आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009

फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/15-21/OA/2019

DIN 20210464WT0000555A93

आदेश की तारीख / Date of Order : 24.04.2021

जारी करने की तारीख / Date of Issue : 27.04.2021

द्वारा पारित/Passed by -

अमरजीत सिंह / AMARJEET SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–003/2021-22

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा

हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।

(The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की, शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show Cause Notice no. DGGI/AZU/Gr.'E'/36-01/2019-2020 dated 04.04.2019 issued to M/s. Dishman Pharmaceutical & Chemicals Ltd. [presently known as DishmanCarbogenAmcis Ltd.], situated at Survey No. 47, Paiki Subplot No. 1, Bavla-Sanand Road VI. Lodariyal, TalukaSanandBavla, Ahmedabad.

BRIEF FACTS OF THE CASE

1. The facts of the case, in brief, are that M/s. Dishman Pharmaceutical & Chemicals Ltd. [*presently known as DishmanCarbogenAmcis Ltd.*], situated at Survey No. 47, Paiki Subplot No. 1, Bavla-Sanand Road VI. Lodariyal, TalukaSanandBavla, Ahmedabad [*hereinafter referred to as M/s DPCL orDACL, for the sake of brevity*] were providing services under the category of Legal Consultancy, Consulting Engineering Service, Manpower recruitment/supply agency service, Rent-a-cab scheme operator Service, Security/detective agency service, Works contract service, Online information and data, Technical Inspection and certification, Maintenance and repair, Transport of goods by road/goods transport agency service and Technical Testing and analysis service as defined under Section 65 of the Finance Act, 1994 for which they were registered with the Service Tax Department and were having Service Tax Registration No. AAACD4164DST001.

2. Intelligence gathered by the officers of the Directorate General of Goods & Service Tax Intelligence (*formerly known as Directorate General of Central Excise Intelligence*), Zonal Unit, Ahmedabad (*hereinafter referred to as DGGI for brevity*) indicated that M/s.Dishman Pharmaceutical and Chemicals Ltd, were providing theTechnical Testing and Analysis service in the taxable territory to their foreign based clients who send or make available goods such as "drug" or "Molecule/API (Active Pharmaceuticals Ingredients)"for the purpose of Testing and Analysis in India. It was noticed that M/s. DPCL was acting as Testing and Analysis agency and they were conducting prescribed tests and analysis on the drugs/molecules received from their foreign clients. Based on the test so conducted, they prepared Dossier/Test Report containing the outcome of the test conducted by them and sent the report to their respective client. The payment made by the foreign client to DPCL, for the above activities, was made in convertible foreign currency. From the ST-3 Returns filed by them it was observed that they were treating the aforesaid activity as Export of Service and accordingly they had not paid the Service Tax payable thereon under the category 'Technical Testing and analysis service" fromthe F.Y.2014-15 to 2017-18.

Investigation

3. Acting on it, the officers initiated an investigation against DPCL under summon proceedings on 02.11.2015 and called for certain records viz. copies of all agreements between DPCL and their foreign clients, Bill of Entries under which

material/goods were imported, records/registers maintained in respect of Technical Testing & Analysis Service, Test/Analysis Report submitted to the foreign clients, Invoices/bills issued to the foreign clients for provision of service, Bank Remittance Advice/Certificate showing the amounts received from foreign clients, Ledger Account of foreign clients to whom service have been exported and month-wise Export of Service Income earned for providing aforesaid services to their overseas clients.

3.1 The Senior Manager (Excise), DPCL, Ahmedabad, vide letter dated 02.11.2015, 19.11.2015, 21.12.2015, 26.06.2018 and 16.01.2019 provided copies of certain works order/agreements/contracts executed between DPCL and their overseas clients, Bank Remittance Advice/Certificate, Service Tax Return, copies of some invoices/bills issued to their overseas clients.

Scrutiny of records provided by M/s. DPCL

3.2.1 On scrutiny of the agreements/work orders/quotations, for example, Work Order dated 17.07.2014 [RUD-R-1] executed between M/s. TESAO Inc. and M/s Dishman USA Inc., it was noticed that Key Starting Material (KSM) were being made available/provided by M/s. TESARO, Inc (on behalf of M/s Dishman USA, Inc) to DPCL at their Bavla Site in India for certification of the analytical development of the Active Pharmaceutical Ingredient (API). Relevant para 4.3 of the said work order reads as "*For key starting materials, intermediates and impurities listed in specification are assumed to be provided by Tesaro.*" Thus, an assumption has been made in the said agreement by DPCL that the material and intermediates shall be provided by M/s TESARO.

3.2.2 On scrutiny of quotation for method validation for impurity ASP195 for CrenolanibBesylate dated 22.06.2015 [RUD-R-2] issued by DPCL to M/s AROG Pharmaceuticals INC, USA, it was revealed that provisions were made for sufficient amount of sample for validation i.e. provision of Active Pharmaceutical Ingredient (API) by M/s AROG Pharmaceuticals for development/familiarization and optimization of the said API or key starting material. Relevant portion of the said quotation reads as "Sufficient amount of the sample for validation will be provided by the Arog." Thus, it is obvious that sample for validation was made available by the client located abroad.

3.3 Scrutiny of Services Frame Agreement dated 13.02.2012 [RUD-R-3] between M/s Dishman Europe Limited and M/s Novartis Pharma AG, and from the Commercial invoice issued by DPCL, it was observed that Raw material was made available by M/s Novartis Pharma AG on behalf of M/s Dishman Europe Limited for the purpose of performing the services. Relevant para 10.6 of the said Services Frame Agreement reads as "*Study Materials shall mean all materials, compounds, molecules and samples provided by or on behalf of Novartis and/ or its Affiliates*"

4. From above it is clear that M/s Dishman Pharmaceutical & Chemicals Ltd, were providing the Technical Testing and analysis service to their foreign based clients who were sending or making available goods such as "drug" or "Molecule/ API" for carrying out the test in India. It was observed that M/s DPCL was acting as Testing & Analysis Agency. They conducted prescribed tests and analysis on the drugs/molecules received from their foreign clients and prepared a Dossier/Test Report containing the outcome of the test conducted by them and finally sent it back to their respective client.

5. <u>Statement of Shri Nilesh Patel, Principal Scientist of M/s Dishman Pharmaceutical&Chemicals Ltd, Ahmedabad</u>

5.1 During the investigation, statement of Shri Nilesh Patel, Principal Scientist of M/s.Dishman Pharmaceutical &Chemicals Ltd, Ahmedabad was recorded under Section 14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 on 02.11.2015. The relevant portion of this statement is reproduced below:

> "*Ques 4:Please describe in detail the various stages of provision of services, being classified under the taxable category of Technical Testing & Analysis Service.*
> *Ans 4:Technical Testing & Analysis Service includes Analytical Testing Service and Research & Development Work which are described in detail as under:*
>
> *Research & Development Work:*
>
> *The provision of Research & Development Work starts with the procurement of Work Order/ Purchase Order.*
>
> *The procurement of Work Order/Purchase Order, given by our foreign Clients, is being managed by our Marketing person and Project Management Team. The Project Management Team is headed by Dr. HimaniDhotre. The said Work Order/Purchase Order is then forwarded to the R&D department headed by me.*
>
> *The activity is then defined based on the Work Order/Purchase Order which includes assigning number of chemist/scientist, assigning specific role to*

each chemist/scientist, procurement of chemicals/raw materials required for testing & analysis, procurement of testing columns.

The Research & Development Work process is to be carried out either on the molecule supplied/ provided by the foreign clients. Otherwise, instead of molecule being directly provided by the client, they may provide the technical information or Route of synthesis of the molecule. Based on the technical information/Route of synthesis, on their behalf we procure the required raw materials and synthesize the molecule by ourselves, in our R&D laboratory. These starting material/raw materials are procured locally or imported. In some cases these starting material/raw material are provided by the foreign client themselves.

When the molecules are provided by the client or the raw materials areprovided by the clients, the arrangement of these molecules/raw materials, fromabroad, is handled by the Project Management Team, who arranges for the transportation/import of these material(s), in coordination with Marketing Person and customer/client.

(ii) Analytical Testing Service:

The provision of Analytical Testing Service also starts with the procurement of Work Order/ Purchase Order.

The procurement of Work Order/Purchase Order, given by our foreign Clients, is being managed by our Marketing person and Project Management Team. The Project Management Team is headed by Dr. HimaniDhotre. The said Work Order/Purchase Order is then forwarded to the R&D department headed by me.

The activity is then defined based on the Work Order/Purchase Order which includes assigning number of chemist/ scientist, assigning specific role to each chemist/ scientist, procurement of chemicals/raw materials required for testing & analysis, procurement of testing columns.

The Analytical Testing Service is to be carried out on the molecule supplied/ provided by the foreign clients. The arrangement of these molecules, from abroad, is handled by the Project Management Team, who arranges for the transportation/import of molecules, in coordination with Marketing Person and customer/client.

These imported molecules, provided by the clients, are directly received in the R&D/ ADL department.

DETAILS OF TESTS PERFORMED BASED ON BOTH R&D WORK ORDER AS WELL AS ANALYTICAL TESTING SERVICE WORK ORDER:

Upon receipt of the molecules, directly from the clients, or those synthesized by us, based upon the technical information/Route of Synthesis provided by the foreign client, we perform various tests and analysis procedures, on these molecules, which can broadly be classified under following five heads:

Validation of testing methods:

It involves test & analysis whether a molecule/ method is giving the same results over & over again.

(ii) Development of testing methods:

It involves the development of methods of testing & analysis on various instruments depending on the customer requirement.

(iii) Verification of testing methods:

It involves verifying the test & analysis methods provided by the clients/ customers

(iv) Stability testing:

It is done on the molecule to test &analyses their stability over the period of time.

(v) Impurity Profiling:

It involves determination of impurities in the molecules.

Based on the above test & analysis conducted on the molecules, we prepare Report based on the requirement of Work Order. I further state that a Work Order may contain conducting of one or more or all of the above procedures, based upon the requirement of the client.

I further state that based on the Work Order, the foreign client, may monitor the progress report on weekly or fortnightly basis through teleconferencing. Further, after completion of the entire test & analysis work, a complete report is sent to the foreign client electronically.

Ques 5: Are you authorized to perform such technical testing & analysis services at your above mentioned plant? If yes please provide the copy of permission/ approval taken from Central Drug Controller Authority.

Ans 5: I state that for performing technical testing & analysis services we don't require permission/approval of India Drug Controlling Authority, however, we are approved/certified by USFDA, European Union etc. for performing test and analysis.

Ques 6:Please state what internal records you are maintaining in relation to the
provision of the service of Technical Testing & Analysis.
Ans 6:I state that we maintain the following records:

(i) Laboratory Notebooks containing the development activity of both R&D
& Analytical service;

(ii) Instrument Logs which contains the records of analysis performed on various testing instruments;

(iii) Development Reports contains weekly/biweekly reports, wherever applicable.

Ques 7: The molecules supplied by the foreign client is directly receivedat the R&D department. Please state the record maintained in respect of receipt of such molecules.

Ans 7: I state that the records regarding receipt of molecules from foreign clients are maintained with R&D Stores department. All the documents relating to such molecules viz. Bill of Entry, Packing List, Safety Data Sheet etc. are also maintained by R&D Stores department.

Ques 8: Please provide copies of the records maintained in relation to theprovision of Technical Testing & Analysis service from April'2011 to till date.

Ans 8: As the said documents are maintained at our corporate office atAhmedabad, the copies of Work order and/or Purchase Order along with the activities/ services carried by us there against will be provided tomorrow.

Ques 9: Before performing test & analysis under a particular contract, do youneed to take permission/license of Drug Licensing Authority for importing small quantities of drugs/molecules on which the said tests/analysis are to be performed. If yes, please provide details of such application along with copies of the same.

Ans 9: I state that none of the drugs/ molecules which are beingprovided by our foreign client are prohibited under Drugs and Cosmetics Act & Rules, 1945 and therefore we don't need permission/license of Drug Licensing Authority for importing small quantities of these drugs/molecules on which the said tests/ analysis are to be performed.

Ques 10: Please state what are the records mandated by the Central DrugControl Organization (Test Licence Division) to be maintained in lieu of the Test Licenses issued by them.

Ans 10:I state that there are no specific records mandated by the Central DrugControl Organization (Test License Division) which are required to be maintained, however we maintain internal documents as enlisted above.

Ques 11: Please provide the list of foreign clients to whom Services of "Technical Testing & Analysis" have been provided by you.
Ans 11: The following are the foreign clients for which the Laboratoriesheaded by me are working:

(i) M/s Johnson & Johnson;
(ii) M/s Clovis;
(iii) M/s Novartis;
(iv) M/s Abbott.

Que 12: Please state how the test reports for the technical testing & analysisare provided to the foreign clients.

Ans 12: As mentioned earlier, based on the Work Order, the foreign client, may monitor the progress report on weekly or fortnightly basis through teleconferencing. Further, after completion of the entire test & analysis work, a complete report is sent to the foreign client electronically. In the case of M/s Novartis the Final Report is shared by us in their sharing folder and in case of other overseas clients, the Final Report is sent through Email. It is to mention that the Final Report once shared or and sent by Email cannot be edited by anyone including us.

5.2 From the statement dated 02.11.2015 of Shri Nilesh Patel, Principal Scientist of M/ s Dishman Pharmaceutical & Chemicals Ltd, Ahmedabad it was

revealed that goods i.e. API or molecule was sent/made available by their foreign clients. They conducted various prescribed tests and analysis on the drugs/ molecules received from their foreign clients and prepared a Dossier/Test Report containing the outcome of the test conducted by them and sent it to their respective client. It was also observed that although in reply to Q.No.4 as above, Shri Patel submitted that in some cases, instead of molecules directly being provided by the client, the clients provide technical information of the molecule and they conduct testing by procuring raw materials and synthesizing molecule in the lab, he failed to substantiate his contention with any documentary evidence.

6. **Legal Provisions**

6.1 With the advent of negative list regime the definition of "Service" has been prescribed with effect from 01.07.2012. As per section 65B (44) of the Finance Act, 1994, "Service" has been defined as under:-

> *"Service" means any activity carried out by a person for another for consideration, and includes a declared service.*

6.2 As per Rule 3 of Place of Provision Rules, 2012 generally, the place of provision of a service shall be the location of the recipient of service. However, Rule 4 (a) of Place of Provision Rules, 2012 prescribes that the place of provision of a service in respect of services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service in order to provide the service shall be the location where the services are actually performed.

7 With effect from 01.07.2012 amendment have been made in Service Tax Rules, 1994 with the insertion of Rule 6A regarding "Export of Services". As per this Rules 6A the provision of any taxable shall be treated as export of service when the following conditions are satisfied, namely:-

(a) Such service is provided from India and used outside India; and

(b) Payment for such service is received by the service provider in convertible foreign exchange.

(c) the service is not a service specified in the 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 in 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.

Investigation revealed that the provision of such services provided by M/s DPCL does not satisfy the condition number (d) of Rule 6A of Service Tax Rule, 2012 and thus does not qualify to be treated as export of service.

7.1 From 01.07.2012, the service provided by M/s DPCL is "Technical Testing and Analysis" as defined under the activity carried out by assessee appears to fall under the purview of "Service" as defined under Section 65B(44) and made taxable under Section 66B read with Section 66D of the Finance Act, 1994, as the same is neither covered by negative list nor by any exemption notification. Further,as the service provided is Performance Based Service and actually performed in India and the same appears to come under the purview of Rule 4(a) of Place of Provision Rules, 2012 w.e.f 01.07.2012 which is relevant to establish taxability under service tax.

8. In this regard, Para 5.4 of the Education Guide in respect of Rule 4 of Place of Provision of Service Rule, 2012 clarifies that Technical Testing/Inspection/ Certification/Analysis of goods is a performance Based Service. Hence, the service provided by M/s. DPCL is a performance based service. Para 5.4 of the Education Guide, which clarifies that the service provided by the M/s DPCL comes under the purview of 'Performance based Service' is reproduced as follows: -

"5.4.Rule 4-Perfomance based Services
Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning or any other work on goods (Not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/ inspection/ certification/ analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g where a consultancy report commissioned by a person is given belonging to the customer. Similarly, provision of a market research service to manufacturing firm for a consumer product (say, a new detergent) will not fall in this

category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacture, to carry for door-to-door surveys."

9. The essential characteristic of a service to be covered under this rule i.e. Rule 4(a) of Place of Provision of Services Rule, 2012 is that the goods temporarily come into the physical possession or control of the service provider, and withoutthis happening, the service cannot be rendered. Thus, in the instant case the goods, i.e. API/Molecule temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus,the service involves movable objects things that can be touched, felt or possessed. Therefore, it is crystal clear that testing of drugs cannot be done absence of physical or control of the service provider.

10. Rule 4 of the Place of Provision of Service Rules, 2012 is reproduced as under: -

"4. PLACE OF PROVISION FO PERFORMANCE BASED SERVICES- The place of provision of following services shall be the location where the services are actually performed, namely:-

(a) Services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service in order to provide the service:

Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be location where goods are situated at the time of provision of service:

Provided further that this sub-rule shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs, reconditioning orreengineering for re-export, subject to condition as may be specified in this regard.

(b) service provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for provision of the service."

11. Thus, as per the Rule 4(a) ibid the place of provision is the place where the service are actually performed, and in the instant case the services are actually performed in India. Therefore, M/s.Dishman Pharmaceutical & Chemical Ltd are required to pay the service tax after introduction of Place of Provision of Service Rules, 2012 w.e.f. 01.07.2012. Thus, in terms of the Rule 4(a) of the said rule, in the instant case the place of provision of service is India. Further, since M/ s DPCL has not fulfilled the condition laid down in Rule 6A(d) of Service Tax Rule, 2012, the

provision of service provided in this instant case shall not be treated as Export of Service. Accordingly, the service tax is required to be paid by the M/s DPCL which had not been actually paid by them. Therefore, service tax is required to be charged from M/s DPCL in terms of Section 66B of the Finance Act, 1994.

12. In this regard, M/s Dishman Pharmaceutical & Chemical Ltd vide their letter dated 16.01.2016 has submitted that all the conditions of Export of Service rules, 1994 have been fulfilled by them with respect of the exports of services declared in ST-3 returns. Further, they have submitted that the serviced provided by them is squarely covered in under Place of Provision Rules 3 and covered in any other rules of POPS Rules.

12.1 They have also put their reliance upon the various judgments wherein the matter has been decided in favor of M/s DPCLs. The list of judgment submitted by the M/s DPCL is as under:-

(i) Verdict of Hon'ble Supreme Court in case of All India Federation of Tax PR actioners V. Union of India [2007(7) S.T.R.625);

(ii) Commissioner v. SGS India Pvt Ltd [2014 (34) ST.R 554 (Bom.)]

(iii) Mumbai Tribunal Judgment in case of Commissioner v. Sai Life Sciences Ltd. [2016 (42) S.T.R. 882 (Tri.-Mumbai)

(iv) Mumbai Tribunal Judgment in case of Commissioner vs. M/s Advinus Therapeutics Ltd [2017 (51) S.T.R. 298 (Tri-Mumbai)]

12.2 Ongoing through the first two judgments submitted by M/s DPCL it is observed that there is no reference to Place of provisions of Service Rules 2012 since the period involved in the both judgment relates to the period before 2012. Therefore, the said rationale cannot be applicable after enactment of Place of provision of Service Tax Rules 2012.

12.3 With regard to the Mumbai Tribunal Judgment in case of Commissioner Vs. Sai Life Sciences Ltd. [2016 (42) S.T.R. 882 (Tri.-Mumbai)] it is noticed that the tribunal has decided the issue in favour of the assesse relying on earlier decision of Hon'ble Bombay High Court in of Commissioner of Service Tax, Mumbai-II vs. SCG India Ltd and as discussed in the Para 12.2 there is no reference to Place of provisions of Service Rules 2012 since the period involved in the said judgment relates to the period before 2012.

12.4 In case of Commissioner vs. M/s Advinus Therapeutics Ltd [2017 (51) S.T.R. 298 (Tri-Mumbai)], it was noticed that the tribunal has decided the issuein favour of the assesse relying on its earlier Judgment in case of Commissioner v. Sai Life Sciences Ltd. [2016 (42) S.T.R. 882 (Tri.-Mumbai)].

13. Further, it is pertinent to mention that in case of Advinus Therapeutics Ltd passed by Mumbai Tribunal was not accepted by the department and an appeal was preferred against the said judgment before the Hon'ble High Court Mumbaiwhich is separately pending for disposal. Since, the issue has still not attainedfinality and pending before Hon'ble High Court Mumbai, the citation referred to by M/s DPCL cannot be treated as stating the settled law on the subject.

14. On the contrary, in the Advance Ruling in case of M/s Steps Therapeutics Limited, Hyderabad (Ruling No. AAR/44/ST-1/27/2016, dated 12.07.2016) it is held that service provided in respect of goods that are required to be made physically available by the service receiver to the service provider is taxable under the Act in light of Rule 4 of the Place of Provision of Services (POP) Rules, 2012.The relevant extract of the said advance ruling is as under:-

> *"The proposed activities of undertaking Clinical Pharmacology by the applicant are taxable under the Act in light of Rule 4 of the Place of Provision of Services (POP) Rules, 2012, as the services are proposed to be provided in respect of goods that are required to be made physically available by the service receiver to the service provider (applicant). Further, Clinical Research service provided in respect of goods that are required to be made physically available by the service receiver to the service provider (applicant) are also taxable under the Act in light of Rule 4 of the Place of Provision of Services (POP) Rules, 2012".*

Outcome the Investigation.

15. With effect from 01/07/2012, the activity carried out by M/s DPCL falls under the purview of definition of" Service" in terms of Section 65B (44) and made taxable under Section 66B read with Section 66D of Finance Act, 1994, as the same is neither covered by negative list nor by nay exemption notification. Further, as the service provided is Performance Based Service and actually performed inIndia the same is come under Rule 4 (a) of Place of Provision of Service Rules, 2012 w.e.f. 01.07.2012.

16. Further, the service provided to the foreign clients by performing technical testing and analysis service on API/Molecule provided/made available by their foreign clients in India, cannot be considered as 'export services' as the condition

prescribed under Rule 6A(d) of Service Tax Rule, 2012 regarding export of services has not been fulfilled in view of provisions under Rule 4 (a) of Place of Provision of Service Rules, 2012. Further, no exemption for payment of service tax is available on the said services provided by the M/s DPCL in this case as discussed above, the said services have been actually performed in India only and are hence taxable.

17. Since M/s DPCL carried out 'Service' regarding technical testing and Analysis for the purpose chemical testing of drugs and formulations in India and at the time of provision of the service, location of goods i.e. molecules/ API were not situated outside India but actually the services i.e technical testing and analysis were performed on the goods i.e. molecules/API in India and therefore the service cannot be considered as an export of Service in terms of Rule 6A of Service Tax Rules read with Rule 4 (a) of Place of Provision of Service Rules, 2012.

18. Therefore, the service provider is liable to pay service tax on such services which are actually performed in India even though the result/ reports thereof were sent outside India and were used outside India. It is clear that the entire "Service" is performed in India. They are only sending clinical reports/ dossier after provision of services from Indian taxable territory, by courier outside India.

Quantification of Demand:

19. Scrutiny of ST-3 returns filed by M/s DPCL reveals that they have shown total value of Export of Service under Technical Testing and Analysis services Rs. 1,66,63,33,922/-. Since M/s DPCL had neither provided desired information required by this office under Summons dated 09.02.2016, 22.03.2018, 13.04.2018, 29.05.2018, 2.11.2018 nor appeared to record statement on 26.12.2018 and 20.03.2019 so as to quantify the exact figure of such services where they had performed technical testing and analysis services on molecules/API provided by foreign service receivers, total amount of value of export of service under Technical Testing and Analysis service shown as Export of Service has been taken forquantification of demand. They also failed to provide any documentary evidence to establish that in certain cases they have provided the impugned service by procuring raw material and synthesizing the molecule in their lab, instead of receiving it from foreign based client, as claimed by Shri Nilesh Patel, Pr. Scientist of DPCL in his statement dated 2.11.2015. Hence, on the basis of such value of Rs. 1,66,63,33,922/- shown in ST-3 returns, Annexure-A showing their service tax liability amounting to Rs. 22,98,31,114 /- (inclusive of Educess& H. E cess) during the period from 01.10.2013 to 30.06.2017 was prepared

and the same was appeared to be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994.

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

Repeal and Saving Section 174

"(l)----
(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 sub-section (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 thereunder; 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), assessment 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 andother legal proceedings or recovery of arrears 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."

Justification for invoking extended period of limitation and mandatory penalty:

21. It is pertinent to mention here that the system of self-assessment is in vogue in respect of Service Tax. In the scheme of self-assessment, the department comes to know about the service rendered and payment made only during the scrutiny of the statutory returns filed by the service providers. Therefore, it places greater onus on M/s DPCL to comply with higher standards of disclosure of information in the statutory returns. It is seen from the facts of the emerged during the investigation of the instant case that M/s DPCL had failed to disclose the above details in their ST-3 Returns during the aforesaid period. Thus, M/s DPCL have suppressed the material facts from the Department by not disclosing actual place of provision of services in their ST-3 Returns. This appears to be done intentionally so as not to bring their activities to the notice of the Department, though they were registered for providing various taxable services, as discussed earlier. Various Courts including the Apex Court have clearly laid down the principle that tax liability is a civil obligation and therefore, the intent to evade payment of tax cannot be established by peering into the minds of the tax payer, but has to be established through evaluation of tax behaviour. The responsibility of the tax payer to voluntarily make information disclosures is much greater in a system of self-assessment. In case evaluation of tax behaviour of M/s DPCL shows intent to evade payment of service tax by an act of omission in as much as that M/ s DPCL though being well aware of the unambiguous provisions of the erstwhile Finance Act, 1994 and Rules made there under, failed to disclose to the department at any point of time, regarding the actual provision of such serviced provided by them, during the period from October, 2013 and June 2017. M/s DPCL had deliberately shown their actual provision of service under export of service in their ST-3 Returns with intent to evade the proper payment of service tax on its due date, but for the investigation proceedings conducted by DGGI (formerly known as DGCEI), Zonal Unit, Ahmedabad, these facts would have not come to light.

21.1 It may be mentioned here that M/s DPCL had failed to declare the actual provision of service provided by them during the relevant period in the ST-3 Returns filed by them during the aforesaid period. In view of the specific omissions and commissions as elaborated earlier, it is apparent, that M/ s DPCL had deliberately suppressed the facts of actual place of provision of services provided by them in the ST-3 Returns during the said period. Consequently, this amounts to mis-declaration and wilful suppression of facts with the deliberate intent to evade payment of Service Tax. The non-payment of Service Tax on the amounts so collected by M/ s DPCL which appears to be the consideration for providing the taxable services came to the knowledge of the DGGI only due to specific investigations carried out as spelt out

earlier. Therefore, the extended period of limitation as envisaged under proviso to Section 73(1) of the erstwhile Finance Act, 1994 appears to be invokable to demand Service Tax for the period from October, 2013 to June 2017 and mandatory penalty prescribed under Section 78 of Finance Act, 1994 is liable to be imposed.

21.2 In this regard, it may not be out of place to highlight here 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 thereunder 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 nonlevy, 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 one year by 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 the 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 or 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 thereunder 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 1 lA, 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 thereunder, 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 therefrom.

20. Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of section 1 lA, 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 well as in the decisions on which reliance has been placed by the learned advocate for the respondent, 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 1 lA 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, non-payment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful mis-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, viz. 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."

22. From the evidence, it appears that the M/s. DPCL had not disclosed the technical testing and analysis as taxable services and thereby they have kept themselves away from their tax liability. They filed periodic ST-3 Returns until investigation was initiated but they misdeclared their taxable service as export of service and they did not pay Service Tax thereon. This fact of non- payment of Service tax came to notice of the department only at the time of investigation. Had the investigation not been undertaken by the department, the taxable service would have escaped assessment resulting in evasion of Service tax, which is nothing butbreach of faith placed on M/ s. DPCL and appear to be an act of suppression of facts with an intention to evade payment of Service tax.

23. Section 68 of the Finance Act, 1994, provides that every person providing taxable service shall pay service tax at the rate specified in Section 66/66B in such manner and within such period as may be prescribed. Rule 6 of the Service Tax rules, 1994 stipulated that service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month, in which the payment are received towards the value of taxable services.

24. M/s DPCL has failed to pay service tax for the period 01.10.2013 to 30.06.2017 in respect of service provided by way of technical testing and analysis service on goods i.e API/Molecule provided by their foreign clients, as per the

provision of section 67, on the rate prescribed in section 66B of the Act, and accordingly contravened the said provisions of Section 68 ibid and Rule 6 of the Service Tax Rule, 1994.

25. Section 70 of the Finance Act, 1994, provides that every person liable to pay the service tax shall himself assessee the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise/Service Tax, a return in such form and in such manner and at such frequency as may be prescribed. Rule 7 of the Service Tax Rules, 1994, prescribes that every Service Provider shall submit a half-yearly return in form ST-3, as the case may be, alongwith a copy of the form GAR-7 challan, in triplicate for the months covered in the half-yearly return. Further sub-rule(2) thereto also states that every Service provider shall submit the half yearly return by 25th of the month following the particular half-year.

26 The M/s DPCL has also failed to assess correctly the tax due on services provided by them as they have not assessed the tax on the correct value of 'consideration' in money charged and received in terms of the provision of section 67 of the Act as discussed in the foregoing paras, and thus have contravened the provision referred in the above para.

27. From the above, it appeared that M/s DPCL has failed to pay the service tax Rs. 22,98,31,114/- which is required to be demanded and recovered from them under Section 73(1) of the Finance Act, 1994, in as much as the M/s DPCL has contravened the following provisions.

28 (a) Section 68 of the Finance Act, 1994, read with Rule 6 of the Service Tax Rules, 1994, in-as-much as they have failed to make the payment of service tax as detailed in Annexure-A to this notice to the credit of the Central Government;

(b) Section 70 of the Finance Act, 1994, read with Rule 7 of the Service Tax Rule, 1994 in as much as they have not correctly assessed the tax payable by them and not declared the correct value of taxable service in their periodical ST-3 Returns.

29. Further, as per Section ibid, 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. As M/s DPCL has not yet paid the service tax of Rs. 22,98,31,114/- they appear liable to pay interest on the same amount of service tax in terms of Section 75 of the Finance Act, 1994 and appeared to be liable to penalty under Section 77 (2) and Section 76 and/ or Section 78 of the Act.

30. Therefore, it appeared that M/S. DPCL have willfully suppressed the above facts with intent to evade payment of Service Tax and the extended period of limitation of five years as envisaged under Section 73 of Finance Act, 1994 (as it existed up to 30/06/2017) read with Section 174 of Central Goods And Services Act, 2017, for the demand and recovery of service tax amounting to Rs. 22,98,31,114/- as detailed in Annexure-A of this SCN appears to be invokable in this case.

31. Therefore, the Additional Director General, DGGI, Ahmedabad issued a Show Cause Notice No. DGGI/AZU/Gr.E/36-01/2019-20 dated 04.04.2019 to M/s Dishman Pharmaceutical & Chemicals Ltd, Survey No. 47, Paiki Subplot No. 1, Bavla-Sanand Road VI. Lodariyal, TA. SanandBavla, Ahmedabad calling upon them to show cause to the Principal Commissioner/Commissioner of CGST, Ahmedabad-North, Ahmedabad having office at 1· floor, Customs House, Opp. Old High Ct Rd, Shreyas Colony, Navrangpura, Ahmedabad, Gujarat 380014, as to why:

(a) The amount shown as received against export of Services total amounting to Rs. 1,66,63,33,922/- charged and received by them from their clients should not be considered as the taxable value/gross amount charged and received by the 'service provider for "Taxable Service" in terms of Section 66B of the Finance Act, 1994 read with Rule 4 (a) of Place of Provision of Services Rule, 2012 in India;

(b) Service tax totally amounting to Rs. 22,98,31,114/- (inclusive of Cess) as detailed in Annexure-A attached to Show Cause Notice, on the value of taxable services amounting to Rs. 1,66,63,33,922/- for the period 0 1.10.2013 to 30.06.2017 should not be demanded and recovered from them under Proviso to Section 73(1) of the Finance Act, 1994 read with the Section 66B and the Section 68 of the erstwhile Finance Act, 1994 (as it existed up to 30/06/2017) read with Rule 6 of the STR, 1994, read with Section 174 of Central Goods And Service Tax Act, 2017;

(c) Interest as applicable on the amount of Service Tax liability of Rs. 22,98,31,114/- (inclusive of Cess) should not be recovered from them for notmaking payment in time, under Section 75 of the Finance Act, 1994.

(d) Penalty under Section 76 of the Finance Act, 1994 as amended should not be imposed on them in as much as they failed to pay service tax within the stipulated time frame.

(e) Penalty should not be imposed on them under the provisions of Section 77(1)(b) of the Finance Act, 1994 as amended, for failing to keep, maintain or retain books of account and other documents as required in accordance with the provisions of Chapter V of the Finance Act, 1994.

(f) Penalty should not be imposed upon them under the provisions of Section 78 of the erstwhile Finance Act, for willful mis-statement, suppressing the facts and contravention of statutory provisions with intent to evade payment of Service Tax demanded hereinabove.

DEFENCE REPLY

32. The said assessee, vide their letter dated 02.05.2019, filed their defence reply *inter alia*, stating that the general operations carried out by them are that M/s. DPCL enters into agreements with various foreign clients for providing Research &Development (R&D) Services which basically contains preparation of sample molecules to be used as Active Pharmaceutical Ingredients (API); that the said molecules/API is completely developed by DPCL by following the detailed development procedure/Route of synthesis usually shared by the client, in its local facility at Gujarat; that all the materials required for testing from start to end is procured by DPCL themselves except in few cases where the Key Starting Material (KSM) is provided by client; that it is imperative to note that the KSM, if any, provided by the foreign client, gets completely consumed in the process of development of molecule; that the process of development of molecule is performed on a piece meal basis and at the completion of each stage, detailed test report containing various facts and information is shared with the client; that on the basis of this report, invoices are raised by DPCL on clients; and that based on the agreed terms, DPCL before proceeding towards the next stage takes approval/feedback from the client based on which future course of action is decided which varies from contract to contract as agreed. They further state that at the end of the development

process, the sample molecules so developed by DPCL is sorted and released as per pre-determined requirements of the clients and is sent, on request, through courier along with the final report; that any payment being made by the clients is not for procuring the sample but for using the facilities of DPCL for research and development of the sample and all activities undertaken by DPCL are geared to develop the product into a workable molecule; that the client on receipt of the sample molecule (API) may choose to perform various quality, validation and clinical tests on the sample molecule and consequently, depending on the validation parameters, can either accept, reject or ask DPCL to carry on certain modifications on the molecules; that however, in all cases, the risk and rewards in respect of the services and sample completely belongs to the respective clients and they are obliged to pay any dues accrued to DPCL during the R&D phase. They also submitted that various services with respect to research & development activities in relation to molecules and development/production of molecules carried down by DPCL were already explained by them in detail vide their letter dated 16.01.2019 submitted before the Deputy Director, DGGI; that their services, inter-alia includes, route-scouting, development of molecule, analytical testing services, etc; and that it was also explained that most of the services do not require any performance activity on any materials and are in the nature of pure services. They also enclosed a copy of the said letter dated 16.01.2019, along with its relevant agreements, copies of invoices, copies of POs and work orders,etc.

33. They denied the charges levelled in the SCN and stated that the same was issued without proper and just appreciation of the facts as well as of the law, without application of mind, with mere conjectures and surmises. The stated that the place of provision of the testing services provided byDPCL is outside India, being the location of the service recipient and the place where the services are ultimately consumed and accordingly it is an export of service; that the services provided by DPCL to its clients located abroad against consideration received in foreign convertible currency is export of service and not liable to service tax; that as per the Export of Service rules, any taxable service shall be treated as export of service "if such service is provided from India and used outside India"; that Hon'ble Delhi Tribunal in the case of MicrosoftCorpn (I) (P) Ltd. v. CCE, New Delhi[2009(15) S.T.R 680] has taken the assistance of the Customs Act 1962 to define export to mean "taking out of India to place outside India"; and that in the case of TNT India Pvt. Ltd. v Comm. Of Service Tax, Bangalore [2007(7) S.T.R 207], it has been held that "once the goods are taken outside the country export would be deemed to have taken place". They state that tax on services, like tax on sale of goods is a destination based tax on consumption and

thus taxable service provided by a service provider in a particular taxable area would attract service tax only when the service has been consumed in that taxable area and if the consumption of service is outside the taxable area, the service tax would not be attracted and it would be treated as an export of service; that it is not the place of performance but the place of consumption which is relevant and export would take place when the service is provided in India by some person but is received and consumed abroad; and that this principle has also been recognized by the Hon'ble Supreme Court in the case of All India Federation of Tax Practitioners v. Union of India[2007 (7) S.T.R. 625 and Association of Leasing & Financial Service Companies (supra) [2010 (20) S.T.R 417] wherein it was held that service tax is a value added tax which in turn is a destination based tax on consumption in the sense that it is levied oncommercial activities and it is not a charge on business but on the consumer.

34. DPCL further stated that the Export of Services Rules, 2005 and Taxation of Services (Provided from outside India as received in India) Rules, 2006, are basically the rules for determining the place of consumption of services; that these rules were replaced in the Budget of 2012-13 by POPS, the Rule 3 of which states that the place of provision of a service shall be the location of the service recipient, (who is the service consumer), and hence there is nothing in the Export of Services Rules, 2005 or POPS rules which can be said to be contrary to the constitutional provisions of the Apex Court's judgment in the case of All India Federation of Tax Practitioner's Association; that in the case of Association of Leasing & Financial Service Companies (supra), Supreme Court held that Service Tax is a tax on consumption and is a charge on the consumer of service; that although the POPS Rules were introduced in 2012, the above maxim and legal position held by Supreme Court is maintained as a general rule and is included in Rule 3 of the said Rules; that in their case, the fruits of the services are consumed abroad when one receives the report sent from India by DPCL; that theirs is not a performance based service, as the working upon the KSM or other inputs in India does not result in provision of any service to the customer till the reports are generated and received by the customer and the satisfaction of the client occurs upon an outcome which is possessed by the recipient i.e. the report of the tests conducted by them, and hence, even if some of the activities are carried out in India, if the report and samples are not submitted, then by no stretch of imagination it can be asserted that the service has been fulfilled.

35. DPCL placed reliance on the following decisions to support their arguments:

(i) Commissioner Vs. SGS India Pvt. Ltd. [2014 (34) S.T.R. 554 (Born.)] wherein the clients of the respondents used the services of the respondent in inspection/ test analysis of the goods which the clients located abroad intended to import from India. In other words, the clients abroad were desirous of confirming the fact as to whether the goods imported complied with requisite specifications and standards. Thus, client of the respondent located abroad engaged the services of the respondent for inspection and testing the goods. The goods were tested by the respondents in India. The goods were made available or their samples were drawn for such testing and analysis in India. However, the report of such tests and analysis was sent abroad. The clients of the respondent were located abroad and paid them for such services rendered in foreign convertible currency. It is in that sense, it was held that the benefit of the services accrued to the foreign clients outside India and thus it was a case of export of service.

(ii) Similar decision was upheld in the case of CST Ahmedabad vs. B.A.Research India Ltd [2010 (18) S.T.R 439] wherein it has been said that the performance of testing and analysing has no value unless and until it is delivered to its client and the service is to be completed when such report is delivered to its client. Thus, delivery of report to its client is an essential part of the service.

(iii) Paul Merchants Ltd. Vs Commissioner of C. Ex., Chandigarh (2013 (29) S.T.R. 257 (Tri. - Del.) wherein it has been held at Para 76 (v) that: "*Thus, when the person on whose instructions the services in questionhad been provided by the agents/sub-agents in India, who is liable to make payment for these services and who used the service for his business is located abroad, the destination of the services, in question, has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of service.*"

36. DPCL further stated the services are provided to clients located abroad against consideration received in foreign convertible currency and hence it may be correctly deduced that place of provision of the services provided by them is outside India; that Rule 4 of the POPS Rules is not applicable in the case of DPCL as the so called "goods" sent by client/customer, if any, is merely KSM which are simply thestarting material, got consumed in the process and does not represent goods "on which the service is performed"; that the molecules are synthesized by DPCL themselves based on technical information/route of synthesis provided by foreign clients and the technical process and procedure adopted by DPCL in India; that during the process of the synthesis, no goods were actually being supplied directly by the clients except in some cases, the key start up material, which gets ultimately

consumed in the development process; that the consumption of the KSM in India does not itself represent the provision of service for which DPCL has been engaged, and hence, this kind of activity is strictly not a performance based service as contemplated in Rule 4 of POPS Rules; and that further, it is imperative to note the following essential conditions provided in Rule 4(a) of the POPS Rules: (a) that the goods are required to be made physically available by the recipient of service to the provider of service; and (b) that service is to be provided in respect of the goods. They argued that the services of testing is provided on molecules synthesized by DPCL, and it does not come under the purview of Rule 4 as in the instant case the objective is to provide the services for the development and synthesis of a chemical compound which is distinct and different from the KSM or any other goods used in the process; that the main result and fruits of the activities is the test report which is prepared at different stages of the process, and hence, the services are not provided in respect of the goods received from the client, if any, and therefore, this activity is not covered under the provision of Rule 4 but is covered under Rule 3 of POPS Rules.

37. They also submitted that the application of Rule 4 has been aptly explained in the Service Tax Education Guide issued by CBEC, where it has been interalia clarified that "*it will not cover services where the supply of goods by the receiver is notmaterial to the rendering of the service*". It is relevant to note that in the case of DPCL, the starting materials supplied by the clients get altered/consumed in the process of developing the molecule and usually gets fully consumed in the process. The said molecule so generated has entirely different characteristics from the starting material provided by client. Any testing service provided by DPCL is on the unfinished molecule and not on the starting material supplied. Further, the fact that the activity of repairs and reconditioning has been kept outside the purview of Rule 4 shows that legislature never intended to tax those activities which result in altering the form of the goods supplied by the recipient. This goes on to show that the objective of the said rule is to bring in the tax net in India, those activities which are performed in India and the fruits of the service are consumed in India e.g. storage/handling/transportation of goods sent by the foreign customer. They, therefore, claimed that the services provided by DPCL is not in respect the goods supplied by the recipient of service. Further, it is pertinent to note that only in few cases, the KSM is provided by client. The entire molecule is being developed by DPCL using materials procured locally or imported by themselves, and hence, Rule 4 is not applicable for them. They also placed reliance in the case of Commissioner Vs. Sai Life Science Ltd. [2016 (42) S.T.R. 882 (Tri. - Mumbai)], which was pronounced by keeping Rule 4 of the POPS Rules in mind. In the said case, the respondent offered

research and development expertise in new compounds of pharmaceutical products. The respondentswere synthesizing a new compound using various chemicals, solvents, reagents compounds which cannot be termed as service provided in respect of the said chemicals, solvents, compounds. The Hon'ble Tribunal ruled in favour of the respondents and held that the services fell outside the purview of Rule 4 of POPS Rules citing the principles laid out in M/s SGS India Ltd.'s case (cited supra). They submitted that the activity carried out by DPCL is exactly similar to that of the respondents in the above case wherein DPCL is synthesizing a new molecule/compound using the KSM supplied by clients as well as from chemicals procured locally by them.Further, in the case of Principal Commissioner of C. Ex., Pune-1 vs. Advinus Therapeutics Ltd. [2017 (51) S.T.R. 298 (Tri. - Mumbai)], the Hon'ble Mumbai Tribunal made the following observations regarding the applicability Rule 4 of POPS:. (a) The intent in Rule 4 to remedy out some specific situations that would, otherwise,have enabled escapement from tax or leviability to tax where Rule 3 of POPS Rules may not serve to confer jurisdiction;(b) Location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; (c) Rule 4 is intended to be resorted when services are rendered on goods without altering its form that in which it was made available to the service provider; (d) If the goods cease to exist in the form in which it has been supplied, it cannot be said that services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods; and (e) It is contrary to law to isolate an expression in a rule to deny the general principle built into all indirect tax statutes for exempting export of services from levy. They explained that the respondents in the above case were engaged in manufacturing of compounds for pharmaceutical products and drug development based on information provided by the overseas clients which is very similar to the process being carried out by DPCL. In the case ofDPCL, the key starting material supplied by the client is altered through various chemical processes in order to synthesize the final workable molecule, on which various tests are conducted and the developed sample is finally sent to the client. Any testing service provided is in respect of the molecule to be developed and not solely on thematerial supplied by the client per se. Without prejudice to the aforesaid, they stated that even if some rudimentary tests are being conducted on the material supplied by the client for the purpose of quality check, the material ceases to exist in the form in which it has been supplied since it gets fully consumed in the process and it cannot be said that services have been provided in respect of such materials going by the above cited judgment.

38. DPCL also invited reference to the case of M/s Indeus Life Sciences Pvt. Ltd. VsCommissioner of Central Excise and Service Tax, Belapur [2018-TIOL-3754-CEST AT-MUM] which was also based on facts similar to that of DPCL. In the given case, it was held that the ratio laid down by the Hon'ble Bombay High Court in M/s SGS India Ltd.'s case (cited supra) could not be rejected on the ground that the POPS Rules were not considered in that case. The Hon'ble Tribunal also referred to the caseofM/s Advinus Therapeutics Ltd. (cited supra) wherein while applying the ratio laid down in the SGS case while interpreting the POPS Rules, the basic principle of levy of service tax was taken into consideration. It was held that Service Tax is a consumption based levy and accordingly, the technical and consultancy service commences from the stage of undertaking test on the goods procured and completes on delivery of the necessary test report to the overseas client and therefore it is ultimately consumed outside the taxable territory of India. The Tribunal in the current case found no reason to deviate from the various judicial precedents and accordingly ruled in favour of the Appellant. Similar judgment has been followed in the case of FertinPharma Research And Development Vs Commissioner Of CGST Navi Mumbai [2019- TIOL-376-CESTAT-MUM] based on similar facts that ratio laid down by the Hon'ble Bombay High Court in M/s SGS India Ltd.'s case (cited supra) could not be rejected on the ground that the POPS Rules were not considered in that case. They also held that technical testing services are essentially advisory services. The goods aresubject to testing and then destroyed/consumed or otherwise disposed of. The client'sinterest is in the report that carries the results of the testing, rather than in the goods that are subject to testing. In view of the aforesaid, they argued that the place of provision of various testing services conducted during development of the molecule by DPCL for its foreign clients cannot by any stretch of imagination be determined under Rule 4 of the POPS Rules. The place of provision of the services shall be outside India, being the location of the service recipient, as per Rule 3 of POPS Rules. *Ipso Jure*, the services satisfy all the conditions laid out in Rule 6A of the ST Rules, and qualify as an export of service not subject to tax.

39. They further stated that the impugned SCN is based on some copies of agreements & the statement that too of a principal scientist recorded during the course of investigation etc. No other concrete and corroborative evidence has been adduced in support of the allegation. Based on certain agreements/work orders/quotations between DPCL and foreign clients (Point no. 3.2 of the SCN) & the statement of Shri Nilesh Patel, it has been alleged in the SCN that DPCL is acting as testing and analysis agency for their foreign client, who were sending or making available goods such as 'drug' or 'Molecule/ API' for carrying out test in India. After completion of

prescribed test and analysis on the drugs/molecules received from their foreign client and preparation of a Dossier/Test Report containing the outcome of the test conducted, the drugs so received are sent back to the respective client. In this regard, they submitted that the RUDsas pointed out in para 3.2 of the SCN, nowhere it is stated that the materials on which DPCL has conducted the testing and analytical work were provided by the overseas clients, and the analysis drawn from the agreements/work orders/quotations is merely based on assumptions and no concrete evidences had been adduced by the department. They further submitted that the work in relation to procurement of work order/purchase order from foreign clients is handled by Project Management team (PMT), headed by DrHimaniDhotre. This fact has also been admitted & informed to the department by Mr. Nilesh Patel (Reply 4(ii) to the Question: 4 of the questionnaire). Mr. Nilesh Patel in his statement dated 02.11.2015 clearly stated that the works of the Research & Department starts based on the Work Orders/Purchase Orders procured by the PMT. Hence, relying on the statement of the person who is not actually involved in the whole function is unsustainable.

40. M/s. DPCL further stated that in spite of the fact that the department was in the knowledge of above facts, they never recorded the statement of the head of the Project Management Team, who actually managed the Work Order/Purchase Order and handled the procurement of key starting material in the long three years of investigation. Instead of recording the submissions of the person who actually procured and made the key starting materials available to the R & D Department, the investigating authority has relied upon the submissions shown to have been made by the Principal Scientist which is contrary to the virtue of the job profile of Mr. Nilesh Patel, and hence, the conclusion derived by the investigating authority is baseless & is liable to be dropped. They also drew attention to the reply to Question: 7 by Mr. Nilesh Patel of the questionnaire which clearly stated that "all the documents relating to such molecules viz., B/E, packing list, Safety Data Sheet etc. are also maintained by R & D Stores Department." Hence, allegation by department that 'he failed to substantiate his contentions with documentary evidence', is unsustainable. They also stated that they had made detailed submissions before the Ld. Deputy Director, DGGSTI on 16.01.2019 wherein it was clearly shown that the services provided by them are export of services. In the said submission, DPCL had given a detailed explanation about the exact nature of services being provided by them and had made a bifurcation of each such service which were not considered while issuing the subject SCN, and hence the same is bad in law and against the principles of natural justice.

41. Meanwhile, M/s. DPCL informed that during the same period, they had provided certain services to their clients without using any materials, either provided by the clients or procured locally, and the value of such services was Rs. 40,76,75,749/-. They also claimed cum-tax benefits on the value adopted by the department, without prejudice to their aforesaid submissions, besides opposed invoking extended period of limitation. They also opposed imposing any penalty as proposed in the SCN as they had acted in bonafide belief without any intention to evade tax. They cited following case laws to substantiate their argument on the above points: -

(i) Sands Hotel Pvt. Ltd. vs. Commissioner of S. Tax 2009 16) STR 329 (Tri-Mum)
(ii) Hon'ble High Court of Karnataka in Commissioner v. Geneva Fine Punch Enclosures Ltd. [2011 (267) E.L.T. 481 (Kar.)]
(iii) Rajasthan Spinning & Weaving Mills[2009 (238) E.L.T. 3 (S.C.)]
(iv) K.K. Appachan v. CCE, Palakkad, [2007 (7) S.T.R. 230 (Tri-Bang.)]
(v) ITI (TIO) Ltd. vs. CCE, 2007 (I1) ELT 316(Tri)
(vi) Neyveli Lignite Corporation Ltd. vs. CCE, 2007 (209) ELT 310(Tri)
(vii) Commissioner vs. Bentex Industries, 2004 (173) EL T A079 (SC)
(viii) Commissioner vs. Binny Limited, 2003 (156) EL T A327 (SC)
(ix) Collector vs. Ganges Soap Works (P) Ltd., 2003 (154) ELT A234 (SC)
(x) CCE v. Raptakos Brett & Co. 2006 (194) ELT 101 (Tri.-Mum.)
(xi) CCE v. RishabhVelveleen (P) Ltd. 1999 (114) ELT 839 (Tri.)
(xii) Pee Jay Apparels (P) Ltd. V. CCE 2001 (135) ELT 842 (Tri.-Del.)
(xiii) Cosmic Dye Chemical v. CCE 1995 (75) ELT 721 (SC)
(xiv) Arihant Arts vs. CCE, [2004 (173) ELT 0194 (Tri.-Mum.)]
(xv) Hi Line Pens Pvt. Ltd. vs. CCE, [2003 (158) ELT 168 (Tri.-Del.)]
(xvi) CCE vs. Balakrishna Industries [(2006) 201 ELT 325]
(xvii) CCE vs. H.M.M. Limited [1995 (76) ELT 497 (SC)],
(xviii) Coolade Beverages Ltd. vs. CCE, Meerut [2004 (172) E.L.T. 451 (AIL)]

42. As already stated in Para 32 above, the said assessee had enclosed a copy of their earlier letter dated 16.01.2019 submitted to DGCEI during the course of investigation, which is reproduced as follows: -

"**BRIEF FACTS**

1.1 M/s DishmanCarbogenAmcis Limited (formerly known as Dishman Pharmaceutical and Chemicals Limited) (hereinafter referred to as 'DCAL' or 'the company') is a 100% Export Oriented Unit licenced under the Ministry of Commerce and is a leading player in the Contract Research and Manufacturing Services ('CRAMS') segment of Pharma Business, and is also manufacturing a range of specialty chemicals for pharmaceuticals and products at its plant at Naroda and Bavla in the State of Gujarat.

1.2 DCAL has been instructed by the Directorate General of Goods and Services Tax Intelligence (DGGSTI) to provide details regarding the services exported by it during the period 2013-14 to 2017-18 (till June) (hereinafter referred to as 'relevant period') under the head 'Technical Testing and Analysis service'. In respect of the same, DCAL most respectfully submits client-wise and activity-wise details of services exported during the relevant period with relevant documentation and explanation regarding the nature of various services.

2.0 Services With Respect To Research & Development Of Molecules

2.1 General Operations

2.1.1 DCAL enters into agreements with various foreign clients for providing Research & Development (R&D) Services regarding preparation of samples molecules to be used as Active Pharmaceutical Ingredients (API) by their clients.

2.1.2 The said molecule / API is completely developed by DCAL in its local facility at Gujarat. The client generally shares the detailed development procedure / Route of synthesis which is required to be strictly followed by DCAL during the process of synthesising the molecule. This is done in order to meet the exact specifications of the client.

2.1.3 In certain cases the Key starting material (KSM) is being provided by the client and the other materials are being procured by DCAL themselves. It is imperative to note that no molecule / API is being provided by the client but only the KSM which gets completely consumed in the process of developing the molecule. In many cases, even the KSM is being procured by DCAL themselves.

2.1.4 The consideration for the activities undertaken by DCAL is on mile stone basis involving various stages of the process for which the contract has been given to them.

2.1.5 During the process of development, DCAL performs various tests on the molecule, developed by them from the KSM & other ingredients, and after

completion of such testing, the detailed test report is sent to the clients against which invoices are raised on the client by DCAL. The development of the molecule takes place stage wise and on completion of each such stage, a test is conducted on various parameters. On the completion of the test, a report is sent to the Client for their feedback and approval after which DCAL proceeds for the next stage of development. This process is repeated during all stages and the development of the molecule is completed only after the despatchof report to the client and not before that.

2.1.6 At the end of the development process, the sample molecule developed by DCAL is sorted and released as per pre-determined requirements and is sent to the clients through courier along with the final report. It is pertinent to note that any payment being made by the clients is not for procuring the sample but for using the facilities of DCAL for research and development of the sample and all activities undertaken by DCAL are geared to develop the product into a workable molecule.

2.1.7 The clientafter receipt of the sample molecule performs various quality, validation and clinical tests on the sample molecule and consequently, depending on the validation parameters, can either accept, reject or ask DCAL to carry on certain modifications on the molecules. However, in all cases, the risk and rewards in respect of the sample gets completely transferred to the respective clients and they are obliged to pay any dues accrued to DCAL during the R&D phase. If the sample molecule is approved, the clients may order for additional tests to be carried out by DCAL or get it patented and engage DCAL or other manufacturers for commercial manufacture of the molecule / API.

For the ease of understanding, DCAL is explaining below the details of one such contract executed with TESARO Inc., one of their customers.

2.2 Niraparib Project –TESARO Inc.

2.2.1 TESARO Inc. having its address at 1000 Winter Street, Suite 3300, Waltham, MA 02451, (in short 'TESARO') had entered into an agreement with Dishman USA, a 100% subsidiary of DCAL, having its address at 476 Union Ave, 2nd Floor, Middlesex, NJ 08846 for development of NiraparibTosylate Monohydrate Compound or MK-4827 (in short

'Niraparib). It is understood that Niraparib is an orally active and highly potent drug. Niraparib is cat-4 compound according to DCAL system, where cat-4 represents the most hazardous compound category. Dishman USA has outsourced the research and development of Nirapaib to DCAL and is being developed entirely at the Bavla factory of DCAL.

2.2.2 The salient features of such project can be inferred on conjoint perusal of the following:

a. Manufacturing services Agreement (MSA) entered between TESARO and Dishman USA;

b. Technical Quality Agreement (TQA) entered amongst TESARO, Dishman USA and DCAL; and

c. Various Work orders (WO) issued by TESARO.

- Dishman USA has the power to subcontract the said R&D services to any third party on prior written authorization of TESARO as per Para 4.5 of the MSA. Accordingly,Dishman USA has engaged DCAL as a subcontractor in respect of the same.

- DCAL is mandated to deliver the product (sample) as set forth in a WO. Each WO shall specifies the scope of services to be provided, set forth the quantity of Product (sample) required, the requested delivery date(s), materials provided by TESARO, if any. Each WO is governed by the terms of the MSA and shall be incorporated therein and form part of the MSA. DCAL shall perform the Services specified in each Work Order, as amended by any applicable Change Order(s), and in accordance with the terms and conditions of such WO and MSA.

- DCAL shall supply, in accordance with the relevant approved raw material specifications, all materials, including but not limited to Raw Materials, Components and Packaging Materials, to be used in the performance of Services under a WO (as applicable) other than the TESARO Materials specified in such WO. TESARO remains the owner at all times in respect of such material supplied by it.

- The KSM shall be provided by TESARO themselves and DCAL will test TESARO supplied materials and TESARO supplied intermediates using validation methods provided by TESARO. The objective of such testing

by DCAL is to check that the KSM meets specification on receipt at DCAL. The KSM would get consumed in the process of developing the Niraparib Compound. Only the sample of the Niraparib Compound, developed by using the KSM and other procured ingredients is to be supplied to the client along with Reports.

- TESARO confirms that any material produced as per the WO is meant for research purposes and not to be re-sold or incorporated into other products for re-sale.
- After development of the sample, it shall be sent to TESARO in predetermined batches.

The services provided by DCAL during the R&D phase include but is not limited to the following:

Protocol Validation: This involves review of the Route of synthesis provided by TESARO and accordingly determine future specifications.

Development of the molecule: DCAL shall develop the Niraparib compound using materials supplied by TESARO as well as from materials procured by themselves. This involves a considerable amount of labour time and use of laboratory equipment.

Hold Time Study: It is conducted to establish the time limits of holding the material at different stage of production by assuring that the quality of product does not deteriorate during the hold time and the material can be used for further processing. A report shall be provided to TESARO on completion of the study.

Stability study and testing: It is conducted for evaluation of API stability under the influence of a variety of environmental factors such as temperature, humidity and light. Data from these studies enable recommended storage conditions, retest intervals and shelf lives to be established. A report shall be provided to TESARO on completion of the testing.

Validation Testing: It is conducted for establishing documentary evidence demonstrating that a process, or activity carried out in testing

and then production maintains the desired level of compliance at all stages. It is to assure that the process will consistently produce the same result over and over again.

Reimbursement: DCAL procures some materials and equipment themselves on behalf of TESARO and claims reimbursements for the same.

Calibration of equipment: DCAL recalibrates many of its equipment in its manufacturing facilities as per specifications of TESARO and charges it for the same.

Release testing: It involves analytical testing of the quality attributes of the API prior to DCAL Release in accordance with the predefined product specifications.

Capacity Reservation Fee: As per the TQA, the Niraparib compound and its intermediaries would be produced in Unit 9, which is a highly potent manufacturing unit within Bavla factory of DCAL. In view of the same, TESARO reserves all the capacities available in the block before the tentative date of start of production and before sharing the protocol with the manufacturer. DCAL charges the customer against the aforesaid reservation. No testing is involved in respect of the same.

Shipment of samples:DCAL will perform tests on a sample of each batch to enable sample shipment. DCAL will issue an analytical test result to be used for sample shipment purpose only. The samples shall be sent by courier. They would be packaged and sorted as per the specifications of TESARO.

Reprocessing: It involves repeating one or more steps of the approved manufacturing process to improve quality or purity.

Reworking: It involves performing, in order to improve quality or purity, a manufacturing process that differs from the previously approved manufacturing process that was already performed.

3.0 <u>Submissions on merits</u>

This submission has been made without prejudice to the rights and contentions of the company and after considering the above facts, the true letter and spirit of the agreements between the parties in the transaction and their mutual understanding. It is also respectfully submitted that it is a settled position of law that in case of agreements between parties the apparent should be accepted as true unless proved otherwise. In this connection reliance is placed on the judgement of the Apex Court in the case of Union of India vs. Mahindra & Mahindra Ltd. 1996 (76) ELT 481 (SC), where the Hon'ble Court in para 5 of the judgement, held that :-

"Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflects the real state of affairs, it is no doubt open to the revenue to allege and prove that the apparent is not real ....."

The legal position as per our bonafide understanding is explained hereinbelow.

3.1 **The place of provision of the testing services provided by DCAL is outside India, being the location of the service recipient and the place where the services are ultimately consumed and accordingly it is an export of service**

3.1.1 Whether a service qualifies to be an export is to be determined as per Rule 6A of the Service Tax Rules, 1994 (in short 'ST Rules') which is reproduced herein-below :

"(1) The provision of any service 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 the 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 in 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 2 of clause (44) of section 65B of the Act."

It is most respectfully submitted all the above conditions have been fulfilled by DCAL with respect of the exports of services made by them and declared in ST-3 returns filed. With respect to determining the place of provision of service, reference is being made to the Place of Provision of Services Rules, 2012, (in short 'POPS Rules') wherein Rule 3 of the aforesaid rules is relevant and should be applied in the given situation:

"RULE 3. Place of provision generally. — The place of provision of a service shall be the location of the recipient of service:

Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service."

The provision of services by DCAL to their foreign customers is squarely covered in the above general principle since the activities performed by DCAL is not covered in any other rules of the POPS Rules.

3.1.2 It is also submitted that in the case of DCAL, the benefit in respect of the services provided actually accrues to the foreign clients when he receives the reports after each specified stages or from time to time. It is an accepted legal position that Service Tax, being a destination based consumption tax, should be levied based on its jurisdiction on the place where it is actually consumed. This principle has also been recognized by the Hon'ble Supreme Court in the case of **All India Federation of Tax Practitioners v. Union of India [2007 (7) S.T.R. 625]** wherein it was held that

"In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable on services provided within the country."

Although the POPS Rules were introduced in 2012, but the above maxim and legal position is maintained as a general rule and is included in Rule 3 of the said Rules. In the given case of DCAL, the fruits of the services are consumed abroad when he receives the report published from India by

DCAL. Without prejudice to the contention that in the case of DCAL, it is not a performance based service, it is submitted that the working upon the KSM or other inputs in India, does not result in provision of any service to the customer till the reports are generated and received by the customer and the satisfaction of the client occurs upon an outcome which is possessed by the recipient i.e. the report of the tests conducted by them. Hence, even if some of the activities are carried out in India, if the report is not submitted, then by no stretch of imagination it can be asserted that the service has been fulfilled. Therefore, submission of the report is the most essential part of the service.

3.1.3 In light of the same, reference can also be made to the case of Commissioner v. SGS India Pvt. Ltd. [2014 (34) S.T.R. 554 (Bom.)], wherein the clients of the respondents used the services of the respondent in inspection / test analysis of the goods which the clients located abroad intended to import from India. In other words, the clients abroad were desirous of confirming the fact as to whether the goods imported complied with requisite specifications and standards. Thus, client of the respondent located abroad engaged the services of the respondent for inspection and testing the goods. The goods were tested by the respondents in India. The goods were made available or their samples were drawn for such testing and analysis in India. However, the report of such tests and analysis was sent abroad. The clients of the respondent were located abroad and paid them for such services rendered, in foreign convertible currency. It is in that sense, it was held that the benefit of the services accrued to the foreign clients outside India and thus it was a case of export of service.

3.1.4 In the case of DCAL, the services are provided to clients located abroad against consideration received in foreign convertible currency and it may be correctly deduced that place of provision of the services provided by DCAL is outside India.

3.2 **Rule 4 of the POPS Rules is not applicable in the case of DCAL as the goods sent by client/customer, if any, is merely KSM which are simply the starting material and does not represent goods "on which the service is performed".**

For ease of reference the relevant portion of Rule 4 of POPS Rules is extracted here in below :-

"RULE 4. Place of provision of performance based services. — The place of provision of following services shall be the location where the services are actually performed, namely:-

(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service :

Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:

Provided further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair;

....."

3.2.1 It is most respectfully further submitted that the molecules are synthesized by DCAL themselves based on technical information / Route of Synthesis provided by foreign clients and the technical process and procedure adopted by DCAL in India. During the process of the synthesis, no goods are actually being supplied directly by the clients except in some cases, the key start up material, which gets ultimately consumed in the development process. It is further submitted that the consumption of the KSM in India does not itself represent the provision of service for which DCAL has been engaged. Hence, this kind of activity is strictly not a performance based service as contemplated in Rule 4 of POPS Rules.

In view thereof, it is imperative to note the following essential conditions provided in Rule 4(a) of the POPS Rules:

(a) That the goods are required to be made physically available by the recipient of service to the provider of service; and

(b) That service is to be provided in respect of the goods.

It is most respectfully submitted that the services of testing is provided on molecules synthesized by DCAL, and it does not come under the purview of Rule 4 as in the instant case the objective is to provide the services for the development and synthesis of a chemical compound which is distinct and different from the KSM or any other goods used in the process and the provision of services also includes issue of the technical report after different stages of the process, which is the main result and fruits of the activities. Hence, the services are not provided in respect of the goods received from the client, if any, and therefore, this activity is not covered under the provision of Rule 4 but is covered under Rule 3 of POPS Rules.

3.2.2 It is most respectfully submitted that the application of Rule 4 has been aptly explained in the Service Tax Education Guide issued by CBEC, where it has been interalia clarified that *It will not cover services where the supply of goods by the receiver is not material to the rendering of the service……".*

It is relevant to note that in the case of DCAL, the starting materials supplied by the clients get altered / consumed in the process of developing the molecule and usually gets fully consumed in the process. The said molecule has entirely different characteristics from the starting material provided by client. Any testing service provided by DCAL is on the unfinished molecule and not on the starting material supplied. It is evident, from the fact that the activity of repairs and reconditioning being excluded from the purview of Rule 4, that it does not intend to tax those activities which result in altering the form of the goods supplied by the recipient. This goes on to show that the objective of the said rule is to bring in the tax net in India those activities which are performed in India and the fruits of the service is consumed in India e.g. storage/handling/transportation of goods sent by the foreign customer. Therefore, it cannot be concluded that services have been provided in respect of the goods that have been supplied by the recipient of service. Further, in some cases, there is no material sent by the client at all. The entire molecule is being developed by DCAL using materials procured

locally or imported. In that case, the testing service, provided after the completion of intermediate stages, is on the materials / molecules procured by DCAL themselves and therefore Rule 4 is not applicable at all.

3.2.3 In this regard, reliance is being placed in the case of **Commissioner v. Sai Life Sciences Ltd. [2016 (42) S.T.R. 882 (Tri. - Mumbai)]**, which was pronounced by keeping Rule 4 of the POPS Rules in mind. In the said case, the respondent offered research and development expertise in new compounds of pharmaceutical products. Though some chemicals required for research were supplied by the clients themselves, the actual 'deliverables' by the respondents were neither supplied or owned by the service receiver nor the respondents wereproviding any service in respect of the deliverables. They were synthesizing a new compound using various chemicals, solvents, reagents,compounds which cannot be termed as service provided in respect of the said chemicals, solvents, compounds. The Hon'ble Tribunal ruled in favour of the respondents and held that the services fell outside the purview of Rule 4 of POPS Rules citing the principles laid out in M/s SGS India Ltd.'s case (cited *supra*). It is most respectfully submitted that the activity carried out by DCAL is exactly similar to that of the respondents in the above case wherein DCAL is synthesizing a new molecule / compound using the KSM supplied by clients as well as from chemicals procured locally by them.

3.2.4 Further, in the case of **Principal Commissioner of C. Ex., Pune-I vs. Advinus Therapeutics Ltd. [2017 (51) S.T.R. 298 (Tri. - Mumbai)]**, the Hon'ble Mumbai Tribunal made the following observations regarding the applicability Rule 4 of POPS:

(a) The intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 of POPS Rules may not serve to confer jurisdiction;

(b) Location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way;

(c) **Rule 4 is intended to be resorted when services are rendered on goods without altering its form that in which it was made available to the service provider;**

(d) **If the goods cease to exist in the form in which it has been supplied, it cannot be said that services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods;**

(e) It is contrary to law to isolate an expression in a rule to deny the general principle built into all indirect tax statutes for exempting export of services from levy.

The respondents in the above case were engaged in manufacturing of compounds for pharmaceutical products and drug development based on information provided by the overseas clients which is very similar to the process being carried out by DCAL. In the case of DCAL, the key starting material supplied by the client is altered through various chemical processes in order to synthesize the final workable molecule, on which various tests are conducted and the developed sample is finally sent to the client. Any testing service provided is in respect of the molecule to be developed and not solely on the material supplied by the client per se. Without prejudice to the aforesaid, even if some rudimentary tests are being conducted on the material supplied by the client for the purpose of quality check, the material ceases to exist in the form in which it has been supplied since it gets fully consumed in the process and it cannot be said that services have been provided in respect of such materials going by the above cited judgment.

3.2.5 Reference can also be made to the case of **M/s Indeus Life Sciences Pvt. Ltd. Vs Commissioner of Central Excise and Service Tax, Belapur** [2018-TIOL-3754-CESTAT-MUM]which was also based on facts similar to that of DCAL. In the given case, it was held that the ratiolaid down by the Hon'ble Bombay High Court in M/s SGS India Ltd.'s case (cited *supra*) could not be rejected on the ground that the POPS Rules were not considered in that case. The Hon'ble Tribunal also referred to the case of M/s Advinus Therapeutics Ltd. (cited *supra*) wherein while applying the ratio laid down in the SGS case while interpreting the POPS Rules, the basic principle of levy of service tax was taken into consideration. It was held that Service Tax is a consumption based levy and accordingly, the technical and consultancy service commences from the stage of undertaking test on the goods procured and completes on delivery of the necessary test report to the overseas client and therefore it

is ultimately consumed outside the taxable territory of India. The Tribunal in the current case found no reason to deviate from the various judicial precedents and accordingly ruled in favour of the Appellant.

3.2.6 In view of the aforesaid, it can be clearly reckoned that the place of provision of various testing services (described in Para 2.2.2 above) conducted during development of the molecule by DCAL for its foreign clients cannot by any stretch of imagination be determined under Rule 4 of the POPS Rules. The place of provision of the services shall be outside India, being the location of the service recipient, as per Rule 3 of POPS Rules. *Ipso Jure* the services satisfy all the conditions laid out in Rule 6A of the ST Rules, and qualify as an export of service not subject to tax.

4.0 **Services with respect to Paid Samples**

It is most respectfully submitted that in some cases, clients require a small sample of various Molecules / API synthesized by DCAL. Accordingly, DCAL sends the required samples through courier and charges the clients in respect of providing services of testing, dispatching, packing, labelling, storage and shipment of the sample as per the specifications of the client. The total amount of services provided in respect of paid samples during the relevant period amounts to Rs. 81,18,821/-

5.0 **Other services**

Particulars	Amount in USD	Amount in INR
Reimbursement of costs incurred on behalf of various clients	50,122	30,67,346
Various organizations require DCAL to obtain a WHO GMP Legalization Certificate from the Food & Drugs Control Administration Authorities. DCAL recovers the costs incurred on obtaining such certificate from such organizations.	707	46,433
Service charges relate to restructuring activities, sharing of technology, product research &development among	61,73,684	40,45,61,970

group companies and co-ventures.		
TOTAL	**62,24,513**	**40,76,75,749**

The aforesaid services are rendered directly to client without using any materials, either provided by the client or procured locally.

a. The Reimbursements of costs are invoices raised upon the clients against various expenses incurred by DCAL on their behalf.

b. DCAL obtains various licences and other certificates on behalf of the clients or on the basis of terms with the clients. The expenses incurred in the above process is recovered by them from the clients.

c. There were certain services provided by DCAL to its foreign clients like product research, technology transfer for manufacturing activities carried on outside India and legal services in the country of residence of the client. This are separately billed to the clients on the basis of agreements executed between them.

6.0 Prayer

In view of the foregoing submissions, it is most respectfully submitted that DCAL has no liability to pay any Service Tax whatsoever in respect of the services exported by them. DCAL as a *bonafide* assessee has provided full cooperation with respect to requisition of documents / information and has duly submitted the same. Hence, the purported proceedings initiated against DCAL may kindly be dropped.

7.0 Personal Hearing

In the unlikely event the foregoing submissions are not acceptable to your goodself and the proceedings are sought to be continued, we pray to grant us personal hearing before adjudicating the same. DCAL craves leave to add, alter, modify or rescind the submissions made here-in-above, either wholly or partly and to produce further documents and / or evidence prior to or at the time of such personal hearing."

43. Thereafter, vide their letter dated 20.08.2020, the said assessee furnished an additional submission wherein they, *inter alia*, stated that they would like to bring on record the decision of Tribunal in case of M/s. Dow Chemical International P. Ltd. Vs CG GST, Navi Mumbai wherein the assessee had filed a refund claim of accumulated cenvat credit for the input service under Rule 5 of CER, 2004 in respect of export of scientific and technical consultancy services. According to the Revenue, the scientific and technical consultancy service, being a performance based service, falls under Rule 4 of POPS. It was submitted on behalf of Revenue that as per the said Rule 4, place of provision of service shall be the location where the services shall be performed and since the services have been performed in India the place of provision of service would be construed to be in India. The Tribunal observed that since the research activity performed by the assessee leads to formation of a new product different from the original raw material, Rule 4 of POPS will not be applicable. Accordingly, it was held that the service provided by the assessee falls under Rule 3 of POPS according to which the location of service provided shall be constructed as the location of the recipient which in the given case was outside India and therefore the said service was held to be 'export of service'. They stated that in this case, they consume the raw material, Key Starting Material ('KSM') or any other goods as the case may be in the process of the development of the molecule. The technical testing and analysis are performed on the molecules and not on the raw material or KSM (whether provided by client or procured by the Noticee). Rule 4 of POPS is applicable only where services are performed in respect of the goods temporarily provided by the service recipient. In this regard, attention is drawn towards para 5.4.1 of the Taxation of Services: An Education Guide, which states that: -

> *"5.4.1 What are the services that are provided "in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service"?- sub-rule (1):*
>
> *Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. <u>The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered</u>. Thus, the service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of*

cargo), technical testing/inspection/certification/ analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys."

44. They stated that from the above reproduced paragraph of the Education Guide, it can be understood that the essential characteristic of a service to be covered under Rule 4 of POPS is that the goods temporarily come into the physical possession or control of the service provider. In the given case, the Noticee consumes the raw materials, KSM, or any other goods and hence it cannot be said that the goods temporarily come into the physical possession or control of the service provider. Furthermore, the technical testing andanalysis is performed on the molecules manufactured by the Noticee and not on the raw materialsprovided by the service recipient. The facts in the case of **M/s Dow Chemical International Pvt. Ltd.** *(supra)* are identical to the case of the Noticee and accordingly, the service provided by the Noticee should be construed to be falling under Rule 3 of the POPS and thus, qualify as 'export of services'.

45. They further drew attention towards para 5.4.1 of the education guide (as reproduced at para The Noticee submits that in its case, it consumes the raw material, Key Starting Material ('KSM') or any other goods as the case may be in the process of the development of the molecule. The technical testing and analysis are performed on the molecules and not on the raw material or KSM (whether provided by client or procured by the Noticee). Rule 4 of POPS is applicable only where services are performed in respect of the goods temporarily provided by the service recipient. In this regard, attention is drawn towards para 5.4.1 of the Taxation of Services: An Education Guide dated June 20, 2012 ('the Education Guide') which is reproduced hereunder: above) which provides the examples of services covered under Rule 4 of the POPS which are services of repair, reconditioning, or any other work on goods **(not amounting to manufacture).** In the given case, the Noticee manufactures molecules and perform test on the molecules so manufactured and not on the raw materials/KSM received. Accordingly, basis the illustrations provided in the Education Guide it is submitted to your good sold that Rule 4 has no application in the given set of facts. Furthermore, the examples quoted in para 5.4:1 of the Education

Guide are the services of repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/inspection/certification/ analysis of goods, dry cleaning etc. It is worth noting that in all the above examples, the goods come into temporary possession of the service provider. The service provider performs services on the goods so provided and thereafter returns the same and not in respect of services on the goods. Thus, the Rule 4 of POPS would cover only those services where the goods temporarily come into the possession of the service provider, works on the good (not for the goods) and return the same. In the given case, the Noticee does not work on the goods provided by the service recipient. Rather, the goods provided by the service recipient are consumed in the manufacturing process. Accordingly, Rule 4 of POPS has no application in the given set of facts.

46. The Noticee also draw the attention of your good self towards the Order in Appeal passed by Commissioner (Appeals) Ahmedabad in the case of M/s. Veeda **Clinical Research Pvt Ltd [No. AHMEXCUS-001-APP-116-17-18 dated September 25, 2017).** In the said case, the assessee provided the services of clinical testing to its foreign clients and did not discharge service tax by considering it as export of services. The assessee received sample drugs, performed testing in his premises, prepared reports and delivered to the foreign clients by e-mail, courier, etc. According to the assessee, this was export of services. Department's stand was that place of provision of service being in India, it is not export of services and hence, applicable service tax is payable. The assessee contended that the place of provision of service is outside India as per Rule 3 of POPS and not Rule 4 of POPS. The learned Commissioner (Appeals) relied on the ruling delivered by Mumbai Tribunal in the case of **Pr. Commissioner of C.Ex., Pune-1 v. Advinus Therapeutics [2017(51) STR 298(Trib.-Mumbai)]** and **C.Ex., Pune v. Sai Life Sciences Ltd [2016(42) STR 882 (Trib.-Mum)]** and observed that Rule 4 of POPS is applicable only in a scenario where goods are received for testing and the same goods are returned to the recipient after conducting the required testing or performing some other service on the goods whereas Rule 3 of POPS is applicable where the drug samples sent by the service recipient are consumed and based on it the reports are provided to the service recipient. Accordingly, it was held that the clinical testing service would fall under Rule 3 of POPS and not under Rule 4 of POPS and thus, qualified as export of services. The case of the Noticee is identical to the case of M/s. **Veeda Clinical Research PvtLtd** *(supra)* since the Noticee also consumes the raw materials, KSM, or any other goods and the testing is undertaken on the molecules

manufactured. Thus, taking into consideration the above rulings, it is humbly submitted before your good self that the service of technical testing and analysis of molecules manufactured from raw materials, KSM, or any other goods falls under Rule 3 of POPS i.e. the location of service recipient is the place of supply and accordingly, the Noticee fulfils the conditions for 'export of service'. Therefore, they requested to drop the demand.

47. They further stated that the demand has been wrongly raised on incomes which are not liable to service tax. Without prejudice to their submissions, the Noticee submitted that the SCN has raised service tax demand (including cess) of Rs. 22,98,31,144 on a total income of Rs. 1,66,63,33,922/-. They stated that the total income of Rs. 1,66,63,33,922 is not pertaining only to services, but it consists of various other income, and submitted a table showing the break-up of such incomes as follows: -

Sl No.	Nature of income	Amount (Rs)	Brief explanation of income
1	Export of services where key materials provided by the foreign clients	25,31,91,171	Income pertains to the technical testing and analysis provided to the recipients located outside India where the key materials are provided by such recipients.
2	Storage charges	16,94,467	Income pertains to the charges for storing the goods belonging to the service recipients, in the premises of our company.
3	Export of services where key materials are not provided by the foreign clients	56,35,43,096	Income pertains to the technical testing and analysis provided to the recipients located outside India where the no materials are provided by such recipients.
4	Export of goods	83,87,33,472	Income pertains to the goods manufactured by the company and exported outside India. This income is not towards provision of services, however the same was inadvertently shown as provision of service in the ST-3 return.
5	Sale of goods in India	6,18,300	Income pertains to the goods manufactured by the company and delivered in India.This income is not towards provision of services, however the same was inadvertently shown as provision of service in the ST-3 return.
6	Cancelled invoices inadvertently shown in ST-3 return	85,53,416	Invoices for this income were cancelled by issuing credit note. Although this cannot be construed as income the same was inadvertently shown in the ST-3 return.
TOTAL		166,63,33,922	

48. They claimed that, for the sake of argument, even if it is presumed that Rule 4 of POPS is applicable in the case of the Noticee which is not the correct legal position based on the provision of the law, then also from the above table it can be understood that the demand of service tax if any (without prejudice to anything contained in this submission and in the alternative,) could be raised only in respect of the income of Rs. 25,48,85,638 as mentioned in Sr. No. A and B of the table above. Thus, considering such income as inclusive of service tax, a total service tax liability which can be demanded would be limited only to the tune of Rs. 2,81,32,836. A year-wise detailed calculation in this regard has also been encapsulated separately in their reply letter along with copies of invoices and work orders/purchase orders etc. to substantiate their point. Considering this year-wise data, they requested that the demand of service tax if any should be limited to Rs. 3,21,94,553only. Thus, it is humbly prayed to your good self that out of the total service tax demand of Rs. 22,98,31,144, the demand of Rs. 19,76,36,591 (Rs. 22,98,31,144 *Less* Rs. 3,21,94,553) may be pleased be dropped since such income is not liable to service tax.

49. The said assessee also listed a number of appellate orders and decisions to thrust their claim that the demand is time-barred and cannot be raised in the absence of any suppression of facts or willful mis-declaration, etc.

PERSONAL HEARING

50. A personal hearing was afforded to the M/s. DPCL on 09.09.2020 wherein Shri Neeraj Bagri, Advocate and Shri Navin C. Patel, Vice President (Excise) appeared on the behalf the said assessee through video conferencing wherein they reiterated the submissions already made and requested for another week's time to make further submissions, if needed, and also requested for another opportunity of PH if felt by the adjudicating authority. Thereafter, they submitted another letter dated 10.09.2020 stating that their company had not received KSM for all transactions for which detailed break up along with invoices/work orders have already bee placed before the adjudicating authority; that without prejudice to their submissions, even if one goes by the presumption of the SCN, the demand on the balance value of services is not sustainable. They also invited attention to the provisions of Rule 4 of POPS Rules and the clarification given in the Education Guide to substantiate their arguments.

51. Thereafter, another Personal Hearing was offered to them on 12.04.2021 which could not be held due to the ongoing pandemic conditions. Meanwhile, M/s.

DPCL, submitted a letter dated 12.04.2021 stating *inter alia*, that they were already given a personal hearing on 09.09.2021 by the Commissioner and hence they do not need another hearing in this case. They further stated that the SCN was issued without pre-SCN consultation in violation of the Master Circular dated 10.03.2017 issued by CBIC. They have also submit-ed an additional submission and requested to consider the same while deciding the case.

52. Vide their additional submission dated 12.04.2021 submitted as above, the said M/s. DPCL, *inter alia*, stated that the subject SCN is factually and legally wrong as it contains points which are contrary to what have been considered by the department for demanding huge amount in the guise of unpaid service tax; that the SCN was issued without proper verification of the books of accounts and records maintained by their company in respect of various goods and services manufactured/supplied/provided to their various clients located outside India, and in contravention of the settled principles of law, and hence the SCN will not survive the test of law and hence deserves to be dropped *inlimine*. They also stated that they have already filed their defence replies in connection with the subject SCN, vide letters dated 02.05.2019 and 20.08.2020 by explaining the facts and circumstances along with all documents and records to substantiate the factual position of our business activities; that they have listed a number of decisions given by various appellate authorities with regard to identical/similar matters, and also appeared before the then Commissioner for the personal hearing which he was pleased to grant, and explained all relevant facts before him; and that they requested to consider these facts and legality of the subject matter as available on records and drop the proceedings initiated against them.

53. DPCL further stated that the SCN was issued for demanding service tax of Rs. 22,98,31,114/- [*Annexure-A to the SCN shows the amount as Rs. 22,98,31,144/-*] on their total export value of Rs. 166,63,33,922/-. As per Col. 3 of Annexure-A to the SCN, this is the value declared as the export turnover which appears under Col. B.1.8 of the ST-3 return. However, as already explained by them in our submission dated 20.08.2020, the aforesaid total value of Rs. 166,63,33,922/- was not only the value of services of the type as covered in the disputes involved in the investigation by DGGI , but it comprised various other income received by them out of exports to their foreign clients. Although they have furnished the relevant details of the export income along with copies of corresponding work orders and export invoices, etc. while filing defence submission dated 20.08.2020, the detailed breakup of such total export income is given below, for ready reference: -

Sl No.	Nature of income	Amount (Rs)	Brief explanation of income
1	Export of services where key materials provided by the foreign clients	25,31,91,171	Income pertains to the technical testing and analysis provided to the recipients located outside India where the key materials are provided by such recipients.
2	Storage charges	16,94,467	Income pertains to the charges for storing the goods belonging to the service recipients, in the premises of our company.
3	Export of services where key materials are not provided by the foreign clients	56,35,43,096	Income pertains to the technical testing and analysis provided to the recipients located outside India where the no materials are provided by such recipients.
4	Export of goods	83,87,33,472	Income pertains to the goods manufactured by the company and exported outside India. This income is not towards provision of services, however the same was inadvertently shown as provision of service in the ST-3 return.
5	Sale of goods in India	6,18,300	Income pertains to the goods manufactured by the company and delivered in India. This income is not towards provision of services, however the same was inadvertently shown as provision of service in the ST-3 return.
6	Cancelled invoices inadvertently shown in ST-3 return	85,53,416	Invoices for this income were cancelled by issuing credit note. Although this cannot be construed as income the same was inadvertently shown in the ST-3 return.
TOTAL		166,63,33,922	

54. They submitted that the purchase/work orders and export invoices submitted as Annexure-A to their letter dated 20.08.2020 substantiates their manufacturing and export of goods to their foreign clients. They also stated that the aforesaid facts of bifurcation/break-up of income is certified by an independent Chartered Accountant after due verification of the relevant returns and books of accounts, and enclosed the said CA certificate.

55. M/s. DPCL further stated that the SCN dated 04.04.2019 issued by DGGI only disputes on the exports made by them under Sl. Nos. (1) and (2) above table, where their foreign clients have provided KSM for research synthesis. Without prejudice to their repeated submissions on the factual and legal aspects of the issue covered under the said Sl. Nos. (1) and (2), which are again recapitulated in this

submission, they stated that the amounts and its corresponding issues mentioned at Sl. Nos. (3) to (6) of the above chart have no relationship with the issue/dispute covered under the subject SCN. Therefore, they submitted that out of the total taxable value of Rs. 166,63,33,922/- mentioned in the subject SCN, an amount of Rs. 141,14,48,284/- is beyond the scope of the subject SCN or the issues discussed therein, and hence required to be excluded from the SCN along with its corresponding service tax demand. Therefore, they stated that the dispute covered in the subject SCN involves total export value of only Rs. 25,48,85,638/-, as against the value of Rs. 166,63,33,922/- considered by DGGI.

56. They also submitted that the SCN states that since their foreign clients have supplied the Key Starting Material/Molecule for conducting route synthesis as a part of developing their target molecules, their activity will be covered under Rule 4(a) of the Place of Provision of Services Rules, 2012 and hence cannot be considered as "*Export of Services*" for the purposes of Rule 6A of the Service Tax Rules, 1994. As already submitted above, their foreign clients had actually supplied such Key Starting Materials/Molecules only in a few cases where the value of exports was Rs. 25,48,85,638/- and hence the actual demand on this issue should have been only Rs. 2,81,32,836/-. However, the investigating officers have wrongly and arbitrarily picked up the entire export value declared by us in our ST-3 returns as explained above. They submitted that while the remaining part of the export value and the corresponding service tax demand is out of the scope of present SCN hence requires to be dropped, even the aforesaid liability of Rs. 2,81,32,836/- cannot be imposed upon them in the light of settled principles of law as explained by them in our defence submission dated 20.08.2020.

57. M/s. DPCL also stated that their letter dated 16.01.2019 submitted to DGGI and the letter dated 02.05.2019 submitted during this proceedings carry detailed discussion on the nature of activities performed by them. Accordingly, even where they receive KSM from foreign clients, the same gets consumed during the course of route synthesis. Such KSM never retains its nature and character during the whole process of synthesis. In fact, it is not that they performed the testing and analysis or any other research works only on the KSM molecule supplied by such clients, but they also have to use other inputs or raw materials procured locally for the route synthesis as part of developing target molecule/API. Therefore, they stated that the department has wrongly construed that they are undertaking some activities which include merely testing and analysis of some goods supplied by the foreign clients.

58. They pointed out that in terms of Rule 6A of STR, 1994 read with Rule 4(a) of PPSR, 2012, any services provided in respect of goods that are required to be made physically available by the service recipient to the service provider, cannot be considered as export of services, and stated that this legal provision has been misinterpreted by DGGI to exclude their services which are nothing but pharmaceutical research services of the type explained by them repeatedly in the earlier submissions. It is not that they are undertaking some testing and analysis of the goods supplied by their clients and return such goods to them along with our testing or analytic report. They actually conduct research and then perform route synthesis of a target molecule. Here, the key starting materials supplied by the clients are consumed during the synthesis along with various other raw materials and processing materials procured by them on our own from the local market, and the finally developed target molecule is an altogether new product that come into existence as a result of the service. Even such target molecules are put into use by the foreign clients only after obtaining regulatory approvals on the basis of test and analytical reports. Therefore, they stated that there is no reason to define their services as having carried out in respect of some goods physically supplied by the service recipient. They further contended that it is incorrect to say that they have performed the services in respect of the KSM supplied by the foreign clients, in view of the facts that the KSM gets consumed during the synthesis of a new molecule, and that the finished goods are not the same as supplied by the clients. They also claimed that in case the department considers that they have manufactured a new product out of the KSM molecule supplied by their clients, then also the process should be considered as an export of goods, which is free from any taxation.

59. DPCL stated that Para 8 of the SCN refers to Para 5.4 of the Education Guide published by the Government which categorically states that the essential character of a service to be covered under Rule 4(a) of PPSR, 2012 is that the goods are temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. A mere perusal of the details explained under this para of the Education Guide would reveal that the services specified under the said rules are goods-specific, i.e. services provided in connection with some goods. It is also stated that the services should not have been able to be provided without physical receipt of the goods from the service-recipient, whereas in their case KSM is only an optional condition of the works contract without which too they could provide the same service to the same foreign client. In fact, in several cases they provided such services by locally procuring KSM. Therefore, it was submitted

that the SCN contains an interpretation which is never the intention of the Government.

60. They also placed reliance on the following judicial/quasi-judicial decisions claiming that the same finally settled the principle of law in their case: -

(i) CESTAT, Mumbai's Final Order No. A/86582/2019 dated 06.09.2019 in the case of Dow Chemical International Pvt. Ltd.

(ii) Commissioner (Appeal) Central Tax, Ahmedabad's order-in-appeal No. AHM-EXCUS-001-APP-116-17-18 dated 25.09.2017

(iii) Tribunal, Mumbai's decision in Advinus Therapeutics Ltd. reported in 2017 (51) STR 298 (Tri.Mum)

(iv) Commissioner of Central Excise, Pune-I Vs. Sai Life Schiences Ltd reported in 2016 (42) STR 882 (Tri.Mum)

(v) High Court's Order in SGS India P Ltd. – 2014 (34) STR 554 (Bom)

61. M/s. DPCL also stated that the SCN is time-barred as the extended period has been wrongly invoked in their case. When the SCN itself categorically states that the value was worked out from the ST-3 returns filed by them, they did not understand as to how the ingredients of extended period were applied. Theystated that the whole SCN was issued on the basis of a wrong interpretation of one word from Rule 4(a) of PPSR, 2012 to infer that they have provided their services in respect of the goods supplied by their foreign clients, and such misinterpretation has been made the basis to allege mis-declaration or suppression of facts. First of all, they stated that the interpretation of the department is factually and legally wrong and hence the same cannot be applied for invoking extended period. Furthermore, it is a settled principle of law that mere interpretation or misinterpretation of legal provisions cannot be formed basis for invoking larger period. It is also a settled point of law that when all details as required under the periodical returns have been furnished, there is no question of any suppression or mis-declaration and hence no larger period could be invoked.

62. They also stated that no penalty can be imposed on them without establishing *mensrea*. They have not committed anything wrong and have availed the

benefits that are legally available to them for exporting goods and/or services. If the department has wrongly construed some facts and followed some wrong interpretation of law, the same cannot be used for imposing any penalty on bonafide taxpayers.

DISCUSSION AND FINDINGS

1. Having carefully gone through the records of the case, which include the SCN, defence reply as well as the written and oral submissions made by DCAL during the proceedings, I find that the solitary issue which requires determination in this case is whether the specified services provided by DCAL would be considered as "*Export of Services*" for the purposes of Rule 6A of the Service Tax Rules, 1994 or if the same would be a "Performance based Services",whereupon the place of provision shall be the location where the services are actually performed,in terms of Rule 4(a) of the Place of Provision of Services Rules, 2012 (POPS Rules). I also find that the only ground invoked in the SCN to apply the provisions of Rule 4(a) of POPS Rules and to consequently deny the export benefit to the services rendered by DCAL is that they, as a service provider, have undertaken such services in respect of the specific goods, i.e. drugs, molecules/API etc. provided or made available by their foreign clients. However, before venturing into the legality of the issue, it is germane to examine the precise nature of services provided by the said assessee, which I would discuss as follows.

2. I find from the defence reply dated 02.05.2019 filed by the said assesse that they had earlier submitted a letter dated 16.01.2019 to DGGI in response to a letter F.No. DGCEI/AZU/12(4)124/2015-16/1719 dated 02.11.2018, which contained itemized explanation regarding the nature of activities carried out by DCAL. Although this letter finds mention in Para 3.1 of the SCN, it does not discuss about the nature of services undertaken by DCAL except reproducing part of a statement recorded in this regard from their principal scientist. The said letter dated 16.01.2019 states that the general operations carried out by them are: that DCAL enters into agreements with various foreign clients for providing Research & Development (R&D) Services regarding preparation of sample molecules to be used as Active Pharmaceutical Ingredients (API) by their clients; that the said molecule/API is completely developed by DCAL in its local facility at Gujarat; that their clients generally share the detailed development procedure/route-synthesis which is required to be strictly followed by DCAL during the process of synthesizing the molecule so as to meet their exact specifications; that in some cases, the Key Starting Material (KSM) is being provided by the clients while the other materials are procured by

DCAL themselves; that no molecule/API is being provided by the client but only the KSM, which too gets completely consumed in the process of developing the molecule, though in many cases even the KSM is domestically sourced or developed by DCAL; and that the consideration for the activities carried out by DCAL is on a milestone basis, involving various stages of the process specified in the contracts. The letter further states that DCAL performs various tests on the molecule developed by them from the KSM and other ingredients, and after completion of such testing, detailed test report is sent to the clients against which invoices are raised by DCAL; that the development of the molecule takes place stage-wise and on completion of each stage, a test is conducted on various parameters; that in some cases, the clients request for test results and reports which are sent to them for their feedback and approval after which DCAL proceeds to the next stage of development; that at the end of the development process, the sample molecule developed by them may be sorted and released as per pre-determined requirements and is sent to the clients, on request, through courier along with the final report; that any payment being made by the clients is not for procuring the sample but for using the facilities of DCAL for research and development of the sample and all activities undertaken by DCAL are geared to develop the product into a workable molecule; that after receipt of the sample molecule (API), their client may choose to perform various quality, validation and clinical tests on the sample molecule and consequently depending on the validation parameters, they can either accept, reject or ask DCAL to carry on certain modifications on the molecules; and that in all cases, the risk and rewards in respect of the services and sample completely belonged to the respective clients and they are obliged to pay any dues accrued to DCAL during the R&D phase. It is also stated that when the client developed a final product (new chemical entity) from the sample molecule, they submit it for approval from the regulatory bodies; and that once such approval received, their clients may get it patented and engage DCAL or other manufacturers for commercial manufacture of the molecule/API.

3. Apart from the aforesaid general operations which constitute their services, the said letter dated 16.01.2019 also contain details of one specific Work Order (WO) executed by DCAL with TESARO Inc., one of their foreign clients. They have stated that in all other contracts executed with other clients, relating to product development, the services provided by DCAL are similar, though KSMs are not received from some clients. In order better comprehend the matter, I would reproduce Para 2.2 of their letter: -

"2.2 Niraparib Project – TESARO Inc.

2.2.1. TESARO Inc. having its address at 1000 Winter Street, Suite 3300, Waltham, MA 02451, (in short TESARO) had entered into an agreement with Dishman USA, a 100% subsidiary of DCAL, having its address at 476 Union Ave, 2nd Floor Middlesex, NJ 08846 for development of NiraparibTosylate Monohydrate Compound or MK-4827 (in short, Niraparib). It is understood that Niraparib is an orally active and highly potent drug. Niraparib is cat-4 compound according to DCAL system, where cat-4 represents the most hazardous compound category. Dishman USA has outsourced the research and development ofNiraparib to DCAL and is being developed entirely at the Bavla factory of DCAL.

2.2.2. The salient features of such project can be inferred on conjoint perusal of the following:

a. Manufacturing services agreement (MSA) entered between TESARO and Dishman USA;

b. Technical Quality Agreement (TQA) entered amongst TESARO, Dishman USA and DCAL; and

c. Various Work Orders (WO) issued by TESARO.

- *Dishman USA has the power to subcontract the said R&D services to any third party on prior written authorization of TESARO as per Para 4.5 of the MSA. Accordingly, Dishman USA has engaged DCAL as a subcontractor in respect of the same.*

- *DCAL is mandated to deliver the product (sample) as set forth in a WO. Each WO shall specify the scope of services to be provided, set forth the quantity of Product (sample) required, the requested delivery date(s), materials provided by TESARO, if any. Each WO is governed by the terms of the MSA and shall be incorporated therein and form part of the MSA. DCAL shall perform the Services specified in each Work Oder, as amended by any applicable Change Order(s), and in accordance with the terms and conditions of such WO and MSA.*

- *DCAL shall supply, in accordance with the relevant approved raw material specifications, all materials, including but not limited to Raw Materials, Components and Packaging Materials, to be used in providing the Services under a WO (as applicable) other than the TESARO Materials specified in such WO. TESARO remains the owner at all times in respect of such material supplied by it.*

- *The KSM shall be provided by TESARO themselves and DCAL will test TESARO supplied materials and TESARO supplied intermediates using Certificate of Analysis (COA) provided by TESARO. The objective of such testing by DCAL is to check that the KSM meets specification on receipt at DCAL. The KSM would get consumed in the process of developing the Niraparib Compound. Only the sample of the Niraparib Compound, developed by using the KSM and other procured ingredients is to be supplied to the client along with Reports.*

- *TESARO confirms that any material produced as per the WO is meant for research purposes and not to be re-sold or incorporated into other products for re-sale.*

- *After development of the process, the sample/report shall be sent to TESARO in predetermined batches.*

The services provided by DCAL during the R&D activities and development of the molecule includes but is not limited to the following.

***Route Scouting**: The selection of the right route is key to ensure fast development and sale-up across all the project phases and support the API projects requirement. During route scouting activity, a number of routes of synthesis are proposed and explored. These routes are designed using available literature information and the vast experience of the team. Once a sustainable route is identified and proven at laboratory scale, the same is adopted for further implementation in the plant.*

Development of the molecule: DCAL shall develop the Niraparib compound using materials supplied by TESARO as well as from materials procured by themselves. This involves a considerable amount of labour time and use of laboratory equipment.

Analytical Testing Service: As a part of the development of the workable molecule an analytical testing is carried out on the intermediate compound on various parameters. These testing focuses on the method using which the compounds processed by DCAL are analyzed.

Impurity and Identification of by-products: The actual, potential and theoretical impurities of the starting materials as well as by-products, which may occur during the synthesis, are thoroughly investigated; furthermore, their transformation to possible impurities in the drug substances along the new synthetic route is performed to exclude them as actual impurities in the drug substance with certainty. The clients provide the sample impurities for spiking the impurity contained in themolecule developed by DCAL. The impurity carry over study is conducted using various methods like Hi-performance Liquid Chromatography, Nuclear Magnetic Resonance, Gas Chromatography, etc.

This test is also conducted on the raw materials purchased from Non-eGMP vendors to find the ratio of impurity contained and the purification process is carried out to match the standards laid by the United States Code of Federal regulations and related guidelines.

Site Master File: On request, DCAL will provide a copy of the Unit 9 Site Master File. Unit 9 is the Highly Potent Manufacturing Unit within DCAL Bavla. In other cases, the Batch Master Records (BMRs) are also sent to the clients for analysis at their end.

Hold Time Study: It is conducted to establish the time limits of holding the materials at different stage of production by assuring that the quality of product does not deteriorate during the hold time and the material can be used for further processing. A report shall be provided to TESARO on completion of the study.

Storage Services: DCAL facilitates storing of the sample compounds and intermediate molecules, being hazardous in nature, in highly restricted areas.

Stability study and testing: It is conducted for evaluation of API stability under the influence of a variety of environmental factors such as temperature, humidity and light. Data from these studies enable recommended storage conditions, retest intervals and shelf lives to be established. A report shall be provided to TESARO on completion of the testing.

Validation Testing: It is conducted for establishing documentary evidence demonstrating that a process, or activity carried out in testing and then production maintains the desired level of compliance at all stages. It is to assure that the process will consistentlyproduce the same result over and over again.

Reimbursement: DCAL procures some materials and equipment themselves on behalf of TESARO and claims reimbursements for the same.

Calibration of equipment: DCAL recalibrates many of its equipment in its manufacturing facilities as per specifications of TESARO and charges it for the same.

Release testing: It involves analytical testing of the quality attributes of the API prior to DCAL Release in accordance with the predefined product specifications.

Capacity Reservation Fee: As per the TQA, the Niraparib compound and its intermediaries would be produced in Unit 9, which is a highly potent manufacturing unit within Bavla factory of DCAL. In view of the same, TESARO reserves all the capacities available in the block before the tentative date of start of production and before sharing the protocol with the manufacturer. DCA charges the customer against the aforesaid reservation. No testing is involved in respect of the same.

Shipment of samples: DCAL will perform tests on a sample of each batch to enable sample shipment. DCAL will issue an analytical test result to be used for sample shipment purpose only. The samples shall be sent by courier. They would be packaged and sorted as per the specification of TESARO.

Reprocessing: It involves repeating one or more steps of the approved manufacturing process to improve quality or purity.

Protocol Validation: This involves review of the Route of synthesis provided by TESARO and accordingly determine future specifications.

Reworking: It involves performing, in order to improve quality or purity, a manufacturing process that differs from the previously approved manufacturing process that was already performed."

4. I find that the defence reply dated 02.05.2019 submitted by the said assessee also contain the aforesaid general and specific testimonials. The aforesaid categorical explanation and statements given by the said assessee to DGGI during the course of investigation vide letter dated 16.01.2019 illustrates the stage-wise development process of target molecules undertaken by them, besides specifically stating that as a matter of practice, their clients do not provide any drug, molecule/API but only the detailed development procedure or route of synthesis, though in some cases they provide only the KSM which too gets completely consumed in the synthesizing process of target molecules.The specimen work order for NiraparibTosylate Monohydrate Compound produced by the assessee categorically states that the KSM provided by their foreign client would get consumed during the process of developing such compound. It is also specifically stated that DCAL will develop the target compound by using the materials supplied by the principal as well as from materials procured by themselves during the contract. It is further stated that as part of developing the target molecule/compound, they would conduct analytical testing on the intermediate goods at various stages of process. In spite of these specific claims, I find that the SCN does not refute such testimonials with any material evidences but merely creates an unsubstantiated impression that DCAL invariably received some drugs, molecules/API from their foreign clients in all cases whereupon they simply carry out some technical testing and analysis services. In fact, a simple reading of the SCN would give a wrong perception that the said assessee was engaged solely in the activity of '*technical testing and analysis services*' on the drugs and molecule/API provided or made available to them by their foreign clients. However, a careful perusal of the aforesaid general provisions of service rendered by DCAL in all cases and the specific activities carried out in the aforesaid specimen case of TESARO makes it abundantly clear that the activities undertaken by them are more of a kind of '*research and development of a target molecule of API*', i.e. documented research in relation to molecules and the stage-wise development of a

target chemical compound which is suitable to function as molecules/API for pharmaceutical products. They have illustrated the stage-wise process of synthesizing the molecule, right from route scouting to final reporting which obviously involve testing and analysis at multiple levels, with such test reports sent to their clients at different stages for appraisal and clearance. It is also specifically stated that the consideration they receive from their clients is not for supplying them any sample but for the consistent usage of their R&D facilities; and that based on the final sample molecule/API developed by DCAL, their clients would carry out further tests and validation of the product before developing a final product (new chemical entity) and submitting it for approval from regulatory bodies; and that once such approval received, their clients may get it patented and engage DCAL or other manufacturers for commercial manufacture of the molecule/API. In the absence of any specific evidences on records to prove to the contrary, I am constrained to accept these statements of DCAL that, as a matter of practice in all cases, they receive either route synthesis or KSM from their foreign clients whereupon they carry out further research and development activities involving procurement of raw materials, stage-wise testing, analysis, reporting, and advancement of the target molecules. Due to the same reasons, I am not convinced with the statement made in Para 2 and 4 of the SCN that the said assessee was receiving goods such as "drug" or "Molecule/API" from their foreign clients for technical testing and analysis.

5. With the advent of negative list regime for levy of service tax with effect from 01.07.2012, classification of services as provided under the erstwhile section 65A of the Finance Act, 1994 became redundant and service tax became leviable on the '*service*' as defined under section 65B(44) of the Act. However, since the SCN is harping on the term '*technical testing and analysis*' as the serviceprovided out by DCAL which cast an imprint while discussing the legality of the issue under Rule 6A of the Service Tax Rules, 1994 or Rule 4(a) of the Place of Provision of Services Rules, 2012 mentioned above, I consider it pertinent to discuss the activity carried out by DCAL in the light of the definition of '*technical testing and analysis service*' as it existed before 01.07.2012 under section 65(106) of the Finance Act, 1994 and read as: -

"(106) "technical testing and analysis" means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or information technology software or any immovable property, but does not include any testing or analysis service provided in relation to human beings or animals;

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause, "technical testing and analysis" includes testing and analysis

undertaken for the purpose of clinical testing of drugs and formulations; but does not include testing or analysis for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals;"

6. The above definition unambiguously indicates that the '*technical testing and analysis service*' would constitute physical, chemical, biological or any other scientific testing or analysis of *goods or material*. Thus, the definition covers various types of testing or analysis which are carried out primarily on some tangible goods or materials. This would mean that the activity of technical testing or analysis is required to be carried out for testing or ascertaining the physical, chemical, biological or any other scientific parameters of a given target of tangible goods. Meanwhile, the nature of services carried out by DCAL, as discussed earlier above, reveals that they develop a target molecule which is further intended to be integrated by their foreign clients an API/pharmaceutical compound by using the different materials which include the KSM, where the KSM is either supplied by their foreign clients or procured by them locally or developed by themselves by using the route synthesis prescribed by such clients. Although the explanation given under the sub-section supra also includes testing and analysis on drugs and formulations, the present testing process carried out by DCAL does not include any drugs or formulations, but it involves a research molecule which would further be used in developing and manufacturing drugs or formulations, etc. It is also observed that during the stage-wise synthesis of developing the candidate molecule/API, the KSM gets consumed, irrespective of whether it was supplied by the foreign clients or procured by themselves from outside or developed by in-house synthesis. Thus, although the said assessee undertakes multiple testing and analysis right from the route synthesis through the process of development of candidate molecule, it cannot be said that such testing and analysis was carried out in respect of any specific goods or materials, or drugs or formulations for its physical, chemical, biological or scientific properties. In common parlance, in technical testing and analysis service, the goods/product on which such testing and analysis was undertaken remains intact and are returned to the client along with test reports and analytics. However, the details provided by DCAL reveal that even the KSM received by them in some cases gets consumed during the research and development process. It cannot be said that the said assessee was conducting any testing or analysis of the KSM received from their clients in such cases, but on the intermediate goods and candidate molecules at various stages of its rout scouting and synthesis. It is stated that as a result of the route synthesis, research and development, DCAL develop an altogether different item which is the candidate molecule further to be integrated and as the pharmaceutical API. It is also stated that during the route scouting and synthesis procedures, DCAL conduct testing and

analysis at multiple stages, and send the test results and analytics to their foreign clients through email for follow up augmentation and escalation to further subsequent stages. Even the final outcome of the service undertaken by DCAL results in developing the target molecule/API is integrally attached with the test reports and analytics. Therefore, I am of the view that the service carried out by DCAL is more of the nature of '*research and development* 'comprisingrout scouting, several stage-wise scientific research, testing and analysis right from conceptualization, route synthesis and developmentinvolvingvarious materials such as KSM, raw materials, intermediates and the developed target molecule. Such research and development (R&D) process is a critical stage in drug development in the pharmaceutical industry, wherein the process starts after an initial candidate drug is identified and encompasses the rigorous research tests that determine its therapeutic suitability. Similarly, analytical service support both process control and material characterization for R&D and manufacturing operations, from initial raw material release through to the release of the final APIs. In fact, I am of the opinion that such stage-wise testing and analysis is being carried out by DCAL not on any specific molecule/KSM, even if provided by their clients, but on the various stages of research process involving intermediate, semi-finished or finished candidate molecules.

7. Having discussed about the nature of services carried out by DCAL, I would now examine the legality of the issue involved, in the light of Rule6A of the Service Tax Rules, 1994 (STR)andRule 4(a) of the Place of Provision of Services Rules, 2012 (POPS Rules). SCN states that the services provided by the said assessee do not satisfy the condition (d) provided under Rule 6A of the Service Tax Rules, 1944 hence cannot be considered as '*export of service*'. For ease of understanding, the said Rule 6A is reproduced as follows: -

> *"6A. Export of services.- (1) The provision of any service 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 the 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 in 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"*

8. Although Rule 6A provides six conditions to constitute a service to be qualified as export, I find that the SCN alleges violation of only condition (d), which prescribes that the place of provision of service should be outside India. In this regard,

SCN alleges that the said assessee was encompassed under Rule 4(a) of the Place of Provision of Services Rules, 2012 which in turn, makes them ineligible for the aforesaid condition (d) of Rule 6A of the STR, 1994. Rule 4(a) of the said POPS Rules reads as follows: -

> *"4.Place of provision of performance based services.- The place of provision of following services shall be the location where the services are actually performed, namely:-*
>
> *(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:*
>
> *Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:*
>
> *Provided further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair.*
>
> *(b) services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service."[Underlined for emphasis]*

9. It is the case of the department that since DCAL has carried out technical testing and analysis service on the drug, molecule/API provided/made physically available to them by their foreign clients, place of provision of such service shall be the location of the service provider in terms of Rule 4(a) of POPS Rules and hence such services provided by them cannot be considered as export in terms of Rule 6A of STR, 1994. In order to bolster its case, department has referred to Para 5.4 of the Education Guide dated 20.06.2012 published by CBEC, which carries following clarification: -

> *"5.4 Rule 4- Performance based Services*
> *5.4.1 What are the services that are provided "in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service"?- sub-rule (1):*
>
> *Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/inspection/certification/analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of*

the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys."[Underlined for emphasis]

10. A harmonious reading of the above Rule 4(a) of POPS Rules and the clarification given by CBEC would make it abundantly clear that the performance based services referred therein are the services which are provided specifically in respect of some goods, and such goods are essentially required to be provided or to be made physically available by the service recipient to the service provider, without which the services cannot be rendered. The usage of the word '*goods*" or the type of "*goods-based services*" specified in the examples cited in the Education Guide, viz. repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/inspection/certification/analysis of goods, dry cleaning etc. further make this point free from any ambiguity. Further, the example of market research service not being covered in this category as stated in the same Para 5.4.1, is similar to the present case where such survey can be conducted with or without sample packets of detergents. In the same way, DCAL can render the aforesaid services with or without their foreign clients providing KSM for route scouting. I am unable to get convinced by the inference drawn in the SCN that DCAL has provided their specified services in respect of the goods, i.e. drugs, molecule/API provided by their foreign clients; that such drugs, molecule/API temporarily came into the physical possession or control of the service provider; and that without this happening, the services cannot be rendered, etc. due to the following facts emerging out of the aforesaid discussion: -

(i) DCAL has not provided anytechnical testing or analysis service '*in respect of the goods*" provided by their clients, but conducted research for the synthesis and development of a target molecule/API as per the route scouting, and conducted testing and analysis of such candidate molecule at different stages of its synthesis as KSM, raw materials, intermediate goods, semi-finished goods, and finished molecule, etc.

(ii) SCN states that the clients had provided or made physically available drugs, molecule/API to DCAL. While molecule/API is the end result of the research and development synthesis undertaken by DCAL, the question of it being a drug arises only after the clients approving the candidate molecule/APIand after their

testing and validation, getting it patented before commercially integrated for manufacturing pharmaceutical drugs or formulations.

(iii) Service provided by DCAL is not related to any specified goods, which required such goods to be made physically available by the service receiver. No goods or materials provided by the clients remained physically available through the process of service rendered by DCAL. Even where the clients had provided KSM, such KSM ceased its physical existence when consumed into the synthesis process along with various other raw materials.

(iv) Clients have not supplied any molecule/API to DCAL on which any technical testing and analysis was required to be carried out by DCAL. While in some cases, clients have supplied KSM, in other cases DCAL has sourced or developed such KSM out of the route synthesis provided by the clients. Even such KSM was consumed during the process of research and development of target molecule. Therefore, it cannot be said that the service cannot be rendered without any KSM physically supplied by the client, or temporarily coming into the physical possession or control of DCAL;

(v) The performance based services discussed in Rule 4 of POPS Rules and in the Education Guide requires a definite supply of goods for the purpose of testing and analysis, without which the service cannot be undertaken at all. It is illustrated in the examples, such as, there cannot be a courier service, storage or warehousing without parcels/packets, there cannot be a cargo handling service of loading, unloading, packing or unpacking without presence of some cargo, there cannot be dry cleaning without clothes, and there cannot be testing/inspection without some goods. While the clarification specifies that such parcels/packets/cargo/clothes/goods are invariably supplied by the client (or made available by them), it categorically excludes services where the supply of goods by the receiver is not material to the rendering of the service; and

(v) DCAL have not rendered any '*technical testing and analysis of goods*" in which context it is mentioned in the CBEC Education Guide,and the examples cited in Para 5.4.1 supra substantiates this point. The services were not of technical testing analysis of '*any specific goods*' but more of the nature of research, and development synthesis of a target molecule/API/pharmaceutical compound, although technical testing and analytics are involved in multiple stages of synthesis and route scouting.

11. Therefore, I am of the considered view that the services related to research, synthesis and development of molecules/API rendered by the said assessee to their foreign clients, as discussed in the foregoing paras, are not the type as specified in Para 5.4 of CBEC's Education Guide or as mentioned in Rule 4(a) of the POPS Rules, 2012 and consequently not excluded from '*Export of Services*" by way of any contravention of condition (d) of Rule 6A of STR, 1994. My views are fully supported by the following clarifications available in the same Chapter- 5 (Guidance Note) of the CBEC's Education Guide, which specifically deals with the POPS Rules, 2012 as discussed in the following paras.

12. As per Para 5.1.3 of the Education Guide, the essence of indirect taxation is that a service should be taxed in the jurisdiction of its consumption, and this principle is more or less universally applied. 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. The basic philosophy of framing POPS Rules, 2012 is stated to make determination of the taxing jurisdiction easier, especially for persons who deal in cross-border services. The examples specified in the said para discuss the situations where multiple locations are involved for the service provider or service recipients or both, and where third-parties are involved, etc. Since the services rendered by DCAL to their foreign clients are on principal-to-principal basis without involvement of any third parties or multiple locations, I am of the view that the specific provisions of performance-based services as given in Rule 4 of POPS Rules are not applicable in the present case of DCAL. I draw support in this regard from Rule 13 of POPS Rules, which is an enabling power to correct any injustice being met due to the applicability of rules in a foreign territory in a manner which is inconsistent leading to double taxation. Para 5.13 of the Education Guide clarifies that Rule 13 is in place due to the cross border nature of many services, wherein it is also possible in certain situations to set up businesses in a non-taxable territory while the effective enjoyment, or in other words consumption, may be in taxable territory; and that the Rule is also meant as an anti-avoidance measure where the intent of the law is sought to be defeated through ingenious practices unknown to the ordinary ways of conducting business. Thus, it is evidently clear that the provisions of POPS Rules, 2012 would come into play only when there is a difficulty in determining the correct place of provision of service, due to existence of multiple persons and locations or a camouflaged web of transactions. Where the services are rendered on principal-to-principal basis with no third parties or third locations involved, the question of invoking the exceptional provisions of POPS Rules is superfluous. This is in terms

with the intention of the legislature as specified in Para 5.1 and Para 5.13 of the said Education Guide.

13. Therefore, in the absence of any specific ingredients which cast any doubt over the taxing jurisdiction of the subject services rendered by DCAL to their foreign clients, the question of invoking specific Rule 4 of POPS Rules, 2012 over the main rule or default Rule 3 ibid is unwarranted. This view is supported by Para 5.3.1 of the same Education Guide which clarifies the applicability of the said Main Rule 3, which reads: -

> *"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 is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules- see para 5.14 of this guidance paper). 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.*
>
> *The principal effect of the Main Rule is that:-*
> *A. Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.*
> *B. However if the receiver is located outside the taxable territory, no service tax will be payable on the said service."*

14. With none of the subsequent specific rules, including Rule 4, are applicable in the present case, as discussed above, the provisions of Rule 3 of POPS Rules, 2012 will remain in full force, according to which the place of provision shall be the location where the service recipient is located and where the services rendered by DCAL are consumed. This is to be read in harmony with the aforesaid clarifications provided under Para 5.1.3 of the Education Guide, as discussed above, which states that the essence of indirect taxation is that a service should be taxed in the jurisdiction of its consumption, and that this principle is more or less universally applied.

15. I also find that according to Rule 14 of POPS Rules, 2012 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 meritequal consideration. As per Para 5.14.1 of the Education Guide, 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*. It is the case of the department that the present matter is falling under Rule 4(a) of POPS Rules, hence by applying the ratio of Rule 14, the provisions of Rule 4 which come

later in the rules will prevail over Rule 3 *ibid.* I am not convinced with this inference in the light of the aforesaid discussions which revealed that Rule 4 is not at all applicable in the present case, as the service is not rendered "*in respect of any specific goods*" provided by the foreign clients, besides the service is not something which cannot be carried out by DCAL without any such goods provided by the clients. Since two different rules from the POPS Rules are not '*equally applicable*' in this case, Rule 3which is the main rule or default rule will prevail, and accordingly the place of provision of the service shall be the location of the recipient of service. Consequently, I find that there is no violation of condition (d) of Rule 6A of STR, 1994 as made out in the SCN and therefore, the services rendered by DCAL to their foreign clients would qualify as '*Export of Services*' as specified in the said Rule 6A ibid.

16. I have also gone through the various case laws that finally settled the present issue. In the case of *All India Federation of Tax Practitioners Vs. UOI cited at 2007 (7) STR 625 (SC)* Hon'ble Supreme Court has examined the constitutional aspects of levying service tax, and observed in Para 7 of the judgment that Service Tax is a value added tax which in turn is *destination based consumption tax* in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable *only on services provided* within the country. Further, Hon'ble High Court of Bombay has also examined a similar case in *re SGS India Pvt. Ltd. cited at 2014 (34) STR 554 (Bom)*and observed that if a service is consumed outside India, it will be considered as exports and not taxable in India. Although the said assessee had cited these case law during the investigation, SCN states that the same is not applicable as it pertains to the period prior to introduction of POPS Rules, 2012. I am unable to accept this observation made in the SCN, as the said judgmentsdelivered in respect of constitutional provisions of taxation that would not undergo any change with or without POPS Rules. I have no doubt that aforesaid judgments uphold the constitutional essence of taxation on export matters, which does not change with or without POPS Rules, and hence universally valid for deciding present dispute. It is the same constitutional intent that is clarified in Para 5.1.3 of the Education Guide, as discussed in the foregoing paras, which also do not change with the advent of POPS Rules. Further, the facts are also not disputed to the extent that the service is consumed in a foreign location. Further, the aforesaid stand taken by the department has already been annulled by Tribunal in re *FertinPharma Research & Development India Pvt. Ltd. cited at 2020 (38) GSTL 33 (Tri.Mum)* which is discussed later in this order. Therefore, I find the SCN wrongly disproved the validity of the aforesaid case laws cited by the said assessee during the investigation.

17. Further, in the case of *Advinus Therapeutics Ltd. cited in 217 (51) STR 298 (Tri. Mum)*, Hon'ble Tribunal has examined almost of all the aspects ascovered in the case DCAL. I find that the ratio of this decision is squarely applicable in the present case. In this case also, the respondent was a 100% EOU and rendering 'scientific or technical consultancy service', by entering into agreements with their foreign clients for generation of candidate compounds for pharmaceutical products on certain drug targets through research and drug development by using information supplied by their client. The first appellate authority had decided refund cases in favour of the respondent by observing that they are in the business of rendering 'scientific or technical consultancy services' and has earned convertible foreign currency by rendering these services during the relevant periods. Contention of the Revenue was that place of provision of service is in India because Rule 4 of Place of Provision of Services, 2012 stipulates that when 'the service is provided in respect of goods that are required to be made physically available by the recipient of the service to the provider of service', and that the place of provision of service is the location of the performance of service. It was also contended that this must be read in consonance with Rule 6A of Service Tax Rules, 1994 with effect from 01.07.2012. Reliance was also placed on Guidance Note 5.1.4 of the Education Guide dated 20.06.2012 published by CBEC (supra) which pertaining to Rule 4 of Place of Provision of Service, 2012. After examining the circumstances of introducing POPS Rules, 2012, Tribunal observed that the said rules were notified owing to the altered circumstances of incorporation of Section 66B as substitute for Section 66 of Finance Act, 1994 with effect from 01.07.2012; consequently, the taxability of service was, thenceforth, not amenable to identification from the transaction defined in various sub-clauses of Section 65(105) of Finance Act, 1994. While considering the plea made by department to apply the place of provision as India, Tribunal observed that if accepted, it would jeopardize the privilege of exporters, and moreover, that proposition would also lead to taxing the activities of the respondent for, if the place of provision of the service is India, it would place the consideration received thereof, notwithstanding its receipt from an overseas entity in convertible foreign currency, within the ambit of taxation under Section 66B of Finance Act, 1994; and that it is moot if such an interpretation of Place of Provision of Services Rules, 2012 can create a jurisdiction to tax and should be allowed to prevail over the principle that taxes are not be exported with goods or services. The following part of the judgment would settle most of the points raised in the present SCN issued to DCAL: -

> *"12. .....The 'negative list' regime was not intended to be either detrimental or beneficial to existing assessees except where such intent was specifically sanctioned by legislation. The respondent, prior to 1st July, 2012, was eligible for all benefits as the service rendered by them were treated as export with the recipient of the*

service being outside the country. The corresponding provision in Place of Provision of Services Rules, 2012 is Rule 3 which brings the service within the ambit of export of service in Rule 6A of Service Tax Rules, 1994. Revenue has not made any submission of legislative intent to deprive a provider of 'scientific or technical consultancy service' in the erstwhile regime of its status as exporter of service owing to change in the regime.

13. In the context of a catena of judgments and decisions that exports are not taxable and, with the most palpable manifestation of export of invisibles being the receipt of convertible foreign exchange from a recipient of service located outside the country, that services are taxable at the destination, the scope of Rule 4 must necessarily be scrutinized to ascertain if there was, indeed, legislative intent to deny acknowledgement as exporter to a certain category of service providers that were so privileged tell them. There is no dispute that the recipient of service is located outside India and that the consideration is received in foreign convertible currency. Yet, Revenue insists that performance of service is in India. A service is not necessarily a single, discrete, identifiable activity; on the contrary, it is a series of invisibles that cater to the needs of a recipient; it is upon the consumption of the service by the recipient that service is deemed to have become taxable. This has been so held by the Hon'ble Supreme Court in All India Federation of Tax Practitioners v. Union of India & others [2007 (7) S.T.R. 625 (S.C.)] below :

> *'7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable on services provided within the country.'*

It would appear from the exposition in the judgment that the tax was intended as a levy on activities that would otherwise be performed by the recipient for itself. The new industry of hiving out or outsourcing of what was, conceivably, being done within the enterprise was intended to be subject to the new levy. In the matter of service rendered by respondent, this activity could, but for commercial viability, will be executed by the recipient within its own organization or the territory in which it exists. The satisfaction of the customer occurs upon an outcome which is possessed by the recipient. Hence, even if some of the activities are carried out in India, by no stretch can it be asserted that the fulfilment of the activity is in India. Therefore, the inescapable conclusion is that the location of the actual performance of the service is outside India and, even with the special and specific provision of Rule 4 of Place of Provision of Services Rules, 2012, the performance of service being rendered outside India would render it to be an export.

14. In this context, the legislative intent of incorporating a special and specific provision in Rule 4 may yield further insights. The special provision, which may be seen as an exception to the general Rule 3, deals with services in respect of goods as well as those provided to individuals. .....

.....

.....

The intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 of Place of Provision of Services Rules, 2012 may not serve to confer jurisdiction becomes increasingly obvious.

15. Accordingly, we can infer that the location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; for that, Rule 3 would have sufficed. A contingency that is not amenable to Rule 3 has been foreseen and remedied by Rule 4 and in the process, the sovereign jurisdiction to tax is asserted. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Services Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. It is obviously not intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, ipso facto, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable

to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable. This is in consonance with the privilege of exemption afforded to export of services. The special and distinct role of Rule 4 becomes clearer.

16. Not intended to tax the activity of altering goods supplied by the recipient of service or for repairs on goods, Rule 4(1) of Place of Provision of Services Rules, 2012 would appear, by elimination of possibilities, to relate to goods that require some activity to be performed without altering its form. The exemplification in the Education Guide referred supra renders it pellucid. Certification is an important facet of trade and such certification, if undertaken in India, will not be able to escape tax by reference to location of the entity which entrusted the activity to the service provider in India. This is merely one situation but it should suffice for us to enunciate that Rule 4(1) is intended to resorted when services are rendered on goods without altering its form that in which it was made available to the service provider. This is the harmonious construct that can be placed on the applicability of Rule 4 in the context of tax on services and the general principle that taxes are not exported with services or goods.

17. The goods supplied to the respondent, minor though the proportion may be, are subject to alteration in the course of research. It is not asserted anywhere that these goods, in its altered or unaltered form, are sent back to the service recipient; if it were, the provisions of Customs Act, 1962 would be invoked to eliminate tax burden. If the goods cease to exist in the form in which it has been supplied, it cannot be said that services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods. Consequently, the provisions of Rule 4(1) are not attracted and, in terms of Rule 6A of Service Tax Rules, 1994, the definition of export of services is applicable thus entitling the appellant to eligibility under Rule 5 of Cenvat Credit Rules, 2004.

18. By this elaboration, we have amplified our earlier decision in (re Sai Life Sciences Ltd.) that it is contrary to law to isolate an expression in a rule to deny the general principle built into all indirect tax statutes for exempting export of services from levy. Reiterating the consistent judicial stand, we hold the respondents to be entitled to refund of accumulated Cenvat credit.

19. Appeals of Revenue are dismissed. Cross-objections are also disposed of."

18. Again, in the case of *FertinPharma Research & Development India Pvt. Ltd. cited at 2020 (38) GSTL 33 (Tri.Mum)*, Tribunal had examined a similar case to determine whether the activity qualified '*export of services*' as per Rule 6A of Service Tax Rules, 1994 in the light of the provisions of Rule 4 of Place of Provision of Services Rule, 2012. While allowing refund of the cash credit arose by considering 'export of services', Tribunal observed as under: -

"8. I do not find merit in the contention of the Learned AR for the Revenue that the ratio laid down by the Hon'ble Bombay High Court in M/s. SGS India Ltd.'s case (supra) cannot be made applicable to the facts of the present case on the ground that in the said case, the Place of Provision of Services Rules, 2012 was not considered. This Tribunal while interpreting the provisions of new Rules, that is, Place of Provision of Services Rules, 2012 followed the ratio laid down in the said case in reiterating the basic principle of levy of service tax and observed that it is a consumption-based levy, accordingly, the technical and consultancy service, commences from the stage of undertaking the test on the goods procured and the service is completed on delivery of the test report/certificate to the overseas client. I do not find any reason to deviate from the aforesaid observation of this Tribunal. Further, the judgments referred by the Learned AR for the Revenue, in my opinion, are not relevant to the facts of the present case, inasmuch as in the said judgment the issue raised was levy of service tax on procurement of FDA certificate for the goods to be sold in the respective country. In the result, following the aforesaid

precedent, I do not find merit in the impugned order to the extent of holding that the services provided by the appellant are not the export service under Rule 6A of Service Tax Rules, 1994....."

19. In yet another similar case of *Steps Therapeutics Ltd. reported at 2017 (49) S.T.R. 114 (AAR),* Advance Ruling Authority has ordered that while clinical pharmacology and clinical research undertaken by the applicant in respect of the goods (tablets, capsules, syrup, etc.) for their foreign clients are taxable in terms of Rule 4 of POPS Rules, 2012, where service of clinical pharmacology is not provided by the applicant and only service of clinical research is provided, then such service would not be in relation to formulation provided by the service receiver located outside India, to the applicant, and hence, it would be not be taxable under the Act in light of Rule 3 of the Place of Provision of Services (POP) Rules, 2012 as the applicant renders said services to its customers and the place of provision is located outside India. It is observed that where service of clinical pharmacology (which is provided in respect of formulations received from service receiver located outside India) is not provided by the applicant and only service of clinical research is provided, then this service would not be in relation to the formulation.

20. Hon'ble Tribunal in the case *in re Sai Life Sciences Ltd. cited at 2016 (42) STR 882 (Tri.Mum)*, had rejected an appeal filed by the department after examining the provisions of POPS Rules, 2012 along with the clarifications issued under CBEC Education Guide to determine exportability of service. In this case, although some chemicals for research were provided by service recipient, it was held that the services provided are not in relation to these materials to invoke bar in terms of Rule 4 of Place of Provisions of Services Rules, 2012. It was also considered a settled law that Service Tax being a destination based tax, services which are received abroad and payment of which remitted in foreign exchange, are covered in export of services. Relevant portion of the said judgment is reproduced below: -

"The refund claims were rejected on the ground that in accordance with Rule 4 of Place of Provisions of Service Rules, 2012 performance of the service was within the country and hence the activities of M/s. Sai Life Sciences Ltd. did not amount to export of services. The first appellate authority has concluded that the two necessary conditions for classifying the place of provisions of service are that the goods are to be made available to the service provider and services are to be provided in respect of the goods. While acknowledging that some of the chemicals required for research and development are provided by the clients of the appellant and hence the condition that goods be made available by the service recipient has been complied with, the impugned order, holding that services are not rendered in relation to these materials, notes as below :

"The 'deliverables' by the Appellants are neither supplied or owned by the service receiver nor the Appellants are providing any service in respect of the deliverables. Synthesis of a new compound using various chemicals, solvents, reagents, compounds

cannot be called as service in respect of the said chemicals, solvents, compounds. Further, the Appellants are formulating the process of the manufacture of the new compounds and the process is being sent to their clients/service receiver. It is seen from the detail service agreement that the Appellants are engaged into converting compound 120 into compound 129."

"3. Learned Authorized Representative has cited specific provisions of Provisions of Services Rules, 2012. Further reliance was placed on Note 5 of the Service Tax Education Guide which relates to Place of Provision of Services Rules, 2012.

4. Learned Counsel for the respondent has placed reliance on the decision of this Tribunal in SGS India Pvt. Ltd. v. Commissioner of Service Tax, Mumbai [2011 (24) S.T.R. 60 (Tri.-Mumbai)], which was upheld by the Hon'ble High Court of Bombay [2014 (34) S.T.R. 554 (Bom.)], and the relevant finding therein :

"8. The view taken by the Central Board of Excise and Customs vide Circular No. 66/2005-S.T., is that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/99-S.T., dated 9-4-1999. The Board was examining the effect of withdrawal of Notification No. 6/99-S.T. This Notification exempted the taxable service specified in Section 65(48) of the Finance Act, 1994 provided to any person, in respect of which payment was received in India in convertible foreign exchange, from payment of service tax. The Notification, in a proviso, laid down that nothing contained in the Notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered was repatriated from or sent outside India. It was this Notification which was rescinded by Central Government by issuing Notification No. 2/2003-S.T., dated 1-3-2003. The Board was called upon to consider representations received from service sector, wherein an apprehension was raised that export of service would be affected adversely in the international market on account of withdrawal of Notification No. 6/99-S.T. The Board dispelled this apprehension by clarifying that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/99-S.T. This clarification is certainly binding on the Revenue. Consequently, it has to be held that the reinstatement of the above exemption through Notification No. 21/2003-S.T., dated 20-11-2003 cannot detract from the correct legal position clarified by the Board. For this reason, we hold that there can be no demand of service tax on the appellant on the ground that exemption Notification No. 6/99-S.T. was withdrawn in March, 2003 and identical exemption was reintroduced in November, 2003. As a matter of fact, none of the notifications referred to 'export of services'. Again, as a matter of fact, the Central Board of Excise & Customs held 'export of services' to be tax-free notwithstanding the notifications. The law which categorically exempted export of services from payment of service tax was brought into force for the first time through the Export of Services Rules, 2005. Undoubtedly, the period of demand, in the present case, is prior to 2005.

9. The view taken hereinbefore is supported by the judgment of the Hon'ble Supreme Court in All India Federation of Tax Practitioners' case (supra), wherein it was held that service tax was a destination-based consumption tax in the sense that it was on commercial activities and was not a charge on the business but on the consumer. The emphasis is on consumption of service. In the instant case, the services rendered by the appellant were consumed abroad where the appellant's clients used the service of inspection/test/analysis to decide whether the goods intended to be imported by them from India conformed to the requisite specifications and standards. In other words, the benefit of the service accrued to the foreign clients outside the Indian territory. By no stretch of imagination can it be said that there was no export of service. The services, in question, were exported. Export of service has ever been tax-free as observed by the CBEC. This exemption has never been affected by Notification No. 6/99-S.T. or its rescission. Ultimately, therefore, we hold that no service tax was leviable from the appellant."

5. In view of those principles emphasized time and again and reiterated as above, the appeal is devoid of merits and is accordingly rejected. The stay petitions are also disposed of.

21. I have also examined the case law cited by the said assessee while filing their final submission dated 12.04.2021, other than those already discussed in

the foregoing paras. CESTAT, Mumbai's Final Order No. A/86582/2019 dated 06.09.2019 in the case of *Dow Chemical International Pvt. Ltd.cited at 2020 (33) GSTL 424 (Tri.Mum)*clearly concludes, after discussing the provisions of POPS Rules, aforesaid clarifications given in the Education Guide as well as the decision of *Sai Life Sciences Ltd. and Advinus Therapeutics Ltd.* (both supra), that the research activity performed by assessee leads to formation of new product different from original raw material, therefore Rule 4 of POPS Rules not applicable; and that Research & development service falls under Rule 3 of Place of Provision of Services Rules, 2012, according to which, location of service provider shall be constructed as location of recipient who is outside India therefore said service shall be treated as export of service.

22. I find that the aforesaid case laws irrefutably establish that the research and development activities of the type as carried out by DCAL for synthesis of a target/candidate molecule/API/chemical compound, with or without any KSM or any other goods or materials provided or physically made available by their foreign clients, would not be considered having rendered in respect of any goods, without which the service could not have been provided, and hence not covered under the purview of Rule 4(a) of the POPS Rules, 2012, hence, consequently, not excluded by way of condition (d) provided under Rule 6A of STR, 1994. Accordingly, I hold that the "*services*" rendered by DCAL to their foreign clients in the present case fully satisfy the definition of '*export of services*' in terms of Rule 6A of STR, 1994 read with Rule 3 of POPS Rules, 2012 and therefore, the demand raised under the subject SCN would not survive the test of law.

22. Although the aforesaid factual and legal position of the issue disprove the demand *per se* raised in the subject SCN, I find that M/s. DPCL has also opposed the manner and method of quantification of demand, stating that the total value of exports considered for computation of the demand also included the value of exports which are beyond the scope of the issue involved. I have examined this issue in the light of the documents submitted by DPCL during this proceedings. The SCN states that DPCL had charged taxable value of total Rs. 166,63,33,922/- from their foreign clients towards provision of the servicesof the type as discussed in the foregoing paras. It is true that the SCN has been issued on a singular issue that M/s. DPCL had carried out technical testing and analysis service on the KSM molecules supplied by their foreign clients, which violates the provisions of Rule 4(a) of POPS Rules and consequently Rule 6A of STR. I find that M/s. DPCL had been claiming during the investigation, as could be seen from their letter dated 16.01.2019, as well as during

the present proceedings that apart from carrying out route synthesis on the KSM supplied by their foreign clients, there are also several instances where DPCL had developed or procured such KSM domestically on their own on which they carried out similar route synthesis. I find from their reply dated 20.08.2020 and from their final submission dated 12.04.2021 that M/s. DPCL have furnished bifurcation of the aforesaid total export value of Rs. 166,63,33,922/-, as tabulated below: -

Sl No.	Nature of income	Amount (Rs)	Brief explanation of income
1	Export of services where KSM provided by the foreign clients	25,31,91,171	Income pertains to the technical testing and analysis provided to the recipients located outside India where the key materials are provided by such recipients.
2	Storage charges	16,94,467	Income pertains to the charges for storing the goods belonging to the service recipients, in the premises of our company.
3	Export of services where KSM are not provided by the foreign clients	56,35,43,096	Income pertains to the technical testing and analysis provided to the recipients located outside India where the no materials are provided by such recipients.
4	Export of goods	83,87,33,472	Income pertains to the goods manufactured by the company and exported outside India. This income is not towards provision of services, however the same was inadvertently shown as provision of service in the ST-3 return.
5	Sale of goods in India	6,18,300	Income pertains to the goods manufactured by the company and delivered in India. This income is not towards provision of services, however the same was inadvertently shown as provision of service in the ST-3 return.
6	Cancelled invoices inadvertently shown in ST-3 return	85,53,416	Invoices for this income were cancelled by issuing credit note. Although this cannot be construed as income the same was inadvertently shown in the ST-3 return.
TOTAL		166,63,33,922	

23. A simple perusal of the descriptions in Col. 2 and 4 of the above chart, which has also been certified by a chartered accountant as per the CA certificate submitted under their letter dated 12.04.2021, clearly reveals that except for Sl. No. 1 of the table which involves a total value of Rs. 25,31,91,171/-, none of the remaining receipts appearing against Sl. Nos. 2 to 6, cover the issues involved in the present dispute. In other words, the actual export receipts against technical testing and

analysis services carried out by M/s. DPCL on the KSM supplied by their foreign clients, was only to the extent of Rs. 25,31,91,171/- as against the aggregate export value of Rs. 166,63,33,922/- considered by DGGI for computation of demand. The remaining amounts of receipts are attributed to storage charges, services where no KSM was supplied by their clients but procured or developed by DPCL domestically on their own, export of goods, domestic sale of goods, and value involved in cancelled invoices, etc. none of which are involved in the present dispute. Meanwhile, I find from Para-19 of the SCN that the quantification of demand was made on the basis of total value of export of service as appearing in the ST-3 returns, on the ground that M/s. DPCL had not provided necessary information to quantify the exact figure of receipt on services where they had performed technical testing and analysis services on molecules/API provided by foreign service receivers; and on the ground that they failed to provide documentary evidence to establish that in certain cases they have provided such service by procuring raw material and synthesizing the molecule in their lab, instead of receiving it from foreign based client, as claimed by Shri Nilesh Patel, Pr. Scientist of DPCL in his statement dated 2.11.2015, etc. Therefore, I find substance in the argument put forth by M/s. DPCL that the total value of export receipts, considered for quantification of demand, actually included amounts which do not fall under the scope of the present SCN. I have also gone through the documents submitted by M/s. DPCL as annexure to their defence reply dated 20.08.2020, which included invoices showing sale/export of goods, as well as specimen work orders indicating no supply of KSM or any other goods by their foreign clients for carrying out testing/analysis service, which further substantiates their claim. Considering these factual and documentary evidences available on records, I find no reason to disregard the CA certificate submitted by M/s. DPCL that the total export value of Rs. 166,63,33,922/- comprised of six different categories of receipts, out of which only Rs. 25,31,91,171/- involves in the present dispute. Therefore, notwithstanding the legality of the issue raised in the subject SCN with the foreign clients supplying KSM molecules or otherwise, as discussed earlier in this order, I hold that the remaining value of services declared by M/s. DPCL in their ST-3 returns and considered by the department for quantification of subject demand, is beyond the scope of the present SCN.

24. In view of the above findings that the demand is not tenable in the law, I do not consider it necessary to delve into the merits of invoking extended period of limitation which has been discussed in the SCN at length and vehemently contested by the said assessee in their submissions. For the same reasons, I am also not entering

into discussions on imposing penalty. Therefore, from the factual matrix and the question of law as discussed in the foregoing paras, I pass the following order: -

ORDER

I drop the demand and vacate the proceedings initiated under Show-Cause-Notice F.No. DGGI/AZU/Gr.'E'/36-01/2019-2020 dated 04.04.2019 issued by the ADG, DGGI, Ahmedabad Zonal Unit.

(AMARJEET SINGH)
COMMISSIONER
CGST & CEX, AHMEDABAD NORTH

Date: 27.04.2021

F.NO. STC/15-21/O&A/2019
BY REGD POST AD

To
M/s.Dishman Pharmaceutical & Chemicals Ltd.,
[*Now known as DishmanCarbogenAmcis Ltd.*]
Survey No. 47, Paiki Sub Plot No. 1,
Village:Lodariyal, Tal: Sanand,
Dist. Ahmedabad-382 220.

Copy to:

1. The Principal Chief Commissioner, CGST& Central Excise, Ahmedabad
2. The Additional Director General, DGGI, Ahmedabad Zonal Unit, Ahmedabad
3. The Deputy Commissioner, CGST Division-Changodar, Ahmedabad-North
4. The Superintendent, CGST, Range-V, Division-Changodar, Ahmedabad North
5. Guard File.