the Company in accordance with the terms of this Agreement.

- Twenty Percent (20%) of the Commissionable value of the Order where the inquiry originates and where the formal offer is delivered and presented to the Purchaser.
- Sixty Percent (60%) of the Commissionable value of the Order to the territory that entails the Engineering and/or the Primary Decision Point.
- Twenty Percent (20%) of the Commissionable value of the Order where the ordered goods are to be delivered.

14. On the analysis of the "activities" carried out by M/s Inos as spelt out in the above

mentioned Sales Agency Agreement dated commencement date 01.01.2018, such as:

(i) Selling of products of M/s Howorth Air Technology limited in India;

(ii) To promote and market the Products to Indian customers;

(iii) To conduct the promotion and marketing of the Products in India;

(iv) To attend meetings with representative of M/s Howorth Air Technology limited and Indian Customers;

(v) To make calls upon Indian Customers for the purpose of promotion of products;

(vi) To maintain up to date list of Indian customers;

(vii) To inform M/s Howorth Air Technology limited of Agent's (Inos) promotional and marketing activities in respect of products with a report;

(viii) Earned **Commission Income** for facilitating the deal between M/s Howorth Air Technology limited and Indian Clients.

15. It appeared that M/s Inos is engaged in providing certain services which facilitate supply of goods from M/s Howorth Air Technology limited (situated outside India) to their customers in the taxable territory (India). Even though, it is mentioned in the agreement that M/s Inos (The Agent) has to promote business in the territory and represent the interest of M/s Howorth Air Technology limited (The Principal). This duty applies to all the products of M/s Howorth Air Technology limited and to all customers in the whole territory. Thus, it appeared from the facts emanating from the agreement that while rendering the service described hereinabove, the M/s Inos had acted as an Intermediary between M/s Howorth Air Technology limited and their potential customers in India. Thus, the services so rendered appear to be falling within the purview of definition of "Intermediary Services" Rule 2(f) of the Place of Provision of Service Rules 2012 as amended w.e.f. 1.10.2014.

16. Similarly, M/s Inos had entered into contract with other Principal foreign manufacturers viz. (i) M/s Natoli, USA - manufactures Punches and Dies; (ii) M/s Ikegami, Japan - manufactures Tablet Inspection machine (iii) M/s Servo Lift, Germany manufactures lifting system for drums; (iv) M/s OCS, Germany manufactures Check weighing machines; (v) M/s Kg Pharma, Germany -manufactures Tablet Press; (vi) M/s teg, Ireland - manufactures Change parts; (vii) M/s CSV, Italy - conducts third party IQ & OQ documentation; (viii) Advantest, Japan - manufactures R&D machines; (ix) Colanar, Germany - manufactures Vial filling machines; (x) TM, Italy - manufactures Vial filling machines; (xi) OMAR, Italy - manufactures blistering &, de-blistering machine(all situated outside India) under written contacts via email as well as verbal contracts. After scrutiny of these agreements/ contract, it appeared that assessee had acted as an intermediary between Principal of foreign manufacturers and their Indian Clients/buyers to promote their business interests by facilitating the deal between foreign manufacturers and Indian buyers.

17. Therefore an analysis of the "activities" i.e. "facilitating the sale of machineries which were manufactured by foreign manufacturers to Indian buyers" carried out by the assessee under the abovementioned Agreements/ Contracts, it appeared that the assessee is engaged in providing certain services which facilitate supply of goods from Overseas machinery manufacturers (situated outside India) to their customers in India. It also appeared from the facts emanating from the agreements that while rendering the services described above, the assesse has acted as an Intermediary between

foreign machinery manufacturers and their potential customers India. Thus, the services so rendered appear to be falling within the purview of definition of "Intermediary Service" Rule 2(f) of the place of provision of service Rule 2012 as amended w.e.f. 1.10.2014.

18. In terms of Notification No. 28/2012-ST dated 20.06.2012, with effect the Place of Provision of Service Rules, 2012 (POPS Rules in Short) were introduced. As per Rule 9 of the POPS Rules, 2012, "The place of provision of following services shall be the location of the service provider:-

a) Services provided by a company, or a financial institution, or a non-banking financial company, to account holders;

b) Online information and database access or retrieval

*c) **Intermediary Services;***

d) Service consisti"g of hiring of means of transport, up to a period of one month;

19. As per Rule 2(f) of the POPS Rules as defined **up to 30.09.2014,** an "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates **a provision of a service** (hereinafter called the `main' service) between two or more persons, but does not include a person who provides the main service on his account. The above definition of the Intermediary services has been substituted vide Notification No. 14/2014 ST dated 11.07.2014, **with effect from 01.10.2014,** the "Intermediary" is defined as a broker, an agent or any other person, by whatever name called, who arranges or facilitates a **provision of a service** (hereinafter called the `main 'service) **or a supply of goods,** between two or more persons, but does not include a person who provides the main service or supplies the goods on his account. Thus, it is seen that the definition of an Intermediary includes any person who arranges or facilitates a provision of a service (w.e.f. 01.07.2012) or **supply of a service or goods** (w.e.f.01.10.2014) between two or more persons, but does not include a person who provides the main service on his account.

20. Generally, an *"Intermediary" is a person who arranges or facilitates* u *supply of goods, or a provision of service,* or *both, between, two persons, without material alteration* or *further processing. Thus,* an *intermediary is involved with two supplies at* any *one time:*

i) the supply between the principal and the third party; and

ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

For the purpose of this Rule, an intermediary in respect of goods (such as a commission agent i.e., a buying or *selling agent,* or a *stockbroker) is excluded by definition* (upto*30.09.2014).*

Also excluded front sub-rule is a person who arranges or facilitates a *provision of* a *service (referred to* in *the rules as "the main service"), but provides the main service on his own account.*

21. Since the activities carried out by the assessee appeared to be in consonance with the above definition of `intermediary' under the provisions of Rule 9 (c) of Place of Provision of Services Rules, 2012 and the assessee appeared to render the intermediary service in respect of sourcing of goods, the place of provision of the service in the instant case appeared to be that of the service provider, the "Intermediary", in India.

22. It is further seen that to be qualified as "Export of Services" in terms of Rule 6A (1) of Service Tax Rules 1994, the condition under clause (d) i.e "the place of provision of service is outside India" is to be fulfilled. In the instant case, this condition is not satisfied, for the reason that the service provided by M/s Inosto foreign manufacturers for facilitating the sale of

machinery (manufactured by Foreign manufacturers) is carried out in India as evident from the Territory mentioned in the agreement.

23. In view of the above, the impugned services claimed as exported and "exempt" services in the ST-3 Returns do not appear to be proper. As per the definition of the Intermediary, effective from 01.10.2014, and as per Rule 9(c) of Place of Provision of Service Rules 2012, the place of provision of intermediary service in respect of supply of services or goods, shall be the location of service provider. As the service relating to 'facilitates the deal for sale of machineries by overseas manufacturers and the Indian companies' fall under the definition of intermediary services, which is defined under Rule 2(f) of Place of Provision of Service Rules 2012, service tax is payable on the said service, Hence, income received as "Income form Commission (Overseas)"by M/s Inos, from the various clients, for the period from October 2014 to June 2017 appeared to be taxable and service tax on the same is required to be demanded under provisio to sec. 73(1) of the Finance Act 1994, along with interest under Sec. 75 and the assesse is also liable for imposition of penalty under Sec.76 and /or 78 of the Finance Act 1994.

24. It appeared that the following statutory provisions are relevant and applicable in the instant case:

(i) After 1.7.2012 'Service' has been defined in clause (44) of the new section 65B of the Finance Act 1994 (hereinafter referred to as the "Act") and means -

- any activity
- for consideration
- carried out by a person for another
- And includes a declared service.

(ii) The said definition further provides that 'Service' does not include

a. any activity that constitutes only a transfer in title of
i. goods or
ii. immovable property by way of sale, gift or in any other manner
iii. a transfer, delivery or supply of goods which is deemed to be, a sale of goods within the meaning of clause (29A) of article 366 of the Constitution
b. a transaction only in (iv) money or (v) actionable claim
c. a service provided by an employee to an employer in the course of the employment
d. fees payable to a court or a tribunal set up under a law for the time being in force.

24. 'Activity' has not been defined in the Act. In terms of the common understanding of the word, activity would include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term with very wide connotation. **The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration.**

25. Section 66B specifies the charge *of* service tax which is essentially that service tax shall be levied on all services provided or agreed to be provided in a taxable territory, other than services specified in the negative list.

26. The **negative list of services** is contained in section 66D of the Act.

27. **Taxable territory** has been defined in section 65B of the Act as the territory to which the Act applies i.e. the whole of territory of India other than the State of Jammu and Kashmir. "India" includes not only the land mass but its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (-of 1976); the sea-bed and the subsoil underlying the territorial waters; the air space above its territory and territorial waters; and the installations structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof.

28. Service Tax is a destination based consumption tax and the essence of this tax post the introduction of the Place of Provision of Service Rule, 2012, appeared to be that a service should be taxed in the jurisdiction of its consumption. In terms of this principle, exports are not charged to tax, as the consumption is elsewhere, and services are taxed on their importation into the taxable territory. Detailed rules called the **Place of Provision of Services Rules, 2012** have been made which determine the place of provision of service depending on the nature and description of service.

29. The **'Place of Provision of Services Rules, 2012'**, specify the manner to be adopted to determine the taxing jurisdiction for a service. These rules determine the place where a service shall be deemed to be provided, in terms of section 66C of the Finance Act, 2012, read with section 94 (hhh) of Chapter V of the Finance Act, 1994. Under the section 66B, a service is taxable only when, *inter alia,* it is "provided (or agreed to be provided) in the taxable territory". Thus, the taxability of a service will be determined based on the **"place of its provision".** The main rule or the default rule provides that a service shall be deemed to be provided where the receiver is located. The **main rule**- that is Rule 3 of the Place of Provision of Services Rules, 2012- is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules). In other words, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver's location will determine whether the service is leviable to tax in the taxable territory. Rule 14 provides that where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration. This Rule covers situations where the nature of a service, or the business activities of the service provider, may be such that two or more rules may appear equally applicable.

30. The **location of a service provider or receiver** (as the case may be) is to determined by applying the following steps sequentially: **(Rule 2 (h) and 2 (i) of the Place of Provision of Service Rule refers)**

A. where the service provider or receiver has obtained only one registration, whether centralized or otherwise, the premises for which such registration has been obtained; the location of his business establishment;

B. where the service provided or receiver is not covered by A above:

C. the location of his business establishment; or

D. where services are provided or received at a place other than the business establishment i.e. a fixed establishment elsewhere, the location of such establishment;

E. where services are provided or received at more than one establishment, whether business or fixed, the establishment most directly concerned with the provision or use of the service; and

F. in the absence of such places, the usual place of residence of the service provider or receiver

31. The PLACE OF PROVISION OF SERVICES RULES, 2012 [Notification No. 28/2012-S.T. dated 20.06.20121 in Rule 2 (f) define an 'intermediary' as follows:

2(f) *"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the `main' service) between two or more persons, but does not include a person who provides the main service on his account;"*

32. Therefore, the services in the nature of 'Intermediary Service' in respect of services rendered in India by intermediary became taxable w.e.f 01.07.2012 in view of the provisions under Rule 9(c) of the POPS Rules as having been rendered in taxable territory. However, as the provisions under Rule 9(c) were not made applicable to the intermediary service in respect of goods even when rendered in India, such services were treated as having been rendered in non-taxable territory in terms of Rule 3 of the POPS Rules as the recipient of service was in non —taxable territory. Subsequently, w.e.f 01.10.2014, the intermediary service even in respect of goods was covered by the provisions under Rule 9 (c) of POPS Rules and thus became taxable as having been rendered in India.

33. **Place of provision of service Rules, 2012, (POP/POSR) Rule 9 is as follows:-**

"9. *Place of Provision of specifled services*
The place of Provision of following services shall be the location of the service Provider-

(a) *service provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;*

(b) *Online information and database access or retrieval service;*
(c) *Intermediary services;*
(d) *Service consisting of hiring of all means of transport other than-*
(i) *aircrafts, and*
(ii) *vessels except yachts, up to period of one month."*

34. Thus, international transactions involving provision of services now revolve around the concept of place of provision of service. The place of provision of a service is determinable in terms of the Place of Provision of Services Rules, 2012 ('POPS Rules). Cross-border provision of services may entail the presence of a representative of the party located outside/or in India. Each such case involves provision of two independent supplies, i.e., one from the principal to the ultimate customer and another from the representative to the principal/ ultimate customer. In terms of the POPS Rules- Any broker, agent or any other person, arranging or facilitating a provision of service ('the main service') between two or more persons, is called as intermediary provided such person does not provide the main service on his own account. Provision of a service 'On your own account', in the context means that a person undertaken an activity for himself and not as a representative of any other person.

35. Clearly, what follows in terms of the POPS Rules- Any broker, agent or any other person, arranging or facilitating a provision of service ('the main serviced between

two or more persons, is called as intermediary provided such person does not provide the main service on his own account. Thus, in order not to fall under the ambit of Rule 9(c) of the POP Rules as an intermediary, a person should provide the main service on his own account.

36. Service tax is imposed under Section 66B of the Finance Act, 1994 where the provision of 'service' is from one person to another and the place of provision is in the taxable territory.

37. It appeared that the use of words 'facilitates' or 'arranges' has, in one way, expanded the scope of application of Rule 9(c). Here the preposition 'or' separates the two words 'facilitates', and "arranges' - this leads to an impression the presence of either one independently is sufficient in the context,; that is to say that if a person **either *'facilitates' or* alternately "arranges"** any supply of service (or goods after 1.10.2014), between two or more persons, and does not provide the main service or supplies the goods on his account, would be regarded as an **'intermediary'.**

38. Moreover, the impost of comma (,) after 'person' and before 'but does not include a person who provides the main service or supplies the goods on his account', is not done as the 'serial comma' but has been used to link the coordinating main clauses in the sentence making up sub — rule (f) of Rule 2 of the place of Provision of Service Rules. Thus, this sentence contains what's known as a 'restrictive relative clause'. Basically, a restrictive relative clause contains information that's essential to the meaning of the sentence as a whole.

39. **'Facilitates' and 'arranges'** are plural forms of the words 'facilitate' and 'arrange' respectively. Merriam Webster Dictionary defines the two words as the following:

Facilitate: to make (something) easier: to help cause (something): to help (something) run more smoothly and effectively 1

Arrange: to bring about an agreement or understanding concerning: to make preparations: to move and organize (things) into a particular order or position: to organize the details of something before it happens: to plan (something)

40. What has been excluded from the definition of an 'intermediary' is the person who provides the main service on his own account. The 'main service' would be the central, most significant **'activity'** (Section 65 B (44) of the ACT refers), as distinguished from **auxiliary** or **supplementary activities** required to be engaged in providing the main service.

41. In other words, where the intermediary provides the main service in the capacity of a representative of the principal, his service would still be considered to be intermediary service. Thus, 'facilitation' can even go up to providing whole of the main service by the intermediary himself, but in the capacity of an agent [as is meant in the Rule 9 (c) of the Place of Provision of Service Rules].

42. It is to be noted that the concept of Place of Provision (**'POPS** of a service emerges as a derivative of the charging section. Accordingly, the Place of Provision of Services Rules, 2012 ('POP Rules') were framed vide the power granted under Section 66C (1) of the Act, with effect from 1-7-2012. It may also be noted that the POP Rules are issued in supersession of the Taxation of Services (Provided from outside India and Received in India) Rules, 2006, ('Import of service Rules' or **I0S** Rulesj and the Export of Services Rules, 2005 (**'EOS** Rules). The POP Rules appear to be a conscious attempt in presenting the new service tax law as a destination-based consumption tax in its

true sense.

43. A relook at the erstwhile EOS Rules, before venturing into the new provisions dealing with export of service brings back to our memory that in order to qualify as export, the taxable services had to fall under any of the three categories contemplated under Rule 3 of the EOS Rules based on (i) location of immovable Property, (ii) performance of service and (iii) location of recipient. In addition to the service failing under any one of these categories, the consideration for the service had to be received in Convertible Foreign exchange (CFE),

44. On a brief reading of the POP Rules, it can be seen that Rules & 5 seem to have carried forward the treatment of services on the basis of 'performance' or 'location of immovable property', as was the case under the erstwhile EOS Rules. However, the effect of such categorization is nullified by **Rule 8 which provides that where the service provider and recipient are located in the taxable territory, the POP would be the location of the service recipient.** To put it precisely, if both the parties in a service agreement are located in India which is the taxable territory, then the POP would be India irrespective of the nature of service.

45. Now coming to the situation after the introduction of POP Rules, Rule 6A is introduced under the Service Tax Rules, 1994 ('ST Rules to determine when a service shall be treated as export of service, As per this rule, provision of service shall be treated as export of service, inter alia, when (i) service recipient is located outside India (ii) place of provision, as per POPS Rules, is outside India and (iii) consideration for the service provided is received by the service provider in CFE. The condition of service recipient being outside India for all services is a departure from the erstwhile EOS Rules which did not impose it for performance based services and services relating to immovable property, to qualify as exports.

46. This condition in fact, flows from Rule 8 of the POP Rules which provides that the POP of a service where the service provider and recipient are located in the taxable territory shall be the location of the recipient which is India. **In other words, in respect of a service transaction where the service provider and recipient are located in India, the POP would automatically become India and such service would not qualify as export, irrespective of fulfilling other factors such as receipt of CFE or the service being fully performed outside India, or being in respect of an immovable property outside India.** This condition of recipient being outside India restricts the scope of services qualifying as exports (say, in respect of services which may be performance based/immovable property based/ event based.)

47. Under the erstwhile EOS Rules, the services which were put to the export test are taxable services per se, which had to cross the threshold of falling under one of the prescribed categories and receipt of CFE. Therefore, even if a performance based service is fully performed outside India, it would not qualify as export if the consideration for such service is not received in CPE, consequently, tax became payable on such a service. furthermore, as there was already a levy on the service which had to qualify the test of export, Rule 4 of the EOS Rules specifically provided that any service taxable under Section 65 (105) of the Act may be exported or of the duty/service tax paid on inputs/input services used in providing such services, Thus, the service providers who are engaged in exporting services had an option to provide such services which were exported were taxable per se the service providers were entitled to avail Cenvat credit in respect of the goods and services used in providing such services.

48. In contrast to such position under the erstwhile EOS Rules, under the new regime, the test of categorization for a service to qualify as export is replaced with the **concept of 'place of provision'** which incidentally is also **the test of taxability.** Thus, in a situation where the POP of a service is outside India the service would not be liable to service tax even if the consideration is not received in CFE, as the service is not provided in the taxable territory. In other words, a service in respect of which the POP is outside India and where the consideration is received in Indian currency, such service would neither be an export nor a taxable service. In such a case, the service provider would not even be entitled to avail Cenvat credit on the goods and services used by him, the service being a non-taxable service. Under the new provisions dealing with export, the Cenvat Credit Rules, 2004 ('CCR Rules) have taken care of the credit aspect of goods/services used in providing services which qualify as exports under Rule 6A of the ST Rules. This has been done by amending the definition of **'exempted service'** which **excludes a service exported in terms of Rule 6A of the ST Rules.**

49. As per Rule 2(f) read with Rule 9(c)of the POPS Rules **as defined upto 30.09.2014** an 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a **provision of service** between two or more persons, but does not include a person who provides the main service on his account was taxable as having been rendered in **India. However, with effect from 01.10.2014, the intermediary service in respect of goods became taxable as the same was covered by the provisions under Rule 9(c) of the POPS Rules as rendered in taxable territory. Therefore, the assessee who is rendering intermediary service in respect of goods to overseas manufacturers is liable to pay tax on the consideration received against such service.**

50. **Further, the only logical implication prior to the change of the definition of intermediary on 1.10.2014 is that a person, who facilitates or arranges the supply of goods between two or more persons, did not qualify as an 'intermediary' and consequently, was not covered within the scope of Rule 9(c). However, with the changes brought in with effect from 1.10.2014, even such a person who facilitates or arranges the supply of goods between two or more persons will now qualify as an intermediary.**

51. **In the situation where the services provided by a person by way of identifying customers and promoting the services of a foreign Party were earlier treated as taxable as business support services, falling under Category-3 (iii) of the erstwhile Export of Services Rules, but such services then were treated as export of services and therefore not charged to service tax.**

52. However, under the new provisions, the service of facilitating the provision of services (and after 01.10.2014, facilitating the supply of goods) by the foreign principal to customers in India shall be treated as provided in the taxable territory, as the person providing this service is located in the taxable territory. The place of provision of these services under the new provisions shall be India as these consist of facilitation of the provision of main service (and after 01.10.2014, facilitating the supply of goods) from the foreign company to its customers, making the Indian company an 'intermediary' within the meaning of Rule 9(c). The same services, it appeared, will now become chargeable to service tax and cannot be treated as export of services, under Rule 6A of the Service Tax Rules, 1994 (this rule was been introduced to lay down the conditions for qualifying as export of service).

53. It appeared that the **'intermediary'** would not only be a person who is a broker or an agent and that the expression in the definition contained in Rule 2 (f) - **'any other person, by whatever name called'** should not be limited in its interpretation to apply to like kind of people who are brokers or agents,

54. What follows next is an examination on this point: -

It is noted that the words 'broker', 'agent' are used obviously as nouns rather than as verbs and that the two words have important and significant differences in both what they mean and how they are used.

An agent - that is one who holds 'an agency'- has a fiduciary relationship that results from the manifestation of consent by one person to another that the other will act on his behalf and subject to his control, and the consent by the other so to act. A distinguishing feature between the agent and a broker is that a broker acts as the middleman for both parties Generally, it is accepted that an agent's powers extend beyond those of a broker. An agent may typically represent one entity; a broker on the other hand is generally, not under a permanent contract to particular business partners and by the very nature of the profession he is in, may be serving many parties at the same time. A 'broker' or [an] 'agent' is not defined in the Act.

In ordinary parlance the word 'broker' is a synonymous with the words- mediator, buffer, conciliator, go- between, interceder, scrivener, moderator, arbiter - this sense is not any different from what the dictionary meaning of the word is. Similarly, for the word 'agent' the synonyms are assignee, delegate, proxy, representative.

There are several kinds of brokers, as, Exchange Brokers, such as negotiate in all matters of exchange with foreign countries; Ship Brokers - those who transact business between the owners of vessels, and the merchants who send cargoes; Insurance Brokers- those who manage the concerns both of the insurer and the insured; Pawn Brokers - those who lend money, upon goods, to necessitous people, at interest; Stock Brokers - those employed to buy and sell shares of stocks in corporations and companies; or brokers in the real estate space who aid in buying and selling of property etc.

Agent is a person who is authorized to act for another (the agent's principal) through employment, by contract or apparent authority. The importance is that the agent can bind the principal by contract or create liability if he/she causes Injury while in the scope of the agency. Who is an agent and what is his/her authority are often difficult and crucial factual issues.

55. It is thus clear that 'a broker' and 'an agent' are not the same thing, but are significantly different in how they are understood to be in the ordinary usage.

56. Looking at the definition of an 'intermediary', it is noted that it appeared that the use of the expression *'or any other person, by whatever name called'* tendsto ***delimit*** the scope of the intermediary to apply only to broker or an agent. In fact, it appeared that the phrase *'who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons' in clause* defining the 'intermediary' gives a clear indication of intendment in as much it ascribes a quality to the person who is to be construed as an intermediary.

57. In the context of Contemporaneous expositions, of the rules to determine the place of provision of service, it is noted that in the Finance Bill 2012 and the Explanatory Memorandum, the following is recorded;-

'.....ii. INTRODUCTION OF NEGATIVE LIST APPROACH;

A Negative List approach to taxation of services is being introduced vide new sections, namely, 65B, 6613, 66C, 66D, WE and 66F proposed in Chapter V of the Finance Act, 1994 (please refer clause 143 of the Finance Bill, 2012). ***The services specified in the 'Negative List' (section 66D) shall remain outside the tax net. All other seruices, except those specifically exempted by the exercise of powers under section 93(1) of the Finance Act, 1994, would thus be chargeable to service tax.*** *Negative list approach to taxation of services shall come into effect from a date to be notified, after the Finance Bill, 2012 receives the assent of the President. For operationalizing the Negative List approach, a number of changes have been proposed in Chapter V of the Finance Act, 1994. Detailed information regarding these changes is being made available as a Guidance Paper, which will be placed in the public domain. The consequential changes in Service Tax Rules, 1994, Service Tax (Determination of Value) Rules, 2006 and Cenvat Credit Rules, 2004 also form part of this Guidance Paper. Provisions relating to positive list approach, namely, sections 65, 65A, 66, and 66A currently appearing in Chapter V of the Finance Act, 1994, will cease to operate from a date to be notified later, as and when the negative list approach begins to operate.*

To support the negative list approach to taxation of services, draft Place of Provision of Services Rules, 2012 is being proposed. ***The draft Place of Provision of Services Rules contains principles on the basis of which taxing jurisdiction of a service can be determined.*** *The Place of Provision of Services Rules, 2012 will be notified after (section 66C) the Finance Bill, 2012 receives the assent of the President. When the Place* of *Provision of Services Rules comes into effect, existing 'Export of Services Rules, 2005' and "Taxation of Services (Provided from outside India and received in India) Rules, 2006" will be rescinded."*

"Service tax

....

Proposed section 66C seeks to empower the Central Government to make rules to determine the place of provision of service having regard to the nature and description of various seruices."

The Finance Bill 2012 in the part relating to MEMORANDUM REGARDING DELEGATED LEGISLATION, further records;-

The proposed section 66B empowers the Central Government to make rules in respete of the manner of collection of service tax. The proposed new section 66C seeks to provide for determination of place of provision of service Sub. clause (1) thereof seeks to provide that the Central Government may, *having regard to the nature and description of various, service, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be Provided or deemed to have been agreed to be provided,*

In the Explanatory Memorandum to Finance Bill 2014

Place of Provision of Services Rules:

- ***Provision for prescribing conditions for determination of place of provision of repair service carried out*** **on** ***temporarily imported goods, to be omitted.***
- ***intermediary of goods to be given the same treatment as is given to intermediary of services.***
- ***Vessels (excluding yachts) and aircraft to be excluded from Rule 9(d); hiring of vessels or aircrafts, irrespective of whether short term*** **or** ***long term, will***

be covered by the general rule, which is place of location of the service receiver.

[The above changes to have effect from 1st October 2014]

58. The Assessee holds a registration made under Rule 4 of the Service*Tax Rules bearing number AACC13445GSDO01with Service Tax. His address indicated in the Registration records is M/s. Inns Technologies Private Limited, 452-455, C-Block, Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad-380058. Hence on applying of the Place of Provision of Service, the location of the service provider in this case has to be construed to be the taxable territory at the premises* for *which such registration has been obtained.*

59. On comparing the amount of Export of Service reported in the ST-3 returns filed by M/s Inos for the period from F. Y. 2016-17 vis-a-vis, the Income from Commission (Overseas) mentioned in in the Trial Balance on which M/s Inos had not paid Service Tax for the even period, it is revealed that there existed substantial difference of Rs. 95,97,705/- in Trial Balance and ST-3 for the F.Y. 2016-17. A detailed sheet capturing the month- wise details of the above difference for the Financial Year 2016-17.

TABLE-A (figures in rupess)

Month	Amount As per ST-3 Return	Amount As per Trial Balance	Difference
APR-16	16,76,332/-	25,21,809.14/-	-8,45,477.14/-
MAY-16	23,68,011/-	17,02,065/-	6,65,946/-
June -16	32,04,410/-	22,38,853/-	9,65,557/-
Jul-16	16,50,339/-	22,44,696/-	-5,94,357/-
Aug-16	1,05,55,834/-	7,42,311/-	98,13,523/-
Sep-16	22,07,712/-	8,57, 359/-	13,50,353/-
Oct-16	0/-	22,15,050/-	-22,15,050/-
Nov-16	7,48,789/-	8,96,868/-	-1,48,079/-
Dec-16	21,84,679/-	19,13,074/-	2,71,605/-
Jan-17	20,14,718/-	19,92,335/-	22,383/-
Feb-17	6,05,339/-	6,13,558/-	-8,219/-
MAR-17	9,02,244/-	5,82,724/-	3,19,520/-
Total	2,81,18,407/-	1,85,20,702.14/-	95,97,704.86/-

Thus, there appeared to be a net difference of **Rs. 95,97,705/- (Rupees Ninety Five Lakh Ninety Seven Thousand Seven Hundred and Five)** between the commission income (overseas) reported in the Trial Balance vis-a-vis the "other taxable service - other than 119 listed" reported in the ST-3 Returns filed for the period for 2016-17, in respect of intermediary service provided by M / s Inns to their clients as detailed above.

60. In view of the above statutory provisions, the assessee is liable to pay service tax on the services provided to various overseas clients, for the period from October 2014 to June 2017. The total services rendered by the assessee and the total service tax payable is as detailed below-

TABLE-B (IN Rs)

Period	Value of Service Provided (Rs.)	Service Tax Rate (%)	Service Tax Payable ()Rs.)
Oct-14	1096612	12.36	135541
Nov-14	418890	12.36	51774
Dec-14	1474334	12.36	182227
Jan-15	1494534	12.36	184724
Feb-15	657048	12.36	81211

Mar-15	169085	12.36	20898
Apr-15	5307032	12.36	655950
May 15	0	12.36	0
Jun-15	1855668	14	259794
Aug-15	0	14	0
Sep-15	0	14	0
Oct-15	581234	14	81372
Nov-15	232822	14.5	33760
Dec-15	3567118	14.5	517232
Jan-16	3170538	14.5	459728
Feb-16	1107545	14.5	160595
Mar-16	2249952	14.5	326244
Apr-16	1676332	14.5	243068
May-16	2368011	14.5	343362
Jun-16	3204410	15	480662
Jul-16	1650339	15	247551
Aug-16	10555834	15	1583375
Sep-16	2207712	15	331157
Oct-16	0	15	0
Nov-16	748789	15	112318
Dec-16	2184679	15	327702
Jan-17	2014718	15	302208
Feb-17	605339	15	90801
Mar-17	902244	15	135337
Apr-17	1455125	15	218269
May-17	992692	15	148904
Jun-17	4065842	15	609876
	60919142		**8731127**

61. Further, during the scrutiny of the ST-3 returns and Profit and loss account, it was revealed that M/s Inos have short paid service tax on the other incomes received under following heads;

(1) Commission income (inland)
(2) Income from installlation and commission (island)
(3) Service Income

62. M/s Inos is also liable to pay the amount of short paid Service Tax on the income received under the heads mentioned in Para 29.3. The service tax liability under these three heads during the period from October 2014 to June 2017 works out as detailed in the below-

Table-C

Sr. No.	Financial Year	Taxable Income As per ST-3 Returns (in)	Taxable income as per Profit and Loss account and Trial Balance (In Rs.)	Difference between income as per ST-3 and p & L account (in Rs.)	Service Tax Rate	Service Tax (short paid payable in Rs.
1.	October	63000	365807	302807	12.36%	37426

	2014 to March 2015					
2.	2015-16	165000	356907	191907	14.5%	27826
3.	2016-17	25000	3,35,684/-	310684	15%	46602
4.	01.04.2017 to 30.06.2017	0	32823	32823	15%	4923
	TOTAL			**8,38,221**		**1,16,777**

63. To communicate the above statutory obligations to the assessee and to know their view regarding the same, summons dated 01.02.2018 and 02.02.2018 were issued to the assessee to record their statement under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and the CGST Act, 2017. Shri Gaurav Soni, Director of M/s. Inos, Technologies Pvt. Ltd. appeared to give his statement.

64. **STATEMENT OF ASSESSES**

In response to the summons dated 01.022018, the director of M/s Inos Technologies Pvt. Ltd. produced himself for the purpose of recording the statement. The statement of shri Gaurav Soni, director of M/s Inos Technologies Pvt Ltd. was recorded under Section 14 of the central Excise Act,1944 read with Section 83 of the Finance Act, 1944 and the CGST Act, 2017 on 01.02.2018 in question/answer formal as under:

Ques.1: Please confirm your personal details as stated above and state about your role in your company?

Ans 1: I confirm that my above mentioned personal details are true. I am B.com. by educational qualification. M/s Inos Technologies Private Limited, Ahmedabad was incorporated on 16.10.2010. I along with my wife Smt, Shruti Soni are Directors of M/s Inos Technologies Private Limited. I look after all business related work, finance work and taxation matter of our company.

Ques 2: Please explain about formation of your company i.e. M/s Inos Technologies Private Limited and its business activities.

Ans 2: M/s Inos Technologies Private Limited was incorporated on 16.10.2010. Our company is engaged in the business of arranging purchase and sale of machineries mostly pertaining to Pharmaceutical Sector. We mainly facilitate the sale of Pharmaceuticals Machinery manufactured by foreign suppliers to buyers based in India. We are also engaged in after sale service and maintenance of these Pharmaceutical Machineries.

Ques 3: Please provide list of your clients including foreign clients whom your company have facilitated in sale of Pharmaceutical Machineries and charged commission from them since year 2012.

Ans 3: List of our main foreign principals whom our company have facilitated in sale of Pharmaceutical Machineries and charged commission from them since year 2012 are as under:

(i) M/s Natoli, USA - manufactures Punches and Dies;
(ii) M/s Ikegami, Japan - manufactures Tablet Inspection machine;
(iii) M/s Servo Lift, Germany - manufactures lifting system for drums;
(iv) M/s OCS, Germany - manufactures Check weighing machines;
(v) M/s Kg Pharma, Germany - manufactures Tablet Press;
(vi) M/s teg, Ireland - manufactures Change parts;

(vii) M/s CSV, Italy - conducts third party IQ & OQ documentation;

(viii) Advantest, Japan - manufactures R&D machines;

(ix) Colanar, Germany - manufactures Vial filling machines;

(x) TM, Italy - manufactures Vial filling machines;

(xi) OMAR, Italy - manufactures blistering & de-blistering machine.

Ques 4: Have your company entered Into any type of Service Agreement with your clients including forein principals for providing facilitation of sale of pharmaceutical machineries? If yes, please provide copies of such agreements.

Ans 4: Yes we have entered into contracts with above manufactures of Pharmaceutical machineries based outside India to facilitate tile sale of their machineries In India and help them procure Purchase Order from Indian clients. We act as a broker between these foreign manufacturer and earn commission Income from them for facilitating the sale of their machineries to Indian buyers. As per our agreement with the foreign manufacturers, we charge them commission in the range of 2%-15% of the ex-work value of machineries sold. I will provide the agreements entered with the foreign manufacturers tomorrow. I further state that in case of many foreign principals there is no formal agreement but tile commission percentage is negotiated on e-mail correspondences of many a times the commission percentage the foreign principal offers is disclosed in the quotes sent for sale of machineries.

Ques 5: Please provide the details of Commission earned by you from the foreign manufacturers of machineries for facilitating their sale to India buyers from 2012-13 to December'2017.

Ans 5: I have already submitted Ledger accounts of Income earned during 2012-13 to 2016-17 to you vide my letter dated 01.02.2018. According to the same our company M/s Inos Technologies Private Limited, has earned Commission from overseas clients as under:

S.No.	F.Y.	Commission Income from foreign clients(Rs.)
1	2012-13	92,60,663/-
2	2013-14	1,11,21,314/-
3	2014-15	1,48,00,204/-
4	2015-16	2,11,43,660/-
5	2016-17	1,85,20,702/-
	TOTAL	**7,36,14,842/-**

Ques 6: Have your company, M/s Inos Technologies Private Limited, Ahmedabad paid Service Tax on the above commission income received from the manufacturers of machineries based outside India. Also please state whether you have taken Service Tax Registration and filed ST-3 Return for the same.

Ans 6: We have not paid Service Tax on the commission income received from the manufacturers of machineries based outside India as we have treated it as Export of Service income, however we have taken Service Tax Registration on 07.01.2013 under the category of "Other Taxable Services - Other than the 119 listed" and have filed ST-3 Returns for the same. The Service Tax Registration allocated to us is AACC13445GSD001. We have filed ST-3 Returns for the following period and have shown Commission income earned from overseas clients under Export of Service category:

S,No,	Period of Return	Filed on

1	April'2012 to September'2012	Not filed
2	October'2012 to Nlardi'2013	22.10.2013
3	April'2013 to September'2013	22.10.2013
4	October'2013 to Mardi'2014	Not filed
5	April'2014- to September'2014	Not filed
6	October'2014 to Nlai-di'2015	Not filed
7	April'2015 to September'2015	03.06,201
8	October'2015 to March'2016	06.06.2016
9	April'2016 to September'2016	16.06.2017
10	October'2016 to Mardi'2017	24.04.2017

65. For the further investigation another summons dated 02.02.2018 was issued to the assessee for recording the statement in the matter. In response to the summons dated 02.02.2018, the director of M/s Inos Technologies Pvt. Ltd. produced himself for the purpose of recording the statement. The statement (RUD2) of Shri Gaurav Soni, director of M/s Inos Technologies Pvt. Ltd. was recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and the CGST Act, 2017on 02.02.2018 in question/answer format as under:

Ques 1:Please peruse your statement recorded on 01.02.2018 and confirm the facts stated therein?

Ans 1:I have perused my statement dated 01.02.2018 and confirm that the facts therein are true and correct.

Ques2: In your statement dated 01.02.2018 you have mentioned that M/s Inos Technologies Pvt. Ltd. is engaged in the business of arranging purchase and sale of machineries mostly pertaining to Pharmaceutical Sector and you facilitate the sale of Pharmaceuticals Machinery manufactured by foreign suppliers to buyers based in India. Please explain the activities you do as part of facilitating the same of Pharmaceuticals Machinery of foreign principals to India buyers.

Ans 2: I state that as part of facilitating the sale of Pharmaceuticals Machinery manufactured by foreign suppliers to buyers based in India we first generate inquiries for the machineries which our foreign principals intend to sell to Indian buyers. For this we participate in Exhibitions and make visits to prospective customers for promotion and marketing of machineries manufactured by the foreign manufacturers.

If the customer is interested, we provide them with price quotation and if required discuss technical aspects. After this, Purchase Order is raised to the foreign manufacturer of machineries. User Requirement Specification is generated and if required Factory Acceptance Test is done. For Factory Acceptance Test the personnel from Indian buyers visit the factory of foreign manufacturers and our personnel is present to facilitate the process.

Thereafter, the machines are sent by the foreign manufacture and are imported by the Indian buyer. The machines purchased by Indian customers from our foreign principals are sent directly in the name of the Indian customer and are imported by the Indian customer.

For installation of machines the personnel from foreign principals visit the factory Of Indian buyer for installation and our personnel remain present to facilitate the process. If required the installation may be clone by us too but in that case a separate agreement is done by us with the Indian buyer and installation charges are collected from Indian buyers.

Ques 3: Does M/s Inos Technologies Pvt, Ltd., Ahmedabad provide After Sales Service? if yes, provide details thereof.

Ans 3: Yes, M/s Inos Technologies Pvt. Ltd., Ahmedabad provides After Sales Service. We provide after sale service and maintenance to the Indian buyers. For providing After Sales Service we enter into maintenance contract with the Indian buyer after getting consent from the foreign principal. In such cases, we prepare Service Report of each maintenance activity & send the same to the Indian customer as well as the foreign principal from whom the machinery has been purchased by the Indian customer.

Ques 4: Please provide copies of Service Agreement entered with your foreign principals for providing facilitation of sale of pharmaceutical machineries manufactured by them?

Ans 4: I am submitting the following agreements'.

(i) Service Agreement dated 01.06.2013 between M/s Dr. Reddy's Laboratories, Hyderabad & M/s Natoli Engineering Company Inc., USA;

(ii) Tripartite Confidentiality Agreement dated 01.12.2015 between M/s Mylan Laboratories Limited, Hyderabad; M/s Natoli Engineering Inc., USA & M/s Inos Technologies, Ahmedabad;

(iii) Agreement between M/s Servolift GmbH, Offenburg and M/s Inos Technologies Private Limited, Ahmedabad;

(iv) Agreement between M/s Howorth Air Technology Limited, United Kingdom and M/s Inos Technologies Private Limited, Ahmedabad;

(v) Service Agreement between M/s Natoli Engineering, USA &, M/s Cipla Limited, Mumbai;

(vi) Letter of Authorization dated 20.11.2012 by M/s, OCS Checkweighers, Germany.

Ques 5: On the basis of documents submitted by you vide your letter dated 01.02.2018 the following income heads are appearing in your Trial Balance for various years. Please explain the nature of income booked under these heads-.

(i) "Income from Commission (Overseas)" Ledger;

(ii) "Income from Commission (Inland)" Ledger;

(iii) "Income from Installation & Commissioning (Inland)" Ledger;

(iv) "Consulting Income" Ledger;

(v) "Service Income" Ledger.

Ans 5: The Income booked under the various ledger heads mentioned by you above is as under;

(i) "Income from Commission (overseas)" Ledger;

Under this head we have booked Commssion income received from our Foreign Principals for whom we have worked for facilitating sale of their machineries to Indian buyers;

(ii) "Income from Commission (Inland)" Ledger;

Under this Ledger head we have booked for service income for services provided to our Indian clients.

(iii) "Income from Installation & Commissioning (Inland)" Ledger:

Under this Ledger head we have booked income earned from Installatio^{n} & Commissioning service provided to Indian clients. Under this activity we do Installation & Commissioning of machines procured by the Indian buyers from the foreign principals. We enter into agreeme^{nt} with the Indian buyers to do installation, commissioning activity for the machines imported by them and charge them

installation & commissioning charges which are booked under the above Income Ledger head.

(iv) "Consultancy Income" Ledger:

We have made advertisement expense for our foreign principals and take reimbursement of the advertisement expenses made by us. In one year we have collected reimbursement of advertisement expenses, from our foreign principals, over and above the expenses made by us. To offset the excess reimbursement claimed by us we have shown it as Consulting Income in the next Year.

(v) "Service Income" Ledger:

(vi) Under this head we have booked income earned for providing maintenance service to our Indian clients. As explained by me above, we enter into Service & Maintenance contract with the Indian buyers for providing after sales support service. The income earned from such activity is booked under this Income Ledger head.

Ques 6: Have your company, M/s Inos Technologies Private Limited, Ahmedabad paid Service Tax on the above income heads.

Ans 6 : We have paid Service Tax on the following income heads:

(i) "Income from Commission (Inland)"

(ii) "Income from Installation & Commissioning (Inland)"

(iii) "Service Income;"

We have not paid Service Tax on " Income from Commission (Overseas)" as we have treated the same as Export of Service. We have also not paid Service Tax on Consultancy Income as the same has been shown to offset the excess reimbursement claimed by us for advertisement expenses in the previous year.

Ques 7: After advent of GST era from 01.07.2017 are you paying GST on your above activity or treating the same as exempted/ export of service?

Ans 7: No, even after advent of GST era from 01.07.2017 we are treating Commission income earned from foreign principals on sale of their Machinery to Indian buyers as export of service. But now our volume of business has changed from Commission based to trading. Earlier we were primarily earning commission from foreign principals for facilitating the sale of their machineries to Indian buyers and part of trading of goods was miniscule, however, now we mostly buy machineries from the foreign principals, import the same ourselves in India and sale the same to Indian buyers. So we have shifted our business volume from commission based model to sale/purchase or trading model. And we are paying IGST on import of the machineries and charging GST on our sale to Indian buyers.

Ques 8: Please provide Sales Ledger, Party-wise Ledger, Service Tax Payable Ledger, Service Tax Paid Ledger, GST Payable Ledger, GST Paid Ledger for the period from 01.04.2017 to 31.12.2017.

Ans 8: I state that we have not maintained our financial records viz: Sales Ledger, Party-wise Ledger, Service Tax Payable Ledger, Service Tax Paid Ledger, GST Payable Ledger, GST Paid Ledger for the period from present financial year, however we have issued Sales Invoices and charged GST on the same. The above mentioned Ledgers are under preparation.

Ques 9: Please provide Sales Invoices for the present Financial Year.

Ans 9: I am providing you copies of Sales Invoices issued during the present Financial Year.

Ques 10: Please provide list of Indian buyers for whom you have facilitated sale of machineries from foreign principals.

Ans 10: Following is the list of our top 10 Indian buyers for whom we have facilitated sale of machineries from foreign principals:

(i) M/s Emcure Pharmaceuticals Ltd., Emcure House, T184 M.I.D.C, Bhosari, Pune 411026.

(ii) M/s Lupin Ltd, B/4 Laxmi Towers,; Bandra Kurla Complex, Bandra. (E), *Mumbai 400 051.* India

(iii) M/s Watson Pharma Pvt Ltd., 21 / 22 Kalpataru Square, Andheri *East,* Mumbai – 400059

(iv) M/s Hetero lab Corporate Industrial Estates, Sanath Nagar Hyderabad- 500 018. Telangana, India;

(v) M/s Inventia Health Care Ltd, Unit 703 and 704, 7th floor , Hubtown Solaris, N S Phadkemarg, Andheri (East), Mumbai -400 069,.Maharashtra (India)

(vi) M/s Dr. Reddy's Laboratories Ltd., 8-2-337, Road No 3. Baniara Hils, Hyderabad Telangana 500034, INDIA

(vii) M/s Cipla Ltd., Cipla House Peninaula Buss par, Ganpatrao Kdam Mg Lower parel , Mumbai, Maharashtra-400013

(viii) M/s Alkem Laboratories Limited., Devanshish Building, Alkem House, Senapati Bapat Road, Lower Parel, Mumbai-400 013

(ix) M/s Aurobindo Pharma Limited, water Mark Building,, Plot No. 11, Survey No-9, Kondapur, Hitesh City, Hyderabad, Telangana 500084

(x) M/s MSN Laboratories Pvt Ltd., MSN House, Plot No: C-24, Industrial Estate, Sanathnagar, Hyderabad, Telangana 500018

Ques 11:What is the income booked under Advertisement Income head?

Ans 11: I state that for promoting the sales of our foreign principals we publish Advertisement in Indian magazines. For this we bear the expense and make payment to these magazines. We take reimbursement of these expenses from our foreign principals for whose promotion we have made these advertisements. I further state that in case of M/s Natoli, USA we share the advertisement expenses in the ratio of 80%:20% with 80% borne by M/s Natoli, USA and 20% by us. In case of other foreign principals, we charge reimbursement of 100% of the advertisement expenses borne by us.

Ques 12: From the Sales Invoices issued by you, it appeared that you have charged GST to the tune of Rs. 7,33,846/- during the period from 01.07.2017 to 31.12.2017. Do you agree and are you ready to pay the same.

Ans 12: Yes I agree that we have charged GST to the tune of Rs. 7,33,846/-during the period from 01.07.2017 to 31.12.2017 but we have not discharged our said GST liability. I agree to pay the GST liability in a week and provide proof of payment of the same to you.

66. ***Evaluation of the Assessee' statement:***

The expression 'intermediary' is not *limited to* what *the Assessee contends in their statement above. A detailed exposition of the term* and an *evaluation of how the "activities' of the Assessee sit with regard* to *Section* 66B, is *contained in paragraphs 3.7 to 3.14 of this show cause notice.*

After the pops have been brought in to *replace* the *EOS and IOS Rules that predated 'he new f amework, it is place of provision along* with *the factum of realization of* export proceeds *in convertible foreign exchange that would dicide whether a particular activity is* an *export* or not- even BAS, *which the assessee holds what is that he is engaged* in may *have qualified as* an export in *the earlier period (prior to 1.7.2012) but If BAS involves intermediation of tile kind referred to* in tile *POPS and engaged* in *by the Assessee Would* put the *place of supply of the service* in the *taxable territory and make it liable* to *service tax.*

67. M/s Inos are engaged in the business of arranging purchase and sale of machineries mostly pertaining to Pharmaceutical Sector and facilitates the deal for sale of machineries by overseas manufacturers and the Indian companies.

68. Once the deal is finished, the overseas manufacturer raises the invoice directly in the name of Indian buyers and the Indian buyers imports the machinery in their own name.

69. Only after the Indian buyer makes the payment for said import of machinery to the manufacturer, the overseas manufacturer makes the payment of commission to M/s Inos.

70. However, M/s Inos had not paid service tax on commission earnings received from the overseas manufacturers as they mis-stated and mis-declared this service as "other taxable services- other than the 119 listed" and had taken exemption by declaring the commission income received from the foreign manufacturers in their ST-3 Returns as "Export of Service" income.

71. *To sum up, it appears that the expression 'intermediary' as defined* in *Rule 2 (9 of the Place of Provision of Service Rules, 2012, has the following elements:*

a)There is a person undertaking an activity for another for a *consideration;*

b)The said person arranges or *facilitates a provision* of service *(w.e.f 01.07.2012) or a supply of goods (after 01.10.2014);*

C)Such arrangement or facilitation of said supply is between two or *more persons ;(not selectively limited* to *choosing some* one who again may be a go-between in the supply chain of goods like a wholesaler/distributor /retailer);

d) the start and end points of such supply as are averred to in the definition above, have not been defined or limited in any way-it can be taken in its broadest sense to be the ultimate/ primary source of supply of such a flow of goods and of services and the final point could well be the ultimate consumer of such supplies or it could be any subset of two persons anywhere in between these two points chosen with a view to maintain the hierarchy of sequential flow involved in the said supply of service or goods,;

e) a person who supplies the main service or the goods on his own account-bears the risk of ownership-is not an intermediary.

72. It appeared that the assessee have been claiming such intermediary services as have been provided to various overseas customer[s] as an export of service (the same has been claimed as export of service in the ST-3 returns filed for the period from October 2014 to June 2017) the correct position in law and under the rules would be that M/s Inos Technologies Pvt Ltd, have

provided taxable services to various overseas customers which are not export as the services have been rendered in the taxable territory in the capacity of being an intermediary and on which the liability to pay service tax should have been appropriately discharged w.e.f 01.10.2014.Therefore it appeared that the non-declaration of consideration received from various overseas customers for providing intermediary services for the period from 01.10.2014 to 30.06.2017 and the exemption claimed in the ST-3 Returns as export of services under the category of "Export of Services" w. e. f. 01.10.2014 is in-admissible and the services provided by the assessee squarely falling under the category of "Intermediary Services" are liable for payment of service tax.

73. Therefore, the assessee appeared to have mis-declared/ mis-represented the taxable services provided by them to various overseas customers as an export service, thereby avoiding the payment of appropriate taxes on its provision. The assessee thus appeared to be liable to pay service tax on value of service provided to various overseas customers. The total value of taxable service provided during the period from October 2014 to June 2017 by the assessee is Rs.6,09, 19,142 /.,The service tax liability @12.36%/ 14%/14.5%/ 15% on total value of service provided during the from October 2014 to June 2017 works out to Rs. 87,31,127/- (inclusive of cess).

Table-D

Period	Value of service provided (Rs.)	S.T. RATE (%)	Service Tax Payable(Rs.)					
			Service Tax payable (Rs.)	E.C. (Rs.)	S.H.E.C. (Rs.)	S.B.C. (Rs.)	K.K.C. (Rs.)	Total Service Tax payable (Rs.)
Oct-14	1096612	12	131593	2632	1316	0	0	135541
Nov-14	418890	12	50267	1005	503	0	0	51775
Dec-14	1474334	12	176920	3358	1769	0	0	182228
Jan-15	1494534	12	179344	3587	1793	0	0	184724
Feb-15	657048	12	78846	1577	788	0	0	81211
Mar-15	169085	12	20290	406	203	0	0	20899
Apr-15	5307032	12	636844	12737	6368	0	0	655949
May-15	0	12	0	0	0	0	0	0
Jun-15	1855668	14	259794	0	0	0	0	259794
Jul-15	2904664	14	406653	0	0	0	0	406653
Aug-15	0	14	0	0	0	0	0	0
Sep-15	0	14	0	0	0	0	0	0
Oct-15	581234	14	81373	0	0	0	0	81373
Nov-15	232822	14	32595	0	0	0	0	32595
Dec-15	3567118	14	499397	0	0	17836	0	517232
Jan-16	3170538	14	443857	0	0	15853	0	459728
Feb-16	1107545	14	155056	0	0	5538	0	160594
Mar-16	2249952	14	314993	0	0	11250	0	326243
Apr-16	1676332	14	234686	0	0	8382	0	243068
May-16	2368011	14	331522	0	0	11840	0	343362
Jun-16	3204410	14	448617	0	0	16022	16022	480662
Jul-16	1650339	14	231047	0	0	8252	8252	247551
Aug-16	10555834	14	1477817	0	0	52779	52779	1583375
Sep-16	2207712	14	309080	0	0	11039	11039	331157
Oct-16	0	14	0	0	0	0	0	0
Nov-16	748789	14	104830	0	0	3744	3744	112318

Dec-16	2184679	14	305855	0	0	10923	10923	327702
Jan-17	2014718	14	282061	0	0	10074	10074	302208
Feb-17	605339	14	84747	0	0	3027	3027	90801
Mar-17	902244	14	126314	0	0	4511	4511	135337
Apr-17	1455125	14	203718	0	0	7276	7276	218269
May-17	992692	14	138977	0	0	4963	4693	148904
Jun-17	4065842	14	569218	0	0	20329	20329	609876
Total	**60919142**		**8316329**			**223636**	**152939**	**8731127**

74. Further, it was also revealed that M/s [nos also earned income under various heads which are as follow:

(i) Income from Commission (Inland);
(ii) Service Income
(iii) Income from installation and Commissioning (inland)

75. Shri Gaurav Soni, Director of M/s Inos Technologies private limited in his statement dated 02.02.2018 stated that they had paid Service tax on the above mentioned income heads and had not paid Service tax on the Commission Income (Overseas).

76. During the scrutiny of the ST-3 returns and Profit and loss account it was revealed that M/s Inos have short paid service tax on the three heads mentioned above.

77. The service tax liability @,12.36%/14%/14.50/-/15% under these three heads during the period from October 2014 to Junc 2017 works out as detailed in the below .

TABLE-E

Sr No.	Financial Year	Taxable Income As perST-3 Returns	Taxable income as per Profit and Loss account and Trial Balance (in Rs.)	Difference as per ST-3 and P & L account (in Rs.)	Service Tax Rate	Service Tax (Short paid payable (in Rs.)
1.	October 2014 to March 2015	63000	365807	302807	12.36%	37426
2.	201-16	165000	356907	191907	14.5%	27826
3.	2016-17	25000	3,35,684	32823	15%	4923
4.	01.04.2017 to 30.06.2017	0	32823	32823	15%	4923
	TOTAL			**8,38,221**		**1,16,777**

TOTAL SERVICE TAX PAYABLE BY M/S INOS for the period from October2014 to

June2017:

TABLE-F

Sr. No.	F.Y.	Total Taxable Value	Total Service Tax Payable
1	October 2014 to March 2015	56,13,310	693804
2	2015-16	1,89,18,528	2927987
3	2016-17	3,06,79,043	981972
4	April 2017 to June 2017	65,46,483	981972
	Total	**6,17,57,363**	**8847904**

78. Legal provisions w.e.f. 01.07.2012:

78.1 With effect from 01.07.2012, Section 65 (105) of the Finance Act, 1994 has been replaced with new Section 65B (44) of the Finance Act, 1994.

As **per new Section 65B(44) of the Finance Act, 1994,**
"service" means any activity carried out *by a person for another for consideration, and includes a declared services, but shall not include -*

a) an activity which constitutes merely, -
(i) a transfer of title in goods or immovable property, by way of sale, gift or *in any other manner; or*
(ii) such transfer, delivery or supply of *any goods which is deemed to be a sate within the meaning of clause (29A) of article 366* of *the Constitution; or*
(iii) a transaction in money or actionable claim;
b) a provision of service by an employee to the employer in the course of or in relation to his employment;
c) fees taken in any Court or tribunal established under any law for the time being in force.

As **per Section 65B(51) of the Finance Act, 1994 –**

"taxabte service" means any service on which service tax is leviable under section 66 B;

79. Further, from 01.07.2012 Section 66 and Section 66A of the Finance Act, 1994 have been replaced with new Section 60B of the Finance Act, 1994,

As **per now Section 66B of the Finance Act, 1994, -**
there shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of twelve percent on the value of all services, other than those services specified in *the negative list, Provided* or *to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

80. Further with effect from 01.07.2012, Export of Services are governed by the provisions of Rule 6A of Service Tax Rules, 1994 which reads as under:

Rule 6A Export of Services -

(1) The provision of any services provided or agreed to be provided shall be treated as export of service when-

a) the provider of service is located in the taxable territory,

b) the recipient of service is located outside India,

c) the service is not a service specified in Section 66D of the Act,

d) the place of provision of the service is outside India,

e) the payment for such service has been received by the provider of service z . n convertible foreign exchange, and

f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of Section 65B of the Act.

81. The essential condition for a service to be export in terms of the above rule is that the place of provision of service should be in non-taxable territory.

82. To determine the place of provision of service, new Section 66 C of the Finance Act, 1994 as well as Place of Provision of Service Rules, 2012 replacing both Taxation of Services (Provided from Outside and Received in India) Rules, 2006, (i.e. *import of services)* and Export of Services Rules, 2005 have been introduced.

Section 66C of the Finance Act, 1994 reads as follows –

The Central Government may, having regard to the nature and description of various services, by rule made in this regard, determine the place where such services are provided or deemed to have been agreed to be provided

Any rule made under sub-section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory.

83. Place of provision of service Rules ,2012

As per Rule 2 (f) of the agent or any other person, by whatever name called , who arranges or facilitates a Provosion of a service (hereinafter called the 'maim' service) or a supply of goodsbetween two or more persons, not include a person who providers the main service on his account.

As per Rule 9 of Place of Provision of Services Rules, 2012,-

the place of provision of following services shall be the location of the service provider in the case of :-

a) Services provided by a banking company, or a *financial institution, or* a non-banking financial *company, to account holders,*

b) Online information and database access or *retrieval services;*

c) ***Intermediary services;***

d) Service consisting of hiring of means of transport, *other than*

• *Aircrafts, and (ii) vessels except yachts,* upto a *period of one month.*

As per Rule 2 (h) of Place of Provision of Services Rules, 2012 -"location of the service provider" *means - (a) where the service* provider has *obtained a single registration, whether centralised or otherwise, the* premises for *which such registration has been obtained.*

84. From a reading of the above provisions of the law/ rules and an examination of the activities taken up by the Assessee it appeared that the amount of Rs. 6,09,19,142/-, collected by the assessee from overseas manufacturers of machinery (for the Period from October 2014 to June 2017) for Provision of services, are actually towards 'Services' in respect of the goods, provided in India.

85. The assessee has not declared the same to the department in any manner that what they are engaged in providing are intermediary services, but have instead insisted in calling it as export services. The Service Tax liability on the said consideration, as determined in terms of Section 67 of the Finance Act, 1994 read with Rule 9© of POPSR, 2002 and Point of Taxation Rules, 2011, works out to Rs.88,47,904/- which is required to be paid by them in terms of Section 68(1) of the Finance Act, 1994 and read with Rule 6(1) of the Service Tax Rules, 1994. The assessee is also liable to pay interest in terms of Section 75 of the Finance Act, 1994 and penalty in terms of Section 76/78 of the Finance Act, 1994 read with section 174 of the CGST Act, 2017.

86. **Relevant provisions under 'The Central Goods and Service Tax Act, 2017:**

Section 174: Repeal and Saving

(1) __

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994(32 of 1994) (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the subsection (1) or section 173 shall not

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered there under; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:

PROVIDED that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of *the amended Act or repealed Acts; or*

(e) affect any investigation, inquiry, verification (including scrutiny and audit), Proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax surcharge, penalty, fine , interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit),assessment proceedings, adjudication and other legal proceedings or recovery of arreas or remedy may be instituted, continued or enforced, and any such tax , surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;

(f) affect any proceedings *including* that relating to an *appeal, review or* reference, instituted *before* on, or after *the appointed* day *under the said* amended Act or repealed Acts *and such proceedings shall be continued* under the said amended Act or repealed Acts *as if this Act had* not *come into force and the said Acts had not been amended or repealed.*

(3) The mention of the *particular matters referred to in sub-sections (1) and (2) shall* not be *held* to *prejudice or affect* the *general application of section 6 of* the *General Clauses* Act, *1897 (10 of 1897) with regard to the effect of repeal.*

87. Miscellaneous Transitional Provisions

Section 142 (8) (a) of CGST, ACT 2017: where in pursuance of *an assessment or adjudication proceedings instituted, whether before,* on or *after the appointed day, under the existing law, any amount* of tax, *interest, fine or penalty* becomes *recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear* of *tax under this Act and the amount so* recovered *shall not be admissible as input tax credit under this Act,-*

89. Contraventions:

It appeared that the assessee has contravened the provisions of Rule 6(A) of the Service Tax Rules, 1994 by wrongly claiming the taxable service rendered by them to overseas manufacturers of machinery as export of service even though all the conditions prescribed under Rule 6(A)(d) of the Service Tax Rules, 1994 have not been fulfilled. It appeared that even though the taxable services rendered by them are governed by the provisions of Rule 9(c) of the Place of Provision of Service Rules, 2012, the assessee has wrongly claimed that the services rendered by them are governed by Rule 3 of the said Rules. It appeared that by claiming the taxable service rendered by them as Export of Service the assessee has failed to discharge the service tax liability from 1-10-2014 thereby contravening the provisions of Section 68 of the Finance Act, 1994.

90. **Justification for invocation of extended period:**

It appeared that in spite of knowing all tile procedures very well and also having undertaken to comply with the provisions of the Financ[e] Act, 1994 read with the Service Tax (Determination of Value) Rules, 2006; Service Tax Rules, 1994; and Point of Taxation Rules, 2011; the Place of Provision of Service Rules 2012; the assessee deliberately suppressed the fact of renderin[g] the services as an Intermediary to overseas manufacturers of the machinery.

91. The scheme of service tax rests on voluntary compliance entrusted with the responsibility to pay the service tax. As such, the original hypothesis with which one starts out is that [the] assessee would be complying with the Law in all earnestness and with assiduousness that is warranted of a responsible tax payer.

92. Interference of departmental officers is generally not permitted as a matter of routine, but only as exceptions and that too when there is specific information or reason to believe that the tax liability is not correctly being discharged. The CBEC, from time to time, has come out with instructions regarding visits by departmental officers, scrutiny of tax returns and other related matters that serve to underline and strengthen the voluntary compliance system.

93. The action of disclosure itself is ordinarily limited to the details contained in the periodical return filed once in every six months and the onus to determine facts and issues relevant to the correct ascertainment and discharge of service tax levy remains with the provider of taxable services.

94. If such facts on the basis of which an independent and proper evaluation can be made is kept away from the department due to an act of omission or commission by the party responsible to pay tax, it would constitute a situation where the first proviso to section 73 of the Finance Act, 1994, can reasonably be invoked.

95. The first proviso to Section 73 of the Finance Act, 1994, states *'Provided that where any service tax has not been levied or paid* or *has been short-levied* or *short paid or erroneously refunded by reason of.*

a. fraud; or
b. collusion; or
c. wilful misstatement; or
d. suppression of facts; or
e. contravention of any of the provisions of this Chapter or file rules made thereunder with intent to evade payment of service tax, by tile person chargeable with service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "One year", the worts "five years" had been substituted.'

96. In this regard, it may not be out of place, to highlight the observations of the Hon'ble Apex Court in the case of Rajasthan Spinning and Weaving Mills / High Court of Gujarat at Ahmedabad in Tax Appeal No. 338 of 2009 in the case of Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd. dated 22.04.2010 regarding applicability of the extended period in different situations.

'11. A plain reading of sub-section (1) of section 11A of the Act indicates that the provision is applicable in a case where any duty of excise has either not *been levied/paid or has been short levied/short paid,* or *wrongly refunded, regardless of the fact that such non-levy etc. is on the basis of* any *approval, acceptance or assessment relating to the rate of duty or valuation under* any *of the provisions of the Act or Rules there under and at* that *stage it would be open to the Central Excise Officer, in exercise of his discretion* to *serve the show cause notice on the person chargeable to such* duty *within one* year *from the relevant date.*

12. The Proviso under the said sub-section stipulates that in case of such non-*levy, etc. of duty which is by reason of fraud, collusion,* or any *mis -statement or suppression of facts, or contravention of* any *provisions of the Act* or the *rules made there under, the provisions of sub-section (1) of section 11A of the Act shall have effect as if the words one year have been substituted by* the *words five years.*

13. The Explanation which follows stipulates that where *service of* notice has *been stayed by an order of a Court, the period of such stay shall be excluded from computing the aforesaid period of one* year *or five years, as the case* may *be.*

14. Thus the scheme that unfolds is that in case of non-levy where there is no fraud, collusion, etc., it is open to the Central Excise Officer to issue a show cause notice for recovery of duty of excise which has not been levied, etc. The show cause notice for recovery has to be served within one year from the relevant date. however, where fraud, collusion, etc. stands established the period within which the show cause notice has to be served stands enlarged by substitution of the words five years, In other words the show cause notice for recovery of such duty of excise not levied etc., can be served within five years from the relevant date.

15. To put it differently, the proviso merely provides for a situation where Under the provisions of sub-section (1) are recast by the legislature itself extending the period Within which the show cause notice for recovery of duty of excise not levied etc, gets enlarged. This position becomes clear when one reads the explanation in tile said sub-section which only says that the period stated as to service of notice shall be excluded in computing the aforesaid Period of one year five years as the case may be.

16. The termini from which the period of one year or five years has to be computed is the relevant date which has been defined in sub-section (3)(ii) of section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such Concept in sub-section (1) of section 11A of the Act or the proviso there under it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.

17. The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term relevant date nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section (1) of section 11A, is clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified there under, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years there from.

20. Thus, what has beers prescribed under the statute is that upon the reasons stipulated urider the proviso being satisfied, tile period of limitation, for service of show cause notice under sub-section (1) of section 11A stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by Subordinate legislation be either curtailed or enhanced. In the present case as as well as in the decisions on which reliance has been placed by the learned advocate for the Tribunal has introduced a novel concept of date of knowledge and has imported into the Proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of section 11A would be applicable. However, such reasoning appears to be fallacious in as much as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated.

21. It may be noticed that where the statute does not prescribe a period of limitation, the Apex Court as well as this Court have imported the concept of reasonable period and have held that where the statute does not provide for a period of limitation, action has to be taken within a reasonable time. However, in a case like the present one, where the statute itself prescribes a period of limitation the question of importing the concept of reasonable period does not arise at all as that would mean that the Court is substituting the period of limitation prescribed by the legislature, which is not permissible in law.

22. The Apex Court in the case of Rajasthan Spinning and Weaving Mills (supra) has held thus:

`From sub-section 1 read with its proviso it is clear that in case the short payment, nonpayment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful miss-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in

default within one year from the relevant date (defined in sub-section 3). In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc, of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years.'

23. This decision would be applicable on all fours to the facts of the present case, uiz, when non-payment etc. of duty is intentional and by adopting any of the means indicated in the proviso, then the period of notice gets extended to five years.'

97. Thus, it appeared that at suppression of facts can happen even in the absence of *a* fraudulent intention or a willful mis-statement, but where suppression has happened and out of a conscious decision extended period is to be invoked.

98. The assessee had an obligation to Comply with the statutory provisions and to furnish the information an required there under in respect of the following provisions:

Section 68(1) of the Act, as stood during *the relevant period, provides that event' person providing taxable service to any person shall pay service tax at the rate specified in section 66B* in such a manner and within *such period as may be prescribed;*

Section 66 B which provides for the *levy of the tax on the value of all services, other than those services specified in, the negative list) provided* or *agreed to be provided* in *the taxable territory by one person to another and collected in such* manner *as* may *be prescribed. It also specifies the rate of tax to be applied as well as;*

Section 66 C which provides for the Determination of place of Provision of service;

Section 66 E contains the list of 'declared Services';

Section 67 which provides for the manner *of* how the *taxable services are to be valued read with Rule 3 of the Service Tax* (Determination of Valuation*) Rule, 2006 and Rule 3 of* Point *of Taxation Rules, 2011;*

Section 70 which directs that every person *liable* to pay service *tax shall himself assess the tax due* on the services *provided by* him and *shall furnish returns as prescribed.*

99. In the present context, the assessee never disclosed important details about the appropriate value of the declared services provided to the Department. In spite of knowing all the procedures very well and also having undertaken to comply with the provisions of the Finance Act, 1994 read with Service Tax Rules, 1994; and Point of Taxation Rules, 2011, the assessee failed to determine service tax on the taxable service provided to various overseas clients.

100. M/s Inos Technologies Private Limited, have failed to disclose the facts of providing services in the nature of intermediary services like arranging purchase and sale of machinery

mostly pertaining to Pharmaceutical sector and facilitates deal for sale of machineries by overseas manufactures and Indian Companies. The nature of services rendered by M/s Inos Technologies Private Limited to its various overseas clients, appears to be in the nature of 'intermediary service of goods' which is essential for facilitating rendering of the service related to supply of products/goods of various overseas clients to their customers in india. They have mis-declared the 'Intermediary service' as 'export of Service' w.e.f. 01.10.2014 and prior to this date such Income was suppressed in the ST-3 Returns to evade payment of service tax. The fact of provision of 'intermediary service; by the assessee in the taxable territory to its various overseas clients, would not have come to the notice of the department, had the the investigation not been initiated against them as a result of intelligence devloped by the officers of Directorate Gerenal of Central Excise Intelligence (now Directorate General of GST Intelligence). It appeared that the assessee has suppressed the above facts from the notice of the department with regard to the details/nature of transactions with a clear intention to evade Payment of service tax under the guise of export of service. It also appeared that the assessee has wilfully contravened the provisions of the Finance Act 1994 & Rules made there under with intent to evade payment of service tax. Thus, it appeared that the service tax amount of Rs. 88,47,904/. (inclusive of cess) is recoverable from the assessee by invoking the extended period of limitation under proviso to Section 73(1) of Finance Act, 1994, along with applicable interest under Section 75 of Finance Act 1994.

101. It appeared that all these facts narrated above go to show that the assessee suppressed the facts, by non-compliance of the obligations cast upon them by the statutory provisions. It is imperative to mention here that intent is a state of mind which can only be inferred from the actions of their lack thereof.

102. This matter has arisen out of investigation initiated by the officers of the Directorate General of Central Excise Intelligence, Ahmedabad Zonal Unit, on the basis of intelligence developed by them. Had they not initiated the investigation in the matter, this evasion of tax would not have been noticed. There is nothing on record which have been averred to or indicated by the assessee to show that the material fact relating to rendering of the said services known to the department till the results of investigation were available.

103. Therefore, it appeared that the above omissions and commissions on the part of the assessee are with intent to evade payment of service tax. Hence, it appeared that the extended period in terms of proviso to Section 73(1) of the Finance Act, 1994 is rightly invokable for recovery of the service tax not paid within the stipulated time, along with interest in terms of the provisions of Section 75 of the Finance Act, 1994. Further, it also appeared that by suppressing the facts of provision of taxable output service and receipt of the consideration with intent to evade payment of service tax, the assessee rendered themselves liable to penalty **under the provisions** of Section 76, 77(1)(b) and Section 78 of the Finance Act, 1994.

104. ***legal Provisions for effectin[g] recovery of service tax,*** **interest and** ***for imposition of penalties:***

As per Section 73(1) of the Finance Act, 1994, where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, the Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with service tax which has not been levied or paid or which has been short levied or short paid or the person to whom [s]uch tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

22. The Apex Court in the case of Rajasthan Spinning and Weaving Mills (supra) has held thus:

`From sub-section 1 read with its proviso it is clear that in case the short payment, nonpayment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful miss-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in

default within one year from the relevant date (defined in sub-section 3). In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc, of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years.'

23. This decision would be applicable on all fours to the facts of the present case, uiz, when non-payment etc. of duty is intentional and by adopting any of the means indicated in the proviso, then the period of notice gets extended to five years.'

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Section 68(1) of the Act, as stood during *the relevant period, provides that event' person providing taxable service to any person shall pay service tax at the rate specified in section 66B* in such a manner and within *such period as may be prescribed;*

Section 66 B which provides for the *levy of the tax on the value of all services, other than those services specified in, the negative list) provided* or *agreed to be provided* in *the taxable territory by one person to another and collected in such* manner *as* may *be prescribed. It also specifies the rate of tax to be applied as well as;*

Section 66 C which provides for the Determination of place of Provision of service;

Section 66 E contains the list of 'declared Services';

Section 67 which provides for the manner *of* how the *taxable services are to be valued read with Rule 3 of the Service Tax* (Determination of Valuation*) Rule, 2006 and Rule 3 of* Point *of Taxation Rules, 2011;*

Section 70 which directs that every person *liable* to pay service *tax shall himself assess the tax due* on the services *provided by* him and *shall furnish returns as prescribed.*

99. In the present context, the assessee never disclosed important details about the appropriate value of the declared services provided to the Department. In spite of knowing all the procedures very well and also having undertaken to comply with the provisions of the Finance Act, 1994 read with Service Tax Rules, 1994; and Point of Taxation Rules, 2011, the assessee failed to determine service tax on the taxable service provided to various overseas clients.

100. M/s Inos Technologies Private Limited, have failed to disclose the facts of providing services in the nature of intermediary services like arranging purchase and sale of machinery

mostly pertaining to Pharmaceutical sector and facilitates deal for sale of machineries by overseas manufactures and Indian Companies. The nature of services rendered by M/s Inos Technologies Private Limited to its various overseas clients, appears to be in the nature of 'intermediary service of goods' which is essential for facilitating rendering of the service related to supply of products/goods of various overseas clients to their customers in india. They have mis-declared the 'Intermediary service' as 'export of Service' w.e.f. 01.10.2014 and prior to this date such Income was suppressed in the ST-3 Returns to evade payment of service tax. The fact of provision of 'intermediary service; by the assessee in the taxable territory to its various overseas clients, would not have come to the notice of the department, had the the investigation not been initiated against them as a result of intelligence devloped by the officers of Directorate Gerenal of Central Excise Intelligence (now Directorate General of GST Intelligence). It appeared that the assessee has suppressed the above facts from the notice of the department with regard to the details/nature of transactions with a clear intention to evade Payment of service tax under the guise of export of service. It also appeared that the assessee has wilfully contravened the provisions of the Finance Act 1994 & Rules made there under with intent to evade payment of service tax. Thus, it appeared that the service tax amount of Rs. 88,47,904/. (inclusive of cess) is recoverable from the assessee by invoking the extended period of limitation under proviso to Section 73(1) of Finance Act, 1994, along with applicable interest under Section 75 of Finance Act 1994.

101. It appeared that all these facts narrated above go to show that the assessee suppressed the facts, by non-compliance of the obligations cast upon them by the statutory provisions. It is imperative to mention here that intent is a state of mind which can only be inferred from the actions of their lack thereof.

102. This matter has arisen out of investigation initiated by the officers of the Directorate General of Central Excise Intelligence, Ahmedabad Zonal Unit, on the basis of intelligence developed by them. Had they not initiated the investigation in the matter, this evasion of tax would not have been noticed. There is nothing on record which have been averred to or indicated by the assessee to show that the material fact relating to rendering of the said services known to the department till the results of investigation were available.

103. Therefore, it appeared that the above omissions and commissions on the part of the assessee are with intent to evade payment of service tax. Hence, it appeared that the extended period in terms of proviso to Section 73(1) of the Finance Act, 1994 is rightly invokable for recovery of the service tax not paid within the stipulated time, along with interest in terms of the provisions of Section 75 of the Finance Act, 1994. Further, it also appeared that by suppressing the facts of provision of taxable output service and receipt of the consideration with intent to evade payment of service tax, the assessee rendered themselves liable to penalty **under the provisions** of Section 76, 77(1)(b) and Section 78 of the Finance Act, 1994.

104. ***legal Provisions for effectin[g] recovery of service tax,*** **interest and** ***for imposition of penalties:***

As per Section 73(1) of the Finance Act, 1994, where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, the Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with service tax which has not been levied or paid or which has been short levied or short paid or the person to whom [s]uch tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of –

- fraud; or
- collusion; or
- willful mis-statement; or
- suppression of facts; or
- contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words thirty months, the words five years had been substituted.

105. As per Section 75 of the Finance Act, 1994, every person, liable to pay the tax in accordance with the provisions of Section 68 or Rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below ten percent and not exceeding thirty six percent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, for the period by which such crediting of the tax or any part thereof is delayed.

106. In exercise of the powers conferred by Section 75 of the Finance Act, 1994, the Central Government vide Notification No. 12/2014 ST dated 11.07.2014 fixes the following rates of simple interest per annum for delayed payment of service tax-.

SI. NO.	Period of delay	Rate of simple interest
1.	Up to six months	18 percent
2.	More than six months and up to one year	18 percent for the first six months of delay and 24 percent for the delay beyond six months
3.	More than one year	18 percent for the first six months of delay, and 24 percent for the period beyond six months up to one year and 30 percent for any delay beyond one year.

107. Further, in exercise of the powers conferred by Section 75 of the Finance Act, 1994 (32 of 1994) and in supersession of the Notification No-12/2014-Service Tax, dated the 11th July, 2014, except as respects things done or omitted to be done before such supersession, the Central Government vide Notification No. 13/2016-ST dated 01.03.2016 fixes the following rates of simple interest per annum for delayed payment of service tax

SI. NO.	Situation	Rate of simple interest
1.	Collection of any amount as service tax but failing to pay the amount so collected to the credit of the Central Government on or before the date on which such payment becomes due.	24 Percent

2.	Other than in situations covered under serial number 1 above.	15 percent

108. As per amended (with effect from 14.05.2015) provisions of Section 76 of the Finance Act, 1994,where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made there under with the intent to evade payment of service tax, the person who has been served notice under sub- section (1) of Section 73 shall, in addition to the service tax and interest specified in the noptice, be also liable to pay a penalty not exceeding ten percent of the amount of such service tax:-

109. Provided that where service tax and interest is paid within a period of thirty days of—

(i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent of the penalty imposed in that order, only if such reduced penalty is also paid within such period.

(iii) As per Section 77(1)(b) of the Finance Act, 1994, who fails to keep, maintain or retain books of account and other documents Is required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to ten thousand rupees.

110. As per amended *(with effect from 14.05.2015) provisions of* Section 78(1) of the Finance Act, 1994, where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or the rules made there under with the intent to evade payment of service tax, the person who has been serviced notice under the proviso to sub-section (1) of Section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred percent of the amount of such service tax.

111. Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty percent of the service tax so determined.

112. As per newly inserted Section 78 B(1) of the Finance Act, 1994 (inserted with effect from 14.05.2015),

Where, in any case, -

Service tax has not been levied or paid or has been short levied or short paid or erroneously refunded and no notice has been served under sub- section (1) of section 73 or under the proviso thereto, before the date of which the Finance Bill, 2015 receives he assent of the President; or

Service tax has not been levied or Paid or has been short paid or erroneously refunded and a notice has been serviced under sub-section (1) of Section 73, before the date on which the Finance Bill, 2015 receives the assent of the President,

then in respect of such cases, the provisions of Section 76 or Section 78, as the case may be, as amended by the Finance Act, 2015 shall be applicable.

113. Further, the assessee' action of non-payment of service tax on provision of '*intermediary seruice'* with intent to evade payment of service tax has rendered them liable for penal action. Therefore, the assesses appeared to be liable for penalty under Section 76 and/or Section 78 of the Finance Act, 1994.

114. Therefore M/s Inos Technologies Private Limited situated at 452-455, C-Block, Sobc, Centre, Gala Gymkhana Road, South Bopal, Ahmedabad - 3 8005 8 were called upon to show cause to the Joint/ Additional Commissioner, CGST, Central Excise, Ahmedabad North, Ahmedabad, as to why -

(i) The activity of arranging purchase and sale of machinery and facilitates deal for sale of machineries by overseas manufactures to Indian buyers, should not be held as *'Intermediary service with respect* to *goods'* as defined in Rule 2(f) of the Place of provision of Rules, 2012;

(ii) Amount of **Rs.6,17,57,363/- (Six Crore Seventeen Lakh Fifty Seven Thousand Three Hundred Sixty Three)** received as consideration towards commission income received from overseas manufacturers and other income heads during the period from October 2014 to June 2017,should not be held as the consideration received towards provision of above *Intermediary* service;

(iii) an amount of **Rs.88,47,904/-(Rupees Eighty Eight Lakhs Forty Seven Thousand Nine Hundred Four)** being the service tax payable on Intermediary services with respect to goods and other services, for the period October 2014 to June 2017, should not be demanded and recovered from them in terms of proviso to Section 73(1) of the Finance Act, 1994;

(iv) Interest at applicable rates on the amount demanded at para (iii) above, should not be demanded and recovered from them under the provisions of Section 75 of the Finance *Act, 1994;*

(v) Penalty *should* not be imposed on them under the provisions of Section 76 and/or 78 of the Finance Act, 1994 as amended, for failure to pay service tax along with cess, within the stipulated time in respect of the demand at St, No.(iii) above.

(vi) Penalty should not be imposed upon them under the provisions of Section 77 (1)(b) of the erstwhile Finance Act, 1994 (as they existed upto 30.06.2017) read with Section 142 and 174 of the CGST Act, 2017 for failing to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made there under.

115. In reply to the show cause notice, vide their letter received in this office on 23.11.2020, the assessee mainly argued that -

denied all the allegations leveled in the show cause notice.

The service provided by them fall under Export of Services Rules.

The consideration for rendering the service has been received in foreign currency.

Contention of the Department classifying their service as Intermediary Service is not correct in view of the judgment of the Advance Ruling in the case of M/s.Universal Services

India Pvt.Ltd Vs The Commissioner of Service Tax, Gurgaon, Ruling No.AAR/ST/07/2016 in application No.AAR/44/ST/14/2014 and North American Coal Corporation India Pvt.Ltd Vs Commissioner of Central Excise, Pune, Advance Ruling No.AAR/ST/13/2015, Application No.AAR/44/ST/2/2014. Therefore, demand of Service Tax as an Intermediary required to be set aside.

- Income received from all of their clients as per the clauses of the agreement can not be termed as intermediary service.
- From the nature of contract it is clear that the same were for business service agreement, rightly classifiable under the category of business support services for the principal to principal work.
- The service has been provided at outside India, therefore, should be treated as export of service which is exempt from Service Tax.
- As per the agreement, their service to act as facilitator. The meaning of 'facilitation' can not be extended to cover those cases where the intermediary undertakes the main services itself, though in the capacity of an agent.
- The department has calculated and demanded service tax on the amount of Rs.95,97,704/- @ 14.5%, Service Tax demand of Rs.13,91,667/- in excess, which notice has shown the basis of ST-3 Return, while the demand has to be on the billing basis, so in 2016-17, receipt has been billed in the year 2014-15, 2015-16 counted twice which required to be deleted.
- They relied the following case laws-

(i) 2013 (31) S.T.R. 673 (Tri. - Bang.) IN THE CESTAT, SOUTH ZONAL BENCH, BANGALORE S/Shri M.V. Ravindran, Member (J) and P. Karthikeyan, Member (T) REGIONAL MANAGER, TOBACCO BOARD Versus COMMR. OF C. EX., MYSORE Final Order No. 874/2010 and Stay Order No. 429/2010, dated 17-5-2010 in Application No. ST/Stay/215/2009 in Appeal No. ST/369/2009

(ii) 2010 (20) S.T.R. 789 (Tri. - Mumbai) IN THE CESTAT, WEST ZONAL BENCH, MUMBAI Shri Ashok Jindal, Member (J) ANVIL CAPITAL MANAGEMENT (P) LTD. Versus COMMR. OF S.T., MUMBAI Final Order No. A/39/2010-WZB/C-IV/SMB and Stay Order No. S/6/2010-WZB/C-IV/SMB, dated 1-1-2010 in Application No. ST/S/1655/2009 in Appeal No. ST/237/2009

(iii) 2010 (19) S.T.R. 242 (Tri. - Ahmd.) IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD [COURT NO. II] Shri Ashok Jindal, Member (J) COMMISSIONER OF SERVICE TAX, AHMEDABAD Versus PURNI ADS. PVT. LTD. Final Order Nos. A/372-373/2010-WZB/AHD, dated 23-4-2010 in Appeal Nos. ST/154-155/2009

2009 (16) S.T.R. 63 (Tri. - Chennai) IN THE CESTAT, SOUTH ZONAL BENCH, CHENNAI Ms. JyotiBalasundaram, Vice-President and Shri P. Karthikeyan, Member (T) SIFY TECHNOLOGIES LTD. Versus COMMISSIONER OF SERVICE TAX, CHENNAI Final Order No. 657/2009, Stay Order No. 504/2009 and Misc. Order No. 309/2009, dated 4-6-2009 in Application Nos. ST/S/56/2009 and ST/EH/42/2009 in Appeal No. ST/82/2009

(v) 2013 (30) S.T.R. 62 (Tri. - Ahmd.) IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD [COURT NO. II] Shri B.S.V. Murthy, Member (T) BHOGILAL CHHAGULAL & SONS Versus COMMISSIONER OF S.T., AHMEDABAD Final Order No. A/669/2012-WZB/AHD and Stay Order No. S/811/2012-WZB/AHD, dated 10-5-2012 in Application No. ST/Stay/251/2012 in Appeal No. ST/107/2012.

- The noticee has also contented that show cause notice covers the period of 01.14.2014 to 30.06.2017 and the show cause notice has been issued on 30.05.2020 invoking extended period of limitation. They submitted that the extended period of limitation cannot be invoked in the present case since there is no suppression, willful misstatement on their part.

➢ The noticee stated that show cause notice has proposed to impose penalty under Section 78 of the Finance Act, 1994. They have demonstrated above that they have not suppressed any information from the department and there was no willful misstatement on the part of their part. They relied on Hon'ble Gujarat High Court decision in case of Steel Cast Ltd. 2011 (21) STR 500 (Guj) and stated that penalty is not sustainable in the present case.

➢ The assessee stated that penalty under Section 76 &77 is not imposable since there is no short payment of service tax. As per the merits of the case, the Appellant is not liable for payment of Service tax. In support of their contention, they relied the following case laws-

Hindustan Steel Ltd. v The State of Orissa reported in AIR 1970 (SC) 253.

Kellner Pharmaceuticals Ltd. Vs CCE, reported in 1985 (20) ELT 80,

Pushpam Pharmaceuticals Company v CCE 1995 (78) ELT 401 (SC).

CCE vs. Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC), *(Supra).*

Bharat Wagon &Engg. Co. Ltd. v. Commissioner of C. Ex., Patna, (146) ELT 118 (Tri. – Kolkata),

GoenkaWoollen Mills Ltd. v. Commissioner of C. Ex., Shillong, 2001 (135) ELT 873 (Tri. – Kolkata).

Bhilwara Spinners Ltd. v. Commissioner of Central Excise, Jaipur, 2001 (129) ELT 458 (Tri. – Del.),

116. The assessee submitted that penalties under Section 76 and 78 of the Act cannot be simultaneously imposed. Penalties under Section 76 and 78 are mutually exclusive. Section 78 is applicable if the non-payment of service tax is due to reasons specified therein with an intention to evade payment of service tax. Section 76 is applicable in cases other than those covered under Section 78 of the Act. They placed reliance on the following case laws:

i. **The Financers v. CCE, Jaipur – 2007 (8) STR 7 (Tri. Del)**
ii. **Commissioner of Central Excise, Ludhiana v. Pannu Property Dealer – 2009 (14) S.T.R. 687 (Tri. Del)**
iii. **COMMISSIONER OF C. EX., CHANDIGARH Vs CITY MOTORS 2010 (19) S.T.R. 486 (P & H)**
iv. **CCEC, Chandigarh Vs M/s Cool Tech. Corporation (Service Tax Appeal No 47 of 2010) (P & H)**
v. **C C E , CommissionerateVs M/s FIRST FLIGHT COURIER LTD 2011 (22) S T R 622 (P & H)**
vi. **Bharat Wagon &Engg. Co. Ltd. v. Commissioner of C.Ex.,** Patna, (146) ELT 118 (Tri. - Kolkata),
vii. **GoenkaWoollen Mills Ltd. v. Commissioner of C.Ex., Shillong, 2001(135) ELT 873 (Tri. - Kolkata).**
viii. **Bhilwara Spinners Ltd. v. Commissioner of Central Excise, Jaipur, 2001 (129) ELT 458 (Tri. – Del.)**

117. The assessee stated that in the present case, Section 80 of the Finance Act will be applicable. Section 80 of the Act provides that no penalty shall be imposed on the assessee for any failure referred to in Sections 76 or 78 of the Act, if the assessee proves that there was reasonable cause for the said failure. Thus, the Act statutorily provides for waiver of penalty. In the present case, there was a bonafide belief on part of the Appellants that the activities carried out by them are not taxable. Therefore, there was reasonable cause for failure, if Any, on their part to pay service tax and to file service tax return. Hence, in terms of Section 80 of the Act,

penalties cannot be imposed under Section 76 and 78 of the Act. In this regard, they placed reliance on the following judgments:

(i) **ETA Engineering Ltd. Vs. CCE, Chennai, 2004 (174) E.L.T 19(T-LB)**
(ii) **Flyingman Air Courier Pvt. Ltd. vs. CCE 2004 (170) ELT 417 (T)**
(iii) **Star Neon Singh Vs. CCE, Chandigarh, 2002 (141) ELT 770 (T)**

118. Finally, they requested for a lenient view and to drop the proceedings including demand of Service Tax, penalty and interest. They also requested for a personal hearing.

Personal Hearing.

119. Personal hearings in this case were fixed on 28.01.2021, 15.04.2021 and 19.05.2021. At the request of the assessee, these hearings were postponed on account of Covid-19 and the atmosphere prevailing during the period. Subsequently, personal hearing was held on 07.06.2021. Shri Vipul Khandhar, CA, duly authorized by the assessee, appeared for the hearing on 07.06.2021 and stated that they are not intermediary and Business Support Service providers and are eligible for exemption under the export of service and POS. Further, for the said period, i.e. April 2016 to June 2017 the department stated that they paid excess Service Tax has not been taken into account against liability. He also referred to their written submission to the show cause notice.

Discussion and Findings:

120. I have carefully gone through the records of the case, written submission made by the assessee in reply to the show cause notice and also submission made before me during the course of personal hearing.

121. The issue to be decided in the present case is whether the activities of arranging and purchasing of machinery and facilitates deal for sale of machines by overseas manufactures to Indian buyers, is to be held as Intermediary Service with respect to goods as defined in Rule 2(f) of the Place of Provision Rules, 2012 or otherwise.

122. From the case records, I find that the officers of Directorate General of Central Excise Intelligence (now Directorate General of Goods and Services Tax Intelligence) on the basis of intelligence gathered by them that M/s Inos had not paid service tax on commission income received from the foreign manufacturers by facilitating the sale of machineries which were manufactured by foreign manufacturers to Indian buyers as they mis-stated and mis-declared the commission income in their ST-3 Returns as "Export of Service" income and took exemption from paying Service Tax.

123. During the course of investigation and on scrutiny of the Balance Sheet and Profit & Loss Account of the assessee, it was revealed that during the period from October 2014 to June 2017 M/s Inos had received "commission income" from its various overseas machinery manufacturer clients. On further verification of the ST-3 Returns it was revealed that M/s. Inos had claimed exemption under "Export of Services" which is reflected in their balance sheet and they did not discharge any amount of Service Tax on the 'commission income received from their foreign clients' to the Government exchequers on the commission income received from overseas manufacturers of the machinery for selling their machinery in India. It was also revealed that M/s. Inos had entered into written and verbal contracts with various overseas machinery manufacturers (Principals) for providing intermediary services to Indian clients. M/s.Inos vide their letter dated 03.02.2018 submitted sample copies of the agreement entered into by them with various foreign machinery manufacturers. The details of the agreements and

their terms and conditions in respect of one such agreement between M/s Servolift Lifetime Solution and the assessee are as follows:-

124. M/s Servolift Lifetime Solution entrusted M/s Inos (Agent) with sole agency for all products and/or sold by M/s Servolift Lifetime Solution in the territory of India. The salient features of the said agreement are as under:

(i)The Agent has to promote business in the territory and represent the interest of M/s Servolift Lifetime Solution. This duty applies to all the M/s Servolift Lifetime Solution products and to all customers in the whole territory.

(ii)The Agent shall undertake to visit all customers and potential customers in his territory on a regular basis. He further assists all M/s Servolift Lifetime Solution employees, who travel to his territory for customer meetings, negotiations or service activities, with the organisation of the journey (e.g. arranging meetings with customers, organizing hotel reservation and transport as well as obtaining travel visa.

(iii)The Agent will regularly report in writing on his activities and performance and provide M/s Servolift Lifetime Solution with the respective documentation (amongst others in relation to the market and the competitive situation). In particular, he will immediately advise M/s Servolift Lifetime Solution as to any prospective business. On request, he will provide M/s Servolift Lifetime Solution with copies of his correspondence with customers.

(iv)The Agent will carefully and regularly report on the financial capacity of the customers.

(v)Sub-agents can only be employed with the prior written consent of M/s Servolift Lifetime Solution.

(vi)M/s Servolift Lifetime Solution reserves the right to act in the agent's territory. In such cases M/s Servolift Lifetime Solution will regularly inform the Agent of the result of negotiations.

(vii)The Agent shall assist M/s Servolift Lifetime Solution related to patents and other industrial property rights as well as in defending M/s Servolift Lifetime Solution against unfair competition by third parties.

(ix)After conclusion of a transaction the Agent assists M/s Servolift Lifetime Solution with the processing of the contractually agreed services in the interest of M/s Servolift Lifetime Solution. He thereby assists both with the processing of orders as well as with respect to on-site activities (e.g. assembling and starting of the operation).

(x) If any complaints are received, M/s Servolift Lifetime solution must be notified immediately and the Agent is obliged to secure any evidence in favour of Servolift.

125. I find the wordings of the contract/agreement, entered into between the assessee and foreign manufacturers (Principals), terms and condition mentioned therein indicates that the nature of service provided by the assessee is of the nature of Intermediary which would fall within the definition of "Intermediary Service" in terms of Rule 2(f) of the Place of Provision of Service Rules, 2012 as amended w.e.f. 01.10.2014.

126. According to the assessee's version, the service provided by them fall under Export of Services Rules, the consideration for rendering the service has been received in foreign currency, contention of the Department classifying their service as Intermediary Service is not correct, income received from all of their clients as per the clauses of the agreement can not be termed as intermediary service, from the nature of contract it is clear that the same were for business service agreement, rightly classifiable under the category of business support services for the

principal to principal work and the service has been provided at outside India, therefore, should be treated as export of service which is exempt from Service Tax.

127. I find that the assessee had entered into agreement with several foreign manufactures. It is mentioned in the agreements that the assessee to promote business in the territory and represent the interest of the company (Principal) and the duty applies to all the products of the company (Principal) and to all customers in the territory. M/s Inos is engaged in providing certain services which facilitate supply of goods from the Principals (situated outside India) to their customers in the taxable territory (India). Even though, it is mentioned in the agreement that M/s Inos (The Agent) has to promote business in the territory and represent the interest of 'The Principal', this duty applies to all the products of the Principal and to all customers in the whole territory. Thus, it appeared from the facts emanating from the agreement that while rendering the service described hereinabove , the M/s Inos had acted as an Intermediary between the Principal and their potential customers in India. Thus, the services so rendered appear to be falling within the purview of definition of "Intermediary Services" Rule 2(f) of the Place of Provision of Service Rules 2012 as amended w.e.f. 1.10.2014. Therefore, the assessee's argument to treat the said services Business Support Services and as Export of Services can not be considered.

128. Further, in terms of Notification No. 28/2012-ST dated 20.06.2012, with effect the Place of Provision of Service Rules, 2012 (POPS Rules in Short) were introduced. As per Rule 9 of the POPS Rules, 2012, "The place of provision of following services shall be the location of the service provider:-

a) *Services provided by a company, or a financial institution, or a non-banking financial company, to account holders;*

b) *Online information and database access or retrieval*

c) ***Intermediary Services;***

d) *Service consisting of hiring of means of transport other than*

(i) *Aircrafts, and,*

(ii) *Vessels except yachts, upto a period of one month;*

As per Rule 2(f) of the POPS Rules as defined **up to 30.09.2014,** an "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates **a provision of a service** (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account. The above definition of the Intermediary services has been substituted vide Notification No. 14/2014 ST dated 11.07.2014, **with effect from 01.10.2014,** the "Intermediary" is defined as a broker, an agent or any other person, by whatever name called, who arranges or facilitates a **provision of a service** (hereinafter called the 'main 'service) **or a supply of goods,** between two or more persons, but does not include a person who provides the main service or supplies the goods on his account. Thus, it is seen that the definition of an Intermediary includes any person who arranges or facilitates a provision of a service (w.e.f. 01.07.2012) or **supply of a service or goods** (w.e.f.01.10.2014) between two or more persons, but does not include a person who provides the main service on his account.

129. Generally, *"Intermediary" is a person who arranges or facilitates supply of goods, or a provision of service,* or *both, between, two persons, without material alteration* or *further processing. Thus;* an *intermediary is involved with two supplies at* any *one time:*

iii) *the supply between the principal and the third party; and*

iv) *the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.*

For the purpose of this Rule, an intermediary in respect of goods (such as a commission agent i.e., a buying or *selling agent,* or a *stockbroker) is excluded by definition*

(upto*30.09.2014).*

Also excluded front sub-rule is a person who arranges or facilitates a *provision of* a *service (referred to* in *the rules as "the main service"), but provides the main service on his own account.*

130. In view of the above, the activities carried out by the assessee is in consonance with the above definition of 'intermediary' under the provisions of Rule 9 (c) of Place of Provision of Services Rules, 2012 and the assessee rendered the intermediary service in respect of sourcing of goods, the place of provision of the service in the instant case, the service provider, the "Intermediary", in India.

131. It is further seen that to be qualified as "Export of Services" in terms of Rule 6A (1) of Service Tax Rules 1994, the condition under clause (d) i.e "the place of provision of service is outside India" is to be fulfilled. In the instant case, this condition is not satisfied, for the reason that the service provided by M/s Inos to foreign manufacturers for facilitating the sale of machinery (manufactured by Foreign manufacturers) is carried out in India as evident from the Territory mentioned in the agreement.

132. Therefore, the impugned services, as contended by the assessee as exported and "exempt" services in the ST-3 Returns do not find proper. As per the definition of the Intermediary, effective from 01.10.2014, and as per Rule 9(c) of Place of Provision of Service Rules 2012, the place of provision of intermediary service in respect of supply of services or goods, shall be the location of service provider. As the service relating to 'facilitates the deal for sale of machineries by overseas manufacturers and the Indian companies' fall under the definition of intermediary services, which is defined under Rule 2(f) of Place of Provision of Service Rules 2012, service tax is payable on the said service, Hence, income received as "Income form Commission (Overseas)"by M/s Inos, from the various clients, for the period from October 2014 to June 2017 are to be taxable and service tax on the same is required to be recovered under provisio to Section 73(1) of the Finance Act 1994, along with interest under Sec. 75 and the assessee is also liable for penalty under Section 76 and /or 78 of the Finance Act 1994.

133. Further, I also find that the following statutory provisions are relevant and applicable in the present case:

After 1.7.2012 'Service' has been defined in clause (44) of the new section 65B of the Finance Act 1994 (hereinafter referred to as the "Act") and means -

- any activity
- for consideration
- carried out by a person for another
- And includes a declared service.

The said definition further provides that 'Service' does not include

a. any activity that constitutes only a transfer in title of
   i. goods or
   ii. immovable property by way of sale, gift or in any other manner
   iii. a transfer, delivery or supply of goods which is deemed to be, a sale of goods within the meaning of clause (29A) of article 366 of the Constitution
b. a transaction only in (iv) money or (v) actionable claim
c. a service provided by an employee to an employer in the course of the employment
d. fees payable to a court or a tribunal set up under a law for the time being in force.

134. Section 66B specifies the charge of service tax which is essentially that service tax shall be levied on all services provided or agreed to be provided in a taxable territory, other than services specified in the negative list.

135. The **negative list of services** is contained in section 66D of the Act.

Taxable territory has been defined in section 65B of the Finance Act as the territory to which the Act applies i.e. the whole of territory of India other than the State of Jammu and Kashmir. "India" includes not only the land mass but its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (-of 1976); the sea-bed and the subsoil underlying the territorial waters; the air space above its territory and territorial waters; and the installations structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof.

136. I find that the Service Tax is a destination based consumption tax and the essence of this tax post the introduction of the Place of Provision of Service Rule, 2012, appeared to be that a service should be taxed in the jurisdiction of its consumption. In terms of this principle, exports are not charged to tax, as the consumption is elsewhere, and services are taxed on their importation into the taxable territory. Detailed rules called the **Place of Provision of Services Rules, 2012** have been made which determine the place of provision of service depending on the nature and description of service.

137. The **'Place of Provision of Services Rules, 2012'**, specify the manner to be adopted to determine the taxing jurisdiction for a service. These rules determine the place where a service shall be deemed to be provided, in terms of section 66C of the Finance Act, 2012, read with section 94 (hhh) of Chapter V of the Finance Act, 1994. Under the section 66B, a service is taxable only when, *inter alia,* it is "provided (or agreed to be provided) in the taxable territory". Thus, the taxability of a service will be determined based on the **"place of its provision".** The main rule or the default rule provides that a service shall be deemed to be provided where the receiver is located. The **main rule**- that is Rule 3 of the Place of Provision of Services Rules, 2012- is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules). In other words, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver's location will determine whether the service is leviable to tax in the taxable territory. Rule 14 provides that where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration. This Rule covers situations where the nature of a service, or the business activities of the service provider, may be such that two or more rules may appear equally applicable.

138. The **location of a service provider or receiver** (as the case may be) is to determined by applying the following steps sequentially: **(Rule 2 (h) and 2 (i) of the Place of Provision of Service Rule refers)**

A where the service provider or receiver has obtained only one registration, whether centralized or otherwise, the premises for which such registration has been obtained; the location of his business establishment;

B where the service provided or receiver is not covered by A above:

C.the location of his business establishment; or

D. where services are provided or received at a place other than the business establishment i.e. a fixed establishment elsewhere, the location of such establishment;

E. where services are provided or received at more than one establishment, whether business or fixed, the establishment most directly concerned with the provision or use of the service; and

F. in the absence of such places, the usual place of residence of the service provider or receiver

The PLACE OF PROVISION OF SERVICES RULES, 2012 [Notification No. 28/2012-S.T. dated 20.06.20121 in Rule 2 (f) define an `intermediary' as follows:

2(f) *"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a* ***provision of a service*** *(hereinafter called the `main' service) between two or more persons, but does not include a person who provides the main service on his account;"*

139. Therefore, the services in the nature of 'Intermediary Service' in respect of services rendered in India by intermediary became taxable w.e.f 01.07.2012 in view of the provisions under Rule 9(c) of the POPS Rules as having been rendered in taxable territory. However, as the provisions under Rule 9(c) were not made applicable to the intermediary service in respect of goods even when rendered in India, such services were treated as having been rendered in non-taxable territory in terms of Rule 3 of the POPS Rules as the recipient of service was in non —taxable territory. Subsequently, w.e.f 01.10.2014, the intermediary service even in respect of goods was covered by the provisions under Rule 9 (c) of POPS Rules and thus became taxable as having been rendered in India.

140. **Place of provision of service Rules, 2012, (POP/POSR) Rule 9 is as follows:-**

"9. ***Place of Provision of specifled services***
The place of Provision of following services shall be the location of the service Provider-
(e) service provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(f) Online information and database access or retrieval service;
(g) Intermediary services;
(h) Service consisting of hiring of all means of transport other than-
(iii) aircrafts, and
(iv) vessels except yachts, up to period of one month."

141. Thus, international transactions involving provision of services now revolve around the concept of place of provision of service. The place of provision of a service is determinable in terms of the Place of Provision of Services Rules, 2012 (POPS Rules). Cross-border provision of services may entail the presence of a representative of the party located outside/or in India. Each such case involves provision of two independent supplies, i.e., one from the principal to the ultimate customer and another from the representative to the principal/ ultimate customer. In terms of the POPS Rules- Any broker, agent or any other person, arranging or facilitating a provision of service (**'the main service'**) between two or more persons,

is called as intermediary **provided such person does not provide the main service on his own account.** Provision of a service **'On your own account'**, in the context means that a person undertaken an activity for himself **and not as a representative of any other person.**

143. Clearly, what follows in terms of the POPS Rules- Any broker, agent or any other person, arranging or facilitating a provision of service ('the main serviced between two or more persons, is called as intermediary provided such person does not provide the main service on his own account. Thus, in order not to fall under the ambit of Rule 9(c) of the POP Rules as an intermediary, a person should provide the main service on his own account.

144. As per Rule 2(f) read with Rule 9(c)of the POPS Rules **as defined upto 30.09.2014** an 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a **provision of service** between two or more persons, but does not include a person who provides the main service on his account was taxable as having been rendered in **India. However, with effect from 01.10.2014, the intermediary service in respect of goods became taxable as the same was covered by the provisions under Rule 9(c) of the POPS Rules as rendered in taxable territory. Therefore, the assessee who is rendering intermediary service in respect of goods to overseas manufacturers is liable to pay tax on the consideration received against such service.**

145. **Further, the only logical implication prior to the change of the definition of intermediary on 1.10.2014 is that a person, who facilitates or arranges the supply of goods between two or more persons, did not qualify as an 'intermediary' and consequently, was not covered within the scope of Rule 9(c). However, with the changes brought in with effect from 1.10.2014, even such a person who facilitates or arranges the supply of goods between two or more persons will now qualify as an intermediary.**

146. It appeared that the **'intermediary'** would not only be a person who is a broker or an agent and that the expression in the definition contained in Rule 2 (f) - **'any other person, by whatever name called'** should not be limited in its interpretation to apply to like kind of people who are brokers or agents,

147. The assessee stated that in the SCN, there is a mention of excess payment. I find that in para 29 of the sow cause notice, it has been pointed out about the difference of Rs.95,97,705/- in Trial Balance and ST-3 for the financial Year 2016-17. The difference has been indicated in Table-A to the para 29 of the show cause notice. Other than this, there is no discussion of excess payment of Service Tax in the said para. The SCN stated that "Thus, there appeared to be a net difference of Rs. 95,97,705/- (Rupees Ninety Five Lakh Ninety Seven Thousand Seven Hundred and Five) between the commission income (overseas) reported in the Trial Balance vis-a-vis the "other taxable service - other than 119 listed" reported in the ST-3 Returns filed for the period for 2016-17, in respect of intermediary service provided by M/s Inos to their clients as detailed above.

148. In view of the above statutory provisions, the assessee is liable to pay service tax on the services provided to various overseas clients, for the period from October 2014 to June 2017. Further, in para 29.4 of the SCN, in Table-C, discussed on the short payment of Service Tax to the tune of Rs.1,16,777/- on the differential income of the ST-3 returns and Profit and loss account.

149. I also find that during the recording of the statement of Shri Gaurav Soni, director of M/s Inos Technologies Pvt. Ltd under Section 14 of the central Excise Act,1944 read with Section 83 of the Finance Act, 1944 and the CGST Act, 2017 on 01.02.2018, he has stated that he along with his wife Smt, Shruti Soni are Directors of M/s Inos Technologies Private Limited. He look after all business related work, finance work and taxation matter of our company, that the company was incorporated on 16.10.2010, their company is engaged in the business of arranging purchase and sale of machineries mostly pertaining to Pharmaceutical Sector. They mainly facilitate the sale of Pharmaceuticals Machinery manufactured by foreign suppliers to buyers based in India they are also engaged in after sale service and maintenance of these Pharmaceutical Machineries. He had also provided a list of their foreign based clients and charged commission since the year 2012. He had also explained the activities of the company. He stated that they have entered into contracts with above manufactures of Pharmaceutical machineries based outside India to facilitate tile sale of their machineries In India and help them procure purchase Order from Indian clients. They act as a broker between these foreign manufacturer and earn commission Income from them for facilitating the sale of their machineries to Indian buyers. As per our agreement with the foreign manufacturers, they charge them commission in the range of 2%-15% of the ex-work value of machineries sold. He stated that in case of many foreign principals there is no formal agreement but tile commission percentage is negotiated on e-mail correspondences of many a times the commission percentage the foreign principal offers is disclosed in the quotes sent for sale of machineries. He also provided details of Commission earned by the company from the foreign manufacturers of machineries for facilitating their sale to India buyers from 2012-13 to December'2017.

150. He also admitted to have not paid Service Tax on the commission income received from the manufacturers of machineries based outside India as they have treated it as Export of Service income, however they have taken Service Tax Registration on 07.01.2013 under the category of "Other Taxable Services - Other than the 119 listed" and have filed ST-3 Returns for the same. The Service Tax Registration allocated to us is AACC13445GSD001. He stated that they have filed ST-3 Returns for the October 2012 to March 2013 onwards and have shown Commission income earned from overseas clients under Export of Service category:

151. During the course of further statement of Shri Gaurav Soni, director of M/s Inos Technologies Pvt. Ltd. recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and the CGST Act, 2017on 02.02.2018, he stated that as part of facilitating the sale of Pharmaceuticals Machinery manufactured by foreign suppliers to buyers based in India we first generate inquiries for the machineries which our foreign principals intend to sell to Indian buyers. For this they participate in Exhibitions and make visits to prospective customers for promotion and marketing of machineries manufactured by the foreign manufacturers. If the customer is interested, they provide them with price quotation and if required discuss technical aspects. After this, Purchase Order is raised to the foreign manufacturer of machineries. User Requirement Specification is generated and if required Factory Acceptance Test is done. For Factory Acceptance Test the personnel from Indian buyers visit the factory of foreign manufacturers and their personnel is present to facilitate the process. Thereafter, the machines are sent by the foreign manufacture and are imported by the Indian buyer. The machines purchased by Indian customers from their foreign principals are sent directly in the name of the Indian customer and are imported by the Indian customer. For installtion of machines the personnel from foreign principals visit the factory Of Indian buyer

for installation and their personnel remain present to facilitate the process. If required the installation may be clone by the assessee too but in that case a separate agreement is done by them with the Indian buyer and installation charges are collected from Indian buyers. To a query as to whether M/s.Inos Technologies provide After Sales Service, he stated that M/s Inos Technologies Pvt. Ltd., Ahmedabad provides After Sales Service, they provide after sale service and maintenance to the Indian buyers. For providing After Sales Service they enter into maintenance contract with the Indian buyer after getting consent from the foreign principal. In such cases, they prepare Service Report of each maintenance activity & send the same to the Indian customer as well as the foreign principal from whom the machinery has been purchased by the Indian customer. He has also provided copies of Service Agreement entered with the foreign principals for providing facilitation of sale of pharmaceutical machineries manufactured by them. He also explained the nature of income booked under various heads. He also admitted that, even after advent of GST era from 01.07.2017 they are treating Commission income earned from foreign principals on sale of their Machinery to Indian buyers as export of service. He further stated that now their volume of business has changed from Commission based to trading. Earlier they were primarily earning commission from foreign principals for facilitating the sale of their machineries to Indian buyers and part of trading of goods was miniscule, however, now they mostly buy machineries from the foreign principals, import the same themselves in India and sale the same to Indian buyers. So they have shifted our business volume from commission based model to sale/purchase or trading model. And they are paying IGST on import of the machineries and charging GST on our sale to Indian buyers. He also provided top 10 Indian buyers for whom they have facilitated sale of machineries from foreign principals.

152. From the above discussion, it is obvious that M/s Inos are engaged in the business of arranging purchase and sale of machineries mostly pertaining to Pharmaceutical Sector and facilitates the deal for sale of machineries by overseas manufacturers and the Indian companies. Once the deal is finished, the overseas manufacturer raises the invoice directly in the name of Indian buyers and the Indian buyers imports the machinery in their own name. Only after the Indian buyer makes the payment for said import of machinery to the manufacturer, the overseas manufacturer makes the payment of commission to M/s Inos.

153. M/s Inos had not paid service tax on commission earnings received from the overseas manufacturers as they mis-stated and mis-declared this service as "other taxable services- other than the 119 listed" and had taken exemption by declaring the commission income received from the foreign manufacturers in their ST-3 Returns as "Export of Service" income.

154. It is also clear that the assessee have been claiming such intermediary services as have been provided to various overseas customer[s] as an export of service (the same has been claimed as export of service in the ST-3 returns filed for the period from October 2014 to June 2017) the correct position in law and under the rules would be that M/s Inos Technologies Pvt Ltd. have provided taxable services to various overseas customers which are not export as the services have been rendered in the taxable territory in the capacity of being an intermediary and on which the liability to pay service tax should have been appropriately discharged w.e.f 01.10.2014.Therefore it appeared that the non-declaration of consideration received from various overseas customers for providing intermediary services for the period from 01.10.2014 to 30.06.2017 and the exemption claimed in the ST-3 Returns as export of services under the category of "Export of Services" w. e. f. 01.10.2014 is

in-admissible and the services provided by the assessee squarely falling under the category of "Intermediary Services" are liable for payment of service tax.

155. I find that the assessee have mis-declared/ mis-represented the taxable services provided by them to various overseas customers as an export service, thereby avoiding the payment of appropriate taxes on its provision. The assessee is, thus liable to pay service tax on value of service provided to various overseas customers. The total value of taxable service provided during the period from October 2014 to June 2017 by the assessee is **Rs.6,09,19,142 /.**,The service tax liability @12.36%/ 14%/14.5%/ 15% on total value of service provided during the from October 2014 to June 2017 worked out to **Rs. 87,31,127/-** (inclusive of cess).

156. It is also revealed during the scrutiny of the ST-3 returns and Profit and loss account that M/s Inos have short paid service tax on Income from Commission (Inland), Service Income and Income from installation and Commissioning (Inland). The service tax liability @,12.36%/14%/14.50/-/15% under these three heads during the period from October 2014 to June 2017 works out to Rs.1,16,777/-, thus the total demand of Service Tax comes to Rs.88,47,904/-.

157. In view of the facts discussed above and examination of the activities taken up by the assessee it is clear that the amount of Rs. 6,09,19,142/-, collected by the assessee from overseas manufacturers of machinery (for the Period from October 2014 to June 2017) for Provision of services, are actually towards 'Services' in respect of the goods, provided in India. The assessee has not declared the same to the department in any manner that what they are engaged in providing are intermediary services, but have instead insisted in calling it as export services. The Service Tax liability on the said consideration, as determined in terms of Section 67 of the Finance Act, 1994 read with Rule 9 (c) of POPSR, 2002 and Point of Taxation Rules, 2011, works out to Rs.88,47,904/- which is required to be paid by them in terms of Section 68(1) of the Finance Act, 1994 and read with Rule 6(1) of the Service Tax Rules, 1994. The assessee [is] also liable to pay interest in terms of Section 75 of the Finance Act, 1994 and penalty in terms of Section 76/78 of the Finance Act, 1994 read with section 174 of the CGST Act, 2017.

158. It is also clear that the assessee has contravened the provisions of Rule 6(A) of the Service Tax Rules, 1994 by wrongly claiming the taxable service rendered by them to overseas manufacturers of machinery as export of service even though all the conditions prescribed under Rule 6(A)(d) of the Service Tax Rules, 1994 have not been fulfilled. Even though the taxable services rendered by them are governed by the provisions of Rule 9(c) of the Place of Provision of Service Rules, 2012, the assessee has wrongly claimed that the services rendered by them are governed by Rule 3 of the said Rules. By claiming the taxable service rendered by them as Export of Service the assessee has failed to discharge the service tax liability from 1-10-2014 thereby contravening the provisions of Section 68 of the Finance Act, 1994.

159. I find that in spite of knowing all tile procedures very well and also having undertaken to comply with the provisions of the Financ[e] Act, 1994 read with the Service Tax (Determination of Value) Rules, 2006; Service Tax Rules, 1994; and Point of Taxation Rules, 2011; the Place of Provision of Service Rules 2012; the assessee deliberately suppressed the fact of renderin[g] the services as an Intermediary to overseas manufacturers of the machinery.

160. Further, the scheme of service tax rests on voluntary compliance entrusted with the

responsibility to pay the service tax. As such, the original hypothesis with which one starts out is that the assessee would be complying with the Law in all earnestness and with assiduousness that is warranted of a responsible tax payer. Interference of departmental officers is generally not permitted as a matter of routine, but only as exceptions and that too when there is specific information or reason to believe that the tax liability is not correctly being discharged. The CBEC, from time to time, has come out with instructions regarding visits by departmental officers, scrutiny of tax returns and other related matters that serve to underline and strengthen the voluntary compliance system. The action of disclosure itself is ordinarily limited to the details contained in the periodical return filed once in every six months and the onus to determine facts and issues relevant to the correct ascertainment and discharge of service tax levy remains with the provider of taxable services. If such facts on the basis of which an independent and proper evaluation can be made is kept away from the department due to an act of omission or commission by the party responsible to pay tax, it would constitute a situation where the first proviso to section 73 of the Finance Act, 1994, can reasonably be invoked.

161. The Hon'ble Apex Court in the case of Rajasthan Spinning and Weaving Mills / High Court of Gujarat at Ahmedabad in Tax Appeal No. 338 of 2009 in the case of Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd. dated 22.04.2010 regarding applicability of the extended period in different situations has been highlighted at length in the Show Cause Notice.

162. I find that the assessee had submitted a lengthy reply to the show cause notice, quoting various definitions, notifications and case laws. On going through the said case laws, I find that the said case laws are not applicable as the facts and circumstances are different in the present case. In the present case, there are evidence of short payment of Service Tax based on the nature of Service rendered, place of providing service, records in hand besides the nature of service provided and how commission has been received has been admitted by the Director of the assessee during the course of his statement recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

163. I find that the assessee never disclosed important details about the appropriate value of the declared services provided to the Department. In spite of knowing all the procedures very well and also having undertaken to comply with the provisions of the Finance Act, 1994 read with Service Tax Rules, 1994; and Point of Taxation Rules, 2011, the assessee failed to determine service tax on the taxable service provided to various overseas clients.

164. I find that M/s Inos Technologies Private Limited, have failed to disclose the facts of providing services in the nature of intermediary services like arranging purchase and sale of machinery mostly pertaining to Pharmaceutical sector and facilitates deal for sale of machineries by overseas manufactures and Indian Companies. The nature of services rendered by M/s.Inos Technologies Private Limited to its various overseas clients, appeared to be in the nature of 'intermediary service of goods' which is essential for facilitating rendering of the service related to supply of products/goods of various overseas clients to their customers in India. They have mis-declared the 'Intermediary service' as 'export of Service' w.e.f. 01.10.2014 and prior to this date such Income was suppressed in the ST-3 Returns to evade payment of service tax. The fact of provision of 'intermediary service' by the assessee in the taxable territory to its various overseas clients, would not have come to the notice of the department, had the investigation not been initiated against them as a result of intelligence developed by the officers of Directorate

Gerenal of Central Excise Intelligence (now Directorate General of GST Intelligence). The assessee has suppressed the above facts from the notice of the department with regard to the details/nature of transactions with a clear intention to evade Payment of service tax under the guise of export of service. The assessee has also wilfully contravened the provisions of the Finance Act 1994 & Rules made there under with intent to evade payment of service tax. Therefore, service tax amounting to **Rs. 88,47,904/-** (inclusive of cess) is recoverable from the assessee by invoking the extended period of limitation under proviso to Section 73(1) of Finance Act, 1994, along with applicable interest under Section 75 of Finance Act 1994.

165. I find that the above omissions and commissions on the part of the assessee are with intent to evade payment of service tax. Hence, the extended period in terms of proviso to Section 73(1) of the Finance Act, 1994 is rightly invokable for recovery of the service tax not paid within the stipulated time, along with interest in terms of the provisions of Section 75 of the Finance Act, 1994. Further, by suppressing the facts of provision of taxable output service and receipt of the consideration with intent to evade payment of service tax, the assessee rendered themselves liable to penalty **under the provisions of** Section 76, 77(1)(b) and Section 78 of the Finance Act, 1994.

I find that in the present show cause notice, penalty has been proposed under Section 76 and 78 of the Finance Act, 1994. I find that in the present case, it is appropriate to impose penalty under Section 78 of the Finance Act, 1994 as there is a definite issue of willful mis-statement and suppression of facts. Further, simultaneous penalties under Section 76 and 78 of the Finance Act, 1994 not imposable as per the prevailing guidelines. Therefore, I do not propose penalty under Section 76 of the Finance Act, 1994.

166. In view of the above discussion and my findings, I pass the following orders.

O R D E R

(i) I order that the activity of arranging purchase and sale of machinery and facilitates deal for sale of machineries by overseas manufactures to Indian buyers, undertaken by the assessee be classified as *'Intermediary service* as defined in Rule 2(f) of the Place of provision of Rules, 2012;

(ii) I order that the amount of **Rs.6,17,57,363/- (Six Crore Seventeen Lakh Fifty Seven Thousand Three Hundred Sixty Three)** received as consideration by the assessee towards commission income received from overseas manufacturers and other income heads during the period from October 2014 to June 2017, be held as the consideration received towards provision of *Intermediary* service;

(iii)I confirm Service Tax amounting to **Rs.88,47,904/-(Rupees Eighty Eight Lakhs Forty Seven Thousand Nine Hundred Four)** payable by the assessee on Intermediary services with respect to goods and other services, for the period October 2014 to June 2017 under Section 73(1) of the Finance Act, 1994;

(iv)I order that interest at applicable rates on the amount Service Tax confirmed above at (iii) be recovered from the assessee under Section 75 of the Finance *Act, 1994;*

(v) I impose a penalty of Rs.**88,47,904/-(Rupees Eighty Eight Lakhs Forty Seven**

Thousand Nine Hundred Four) on M/s.Inos Technology, Pvt.Ltd, 452-455, C-Block, Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad 380 058 under Section 78 of the Finance Act, 1994.

(vi)I impose a penalty of Rs.10,000/- (Rupees ten thousand only) on M/s.Inos Technology, Pvt.Ltd, 452-455, C-Block, Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad 380 058, under Section 77 (1)(b) of the Finance Act, 1994.

(vii) I further order that In terms of Section 78 (1) of the Finance Act, 1994 if M/s.Inos Technology Pvt.Ltd,, Ahmedabad, pays the amount of Service Tax as determined at Sl. No. (iii) above and interest payable thereon at (iv) above within thirty days of the date of communication of this order, the amount of penalty liable to be paid by M/s. Inos Technology Pvt.Ltd, Ahmedabad shall be twenty-five per cent of the penalty imposed at Sr.No.(v) above, subject to the condition that such reduced penalty is also paid within the period so specified.

167. The Show Cause Notice F.No. DGGI/AZU/Gr.C/36-15/2021-22 dated 30.05.2020 issued by the Joint Director, Directorate General of Goods & Service Tax Intelligence, Zonal Unit, Ahmedabad to M/s. Inos Technology, Pvt. Ltd, 452-455, C-Block, Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad 380 058 is disposed-of in the above manner.

(Maruti Tripathi)
Joint Commissioner,
CEx & CGST, Ahmedabad North

F.NoSTC/15-14/OA/2020

Dtd 21.06.2021.

By Registered Post A.D

To
M/s. Inos Technology, Pvt.Ltd,
452-455, C-Block, Sobo Centre,
Gala Gymkhana Road,
South Bopal, Ahmedabad 380 058

Copy to :

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. The Joint Director, Directorate General of Goods & Service Tax Intelligence, Zonal Unit, Ahmedabad, 6th & 7th Floor, 1-the Address, Opp: HCG Hospital, Near Sola Flyover, Ahmedabad 380 059.
3. The Deputy Assistant Commissioner, Central GST & Central Excise, Division-6, Ahmedabad North.
4. The Superintendent, Range V, Division VI,
5. Guard File.