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

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निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/15-37/OA/2019 DIN

आदेश की तारीख / Date of Order : 30.06.2021

जारी करने की तारीख / Date of Issue : 01.07.2021

द्वारा पारित/Passed by -

अमरजीत सिंह / AMARJEET SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–20/2021-22

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)

2.2 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 परं 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.

विषय:- कारण बताओ सूचनाः

Subject:- Proceedings initiated vide Show Cause Notice no. VI/1(b)/CTA/Tech-43/SCN/Oxygen/2018-19 issued to M/s. Oxygen Health Care Research Pvt. Ltd., Plot No. 35, Panchratna Ind Estate, Bavla Road, Changodar, Ahmedabad-382213.

BRIEF FACTS OF THE CASE:

M/s. Oxygen Health Care Research Pvt. Ltd., Plot No-35, Panchratna Industrial Estate, Bavla Road, Changodar, Sanand, Ahmedabad, Gujarat-382213 (hereinafter referred to as the *'assessee'*) are engaged in providing Technical Testing & Analysis Service. The assessee is holding Service Tax registration No. AAACO7229CST001 and Central Excise Registration No. AAACO7229CXM002. The assessee was earlier registered under the Jurisdiction of the Commissioner of Central Excise, Ahmedabad-II. Consequent to the issue of Notification No.12/2017-Central Excise (NT) to 14/2017-Central Excise (NT) all dated 09.06.2017, appointing the officers of various ranks as Central Excise officers & reallocating the jurisdiction of the Central Excise Officers and Trade Notice No. 001/2017 dated 16.06.2017 issued by the Chief Commissioner, Central Excise & Service Tax, Ahmedabad Zone, the assessee is now registered under the Jurisdiction of the Commissioner, Central Goods and Service Tax, Ahmedabad North.

2 During the course of audit of the records of the assessee for the period from April, 2015 to June, 2017, it was noticed that the assessee had shown certain amounts as received in the Balance Sheet and in the Notes forming part of the financial statements under 'Revenue from operations – *"Sale of Services (R&D) – Export"* was mentioned. However, on comparison with the ST-3 returns filed by the assessee, for the audit period, it was observed that the assessee had not shown the consideration received from Sale of Services (R&D)-Export in their ST-3 Returns and had neither claimed any exemption under any Service Tax Notification nor fulfilled any procedure provided for under any Notification.

3. On a perusal of the records, it appeared that the services provided by assessee are in the nature of *"Technical Testing & Analysis Services"* to customers situated outside the taxable territory. For providing the said service, samples/chemicals on which testing & analysis is to be done are required to be made physically available to the assessee by the recipient of the service, by way of reimbursement of the cost of the samples/chemicals procured/imported by the assessee on their behalf. On perusal of the Project work order for the services, it is observed that the following wordings have been inserted –

" As a part of project management services, the company may procure chemicals and specialist equipments and will charge the same at cost price."

The invoices submitted by the assessee also reflect that they had billed the recipient of service for the cost of scientist employed and cost of material/ samples reimbursement of cost of starting materials, *i.e.,* the samples. Hence it appeared that for providing the technical, testing and analysis service, to the service recipients, the samples required for the same were made available by the service recipients and the cost of samples, procured by the assessee on behalf of the service recipients, were reimbursed to the assessee.

4. It was further noticed that the assessee was providing Technical, Testing and Analysis service, mostly to foreign recipients of service located in the non-taxable territory and therefore, the assessee had considered the said services as export of services and no service tax was paid on the same. But it appeared that as the assessee is located in the taxable territory; under the provisions of Rule 4(a) of the Place of Provision of Service Rules, the place of provision of service in the present case will be the location of the service provider, *i.e.,* the assessee.

5. The legal provisions relating to levy of service tax; place of provision of service and export of services under Finance Act, 1994 and Service Tax Rules, 1994 are as under:

5.1 *'Service'* is defined in clause (44) of Section 65B of the Finance Act, 1994 as any activity carried out by a person for another for consideration, and includes a declared service. Any activity of service; when carried out by a person for another, for consideration, would amount to provision of service, as defined in Section 65B (44) of the

Act and would be leviable to Service tax in terms of Section 66B of the Finance Act, 1994. Section 67(i) of the Act *ibid* provides that *"in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him"*. Thus, the activity of technical, testing and analysis Services, when carried out by a person for another, for consideration, would amount to provision of service, and the taxable value shall be the gross amount charged by the service provider for provision of services.

5.2 Section 64 of Finance Act, 1994 states that Chapter V of Finance Act, 1994 extends to the whole of India except the State of Jammu and Kashmir. As per Section 65(52) of Finance Act, 1994 *"taxable territory"* means the territory to which the provisions of Chapter V apply. For determination of place of provision of service, Section 66C of Finance Act, 1994 provides that the Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.

6. As per the above statutory provisions, service tax is leviable on consideration received for taxable services provided by a service provider in taxable territory, *i.e.*, within India. Section 66B specifies the charge of service tax, which is essentially that service tax shall be levied on all services provided or agreed to be provided in a taxable territory, other than services specified in the negative list. Since the provision of service in the taxable territory is an important ingredient of taxability, Central Government has issued the Place of Provision of Services Rules, 2012. Place of Provision of Service shall be governed and determined by Section 66C (Determination of place of provision of service) and the Place of Provision of Service Rules, 2012

6.1 The relevant rules of Place of Provision of Service Rules, 2012 are reproduced below :

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.

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 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 or reengineering for re-export, subject to conditions as may be specified in this regard.

(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.

7. As per Rule 4(a) of POP Rules, 2012, in respect of performance based 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; the place of provision of service shall

be the location where the services are actually performed. In view of above, in respect of services provided in relation to goods, the place of provision of service is the place where the goods are physically made available to the service provider by the service recipient. The essential characteristic of a service 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.

8. In other words, if the goods in respect of which service is provided is made available outside the taxable territory then the POP will be outside the taxable territory and if the goods in respect of which services are provided is made available in taxable territory, i.e., within India, then the POP will be in taxable territory only. It appeared that though the recipient of the service is located outside India and the provider of service is located in the taxable territory, the place of provision of the service is not outside India. The place of provision of service is within India. The samples have to be made physically available to the assessee in the taxable territory. The technical testing and analysis of the sample is then carried out in the taxable territory and therefore, the provision of service is carried out in the taxable territory Since, the assessee is located in the taxable territory, it appeared that under the provisions of Rule 4(a) of the Place of Provision of Service Rules, the place of provision of service in the present case will be the location of the service provider, *i.e.,* the assessee.

9. Rule 14 of the POPS Rules lays down the order of the application of rule and states that where the provision of a service is, *prima facie*, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration. Hence, the provisions of Rule 3 of POPS rules would apply only when any of the rules 4 to 12 are not applicable. In the present case Rule 4(a) which occurs later among the rules would be applicable for determining the place of provision of performance based services, i.e., technical, testing and analysis service and as per the above Rule, the place of provision of technical, testing and analysis services would be the location of the service provider, *i.e.,* the assessee.

10. The assessee had considered the said services as export of services and hence had not paid service tax on the consideration received against provision of taxable services of technical testing and analysis. As per Rule 6A of Service Tax Rules, 1994 ('ST Rules') 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 had 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.

11. Hence, in order to consider a taxable service as export, all the conditions prescribed under Rule 6A of ST Rules, are required to be fulfilled. In the subject case on scrutiny of Project Work Order/Invoices issued for services provided by the assessee it is noticed that conditions (a), (b) (c), (e) of Rule 6A are fulfilled. However, **condition (d) of Rule 6A of ST Rules, which lays down that the place of provision of service, should be outside India is not fulfilled as already discussed in the foregoing paras.** Therefore, it appeared that Technical, Testing & Analysis services provided by the assessee cannot be considered as 'export of services', as the place of provision of the said services is within the taxable territory.

12. It appeared from the agreements that samples are required to be made physically available by the recipient of the service to the assessee, in order to provide the service. It

is mentioned in the work orders issued by the recipient of service that the assessee will be reimbursed the cost of the samples procured on their behalf. It appeared that the invoices submitted by the assessee also reflect that they have billed their service recipient for reimbursement of cost of starting material, *i.e.*, samples. The service provider, in this case, is located within the taxable territory. The samples are made available physically to the service provider in the taxable territory. The technical testing and analysis is done by the service provider on the samples physically available with him in the taxable territory. Therefore, the actual performance of the service is within the taxable territory where the service provider is located and is, therefore, covered within the ambit of Rule 4(a) of the POPR. As the provision of service is in a taxable territory, service tax at the appropriate rate is required to be paid by the assessee under Section 66B of the Finance Act, 1944.

13. The assessee had submitted information in respect of "Sale of Services (R&D) – export" and copy of relevant ledger for which technical testing and analysis (and/ or R & D) activity was carried out for the period from 01.04.2015 to 30.06.2017, as shown below:

Period	Taxable Value of the service as per Financial Accounts (Rs.)	Service tax payable (inclusive of Cess) (Rs.)	Differential service tax to be recovered (Rs.)
2015-16	110674786	16047844	16047844
2016-17	156770859	23515629	23515629
2017-18 (Upto June 17)	58300645	8745096	8745096
TOTAL	325746290	48308569	48308569

14.1 On being pointed out by audit, the assessee explained that they are providing research service, which would qualify as export service. The assessee submitted their replies vide letters dated 24.12.2018 and 4.1.2019 to the query raised during audit. Briefly, the assessee had submitted that the company is an export oriented unit registered at KASEZ office; that it is involved in Research services related to pharma, mainly divided into (1) Organic Chemistry research and (2) Integrated Drug research and is conducting business under O2h brand name. O2h had employed personnel to perform research activities for their foreign clients and collaborators. O2h is charging the collaborator for the manpower used in different projects. It was submitted by the assessee that they were charging invoice to collaborator for manpower service and starting material which they use for the project for particular period.

14.2 It was further submitted that for Research services conducted for entities located outside India, their services would not be covered under Rule 4 of the place of provision of Service Rules, 2012, as no goods/material are given by the recipient of service which is researched upon. Such services would be covered under Rule 3 of the Place of Provision of Services Rules, 2012, i.e., location of service recipient. It was submitted by the assessee that since the service recipients are located outside India, the services would qualify to be 'export services'.

15.1 The contention of the assessee was not acceptable. It is on record that the goods/samples required for providing Technical, Testing & Analysis services are made available by the service recipient by way of reimbursement of expenses and this fact had not been negated. Ongoing through invoice No.O2h1344/16-17 dt 1.9.2016, it was found that the Services are performed within the taxable territory. From the sample agreement, it was noticed that the Service Recipient have entered into 'PWO – Project Work Order' vide No. Project Work Order 2016_Cashew II dated 22-03-2016, wherein they had authorized Service Provider to procure chemicals and specialist equipment for the company on which activities relating to services had to carried out. The Service Agreement stipulates under Point 3.1 that '... the team made available to the company will carry out projects in accordance with project brief ... .. to carry out projects in agreed time table.' Thus, the copies of Agreements obtained during the course of audit indicate that the nature of the

service provided by the assessee is Technical Testing & Analysis and it is evident from the Project work order that the samples of goods were provided to the assessee by the service recipients for the purpose of conducting Technical, Testing & Analysis services, and the samples of goods were made available in India.

15.2 Therefore, as per Rule 4 of POP Rules, 2012, in this case, the Place of Provision of service lies within the Taxable territory only. Accordingly, in terms of Section 66B of Finance Act, 1994 and 68(1) of Finance Act, 1994, since the assessee had provided taxable services in the taxable territory, the assessee is liable to pay service tax on consideration received for providing the same. Since the assessee had not agreed to the observation of the Department and not paid service tax on taxable services provided by them within taxable territory, service tax amounting to **Rs.4,83,08,569/-** not paid by them is liable to be demanded and recovered from them under Section 73 of Finance Act, 1994 along with interest under Section 75 of Finance Act, 1994.

16. From the above facts and discussions, it appeared that the assessee had contravened the provisions of:

- Section 66B of the Act as they have failed to pay the service tax leviable on the taxable service as a service provider in case of technical testing and analysis service;
- Section 68 of the Act read with Rule 6 of the Rules as they have failed to pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed as a service provider in case of technical testing and analysis service;
- Section 70 of the Act read with Rule 7 of the Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed as a service provider in case of technical testing and analysis service.

17. It also appeared that the assessee had not disclosed the full amount of consideration received by them on provision of technical testing and analysis service in the ST-3 returns filed by them for the period from April 2015 to June-2017 and had therefore, willfully suppressed the material facts from the department. The department came to know about such non-payment of service tax on technical testing and analysis service only during audit. Therefore, it appeared that the assessee had not paid the service tax on provision of technical testing and analysis services by way of suppression of facts and contravention of various provisions of Finance Act, 1944 and Service Tax Rules, 1944, as mentioned above, with an intent to evade payment of appropriate duty on services provided.

18. In view thereof, service tax not paid amounting to **Rs. 4,83,08,569/-** on the taxable services of technical testing and analysis provided by them within the taxable territory is liable to be demanded and recovered from the assessee under the proviso to Section 73(1) of the Finance Act, 1994 alongwith interest under Section 75 of the Act, *ibid.* It also appeared that by the act of not disclosing the full amount of consideration received on account of provision of technical testing and analysis services, the assessee is liable for penal action under Section 78(1) of the Act, *ibid.*

19. Therefore, M/s Oxygen Health Care Research Pvt. Ltd., Plot No-35, Panchratna Industrial Estate, Bavla Road, Changodar, Ahmedabad, Gujarat – 382213, were issued a Show Cause Notice, asking them to show cause as to why:

(i) Unpaid Service Tax of **Rs.4,83,08,569/-** should not be demanded and recovered from them under the category of Technical, Testing & Analysis Service, under proviso to Section 73 of Finance Act, 1994 by invoking extended period of five years;

(ii) Interest should not be demanded and recovered under Section 75 of Finance Act, 1994 on (i) above;

iii. Penalty should not be imposed upon them under Section 78 of Finance Act, 1994 on (i) above.

20. DEFENCE REPLY:

The assessee has submitted their reply to the Show Cause Notice, vide their letter dated 7.8.2019 and submitted additional submissions on 30.6.2021.

A. **Statement of Facts:**

1. M/s. Oxygen Healthcare Research Private Limited (hereinafter referred as "Company") is an Export Oriented Unit, incorporated in year 2004 and located in P-35, Panchratna Industrial Estate Changodar, Sarkhej Bhavla, Road, Ahmedabad, Gujrat, India.

2. The Company is engaged in the business of provisions Research and Development ('R&D') Services relating to drugs discovery. There are two type of research first is Organic Chemistry Research and Integrated Drug Research. The Company has a full-fledged laboratory facility in Ahmedabad and has employed personnel to perform Scientific Research activities.

3. The R&D activities *inter alia* includes scientific route design, scheme preparation, chemical quantity calculation, chemical price calculation, completion of medicinal chemistry research activity, preparation & checking of scientific reports, review and communication of productivity numbers of the scientists, review of scientific data prepared in the log-books etc.

4. The Company has entered into a Contract with one of the Clients for providing aforesaid activities. The Clients of the Company are located outside India. The contractual obligation mandates provision of analysist report i.e. study report/certificate is sent after undertaking the detailed investigation. Please be informed that the Company does not carry out research or analysis activities on goods/materials provided by the Client located outside India.

5. During the month of October 2018 and December 2018, the Audit has been conducted by the Audit Team of Central Tax-Ahmedabad, on the records and books of accounts maintain by the Company for periods from April 2015 to June 2017 in accordance with applicable laws.

6. During the Audit of records for the said period, the Audit Team has noticed that the Company has shown amounts INR 32,57,46,290/- in the financial statements under the head of "Revenue from operations-Sale of Services (R&D-export)". However, during the comparison of said amount with filed Service Tax Return (Form ST-3), the Audit Team has observed that the Company has not furnished the said amount in Service Tax Returnsfiled during the periods from April 2015 to June 2017.

7. On perusal of the records pertaining to amount INR32,57,46,290/-, the Audit Team has noticed that the Company has provided the "Technical Testing and Analysis Service" (hereinafter referred as "TTA Service") to its clients located outside India. Further, on perusal of project work, the Audit Team has noticed that the said service has been carried out on the goods/materials purchased by the Company and the cost of said materials/samples has been reimbursed by the Company in the invoices issued to the Client.

8. Therefore, in the view of the above observations, it has been appeared to the Audit Team that for providing the TTA Service to the Client, the sample required for the same were made available by the Clientand the cost of samples, procured by the Company on behalf of the Client, were reimbursed to the Company.

9. The Audit Team, further noticed that the Company has provided the TTA Service to its Foreign Clients located in non-taxable territory and the Company has received the consideration in convertible foreign currency from its Foreign Clients and accordingly, the Company has treated the said service as export of service.

10. In the view of the above observations, the Audit Team has sought the clarification on said export of service and the Company vide its letter dated 24.12.2018 and 04.01.2019 has submitted its detailed reply wherein, the Company has stated the grounds on the basis of which the TTA Service would be treated as 'Export of Service'. The copy of submitted reply vide letters dated 24.12.2018 and 04.01.2019 are enclosed hereto and marked as **Exhibit-2.**

11. As per the Audit Team understanding & contention, the Company has performed the TTA Serviceon goods/materials provided by the Client and the TTA Service has been performed in Kandla Special Economic Zone ('KSEZ'), Ahmedabad, Gujrat, India.

11.1 As per Rule 4(a) of Place of Provision of Services Rule 2012 (hereinafter referred as 'POPS Rules'), the place of provision of service provided in respect of goods provided by the receiver of service, will the place where service has been actually performed. Therefore, in accordance with provisions of Rule 4(a) of POPS Rules, the place of provision of TTA Service provided by the Company is in India.

11.2 Additionally, Rule 6A(1) of Service Tax Rules 1994 (hereinafter referred as 'ST Rules'), provides the conditions which are to be fulfilled for any services to be regarded as 'Export of Service'. As per the condition of clause (d) of Rule 6A(1) of ST Rules, the place of provision of service should be outside India. In present case, as per the Audit Team, the TTA Service provided by the Company has satisfied the conditions as mentioned in Rule 6A(1) of ST Rules except the condition with regard to place of provision of service which should be outside India.

11.3 In view of the above stated provisions, the TTA Service provided by the Company does not qualified as 'Export of Service' and therefore, the TTA Service provided by the Company will be treated taxable service provided in taxable territory in accordance with provisions of Section 66B of Finance Act 1994 (hereinafter referred as "Finance Act") and liable to Service Tax and cess.The year wise Service Tax& cesses payable are tabulated herein below:

Period	Taxable value (in INR)	Service Tax (inclusive of cess) (in INR)
2015-2016	11,06,74,786/-	1,60,47,844/-
2016-2017	15,67,70,859/-	2,35,15,629/-
2017-2018 (up to June 2017)	5,83,00,645/-	87,45,096/-
Total	**32,57,46,290/-**	**4,83,08,569/-**

12. In the view of the above observation made by the Audit Team, the Pre-Show Cause Notice Consultation for litigation management and dispute resolution was grated on 14.05.2019 before the Commissioner of Central Tax Audit, Ahmedabad. Mr. Pragnesh Thakker, Finance head of the Company, appeared before the Commissioner and stated that the service provided by the Company would falls under the Rule 3 of POPS Rules. Mr. Pragnesh Thakker, has also stated that the Audit Team has not considered/examined the submission made by the Company.

13. The Audit Team has not accepted the contention/arguments and submissions of the Company and alleged that:

i. The TTA Service provided by the Company chargeable to Service Tax in term of Section 66B of Finance Act because the place of provision of TTA Service performed by the Company on the goods/materials provided by Client of the Company is in taxable territory i.e. in India in terms of provisions of Rule 4(a) of POPS Rules;

ii. The TTA Service provided by the company does not qualify as 'Export of Service' as the TTA Service performed in India in term of provisions of Rule 4(a) of POPS Rules;

iii. The amount pertaining to the TTA Service has not been disclosed in Service Tax Return filed for the period April 2015 to June 2017 and thereby, wilfully suppressed the material facts from Service Tax Authority to evade the Service Tax& cesses;

14. On the ground of the aforesaid allegations, the Audit Team has issued the notice dated 08.07.2019 (hereinafter referred as "Impugned SCN") to the Company and called upon to show cause before the Commissioner of Central GST, Ahmedabad North as to why:

a. Service Tax of INR 4,83,08,569/- (inclusive of cesses) should not be demanded and recovered under the category of "Technical, Testing & Analysis Service" under the proviso to Section 73(1) of Finance Act by invoking the extended period of five years;

b. Interest should not be demanded and recovered under the provisions of Section 75 of the Finance Act on Service Tax of INR 4,83,08,569/- (inclusive of cesses);

c. Penalty should not be imposed under the provisions of Section 78 of the Finance Act on Service Tax of INR 4,83,08,569/- (inclusive of cesses);

In this regard, our reply to the aforesaid allegations / issues raised are as under:

B. **Their reply is as follows:**

At the outset the Company denies all the allegations raised in the SCN and submits our reply as under:

15. **Place of provision of TTA Service provided by the Company would not falls under Rule 4(a) of POPS Rules**

15.1 The Impugned SCN alleged that the TTA Service provided by the Company will covered under the provisions of Rule 4(a) of POPS Rules as the goods/materials on which the Company has performed the TTA Service has been provided by the Client by way of reimbursement of cost of the materials/goods to the Company.

15.2 In this regard, it is submitted that it is an industry practice of research and development industry that the Company undertakes extensive research on drugs, chemicals, solutions etc. to innovate and introduce a new products and/or services or improving existing services or products. It is often regarded as the first stage in the development process. The goal is typically to take new products and services to market and add to the Company's bottom line. The *modus operandi* also includes buying raw materials, chemicals, solutions, etc., undertake extensive research on it and provide end results to the Clients in the form of formula, results etc.

15.3 In view of the above and in the present case, the Company has provided/performed the TTA Serviceon goods/materials purchased by the Company. The Clients of the Company have not provided any materials/goods for performance of TTA Service and therefore, the provisions Rule 4(a) of POPS Rules would not be applicable on the TTA Service performed by the Company.

15.2 The POPS Rules provides the provisions for determination of place of provisions of service of different kind/types. Rule 4 of POPS Rules provides the provisions relating to determination of place of provision of service on performance basis. The Rule 4 of POPS Rules read 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."

15.3 The aforesaid Rule clearly provides the provisions relating determination of place of provision of services on performance basis-

- **Service with respect to goods:** If goods are **physically made** available to service provider by service recipient, then the place of provisionof the service will be the location where the services are actually performed. The provision of this rule would be applicable where the goods belongs to the service recipients and the said service recipients has provided the goods to the service provider for providing the services. For example, repairing computers, warehousing and others, where goods are physically required to be made available to service provider by service recipient for providing the repair services.

- Service provided from remote location by way of electronic means: If services mentioned above are provided from a **remote location by way of electronic means**, then location where the goods are situated at the time of provision of services will be the place of provision of services.

- Services which requires physically presence: In case of service rendered, which required the **physically presence** of an individual and the service provider at the time of performance of services, then the location where the services were performed will be the place of provision of services. i.e. health club, Medical Surgery, Beauty Treatment etc.

15.4 In the present case, the Company has provided services of research and development and not performance-based services as alleged in the SCN. We wish to inform that intention of the Government under Rule 4(a) is to bring into net the operation / performance related activities like repair or maintenance on goods, health services, medical services etc. To distinguish, research and development services are innovation-based services and not a performance related services. Further, even after performing the innovation, there are probabilities that they may not yield any results and all efforts are wasted. Whereas, in case of performance-based services, the performed activities benefits the client at large and always gets something in return.

15.5 In this regard, the Company would like to draw Your Goodself attention on Education Guide published on 20.06.2012 by the Central Board of Excise and Customs ('CBEC'), which is binding on the Department for concluding on any issues. As per Para 5.4 of the Education Guide provides clarification in relation to Rule 4 of POPS Rules. The relevant extract of said not is reproduced as below for ready reference-

"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 servicee.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.

15.6 As clearly provided in the above para, the essential character of a service to be covered under Rule 4(a) of POPS Rules is that the goods temporarily come into the physical possession or control of the services provider and are returned post completing the activity. The original identity of the products remains and are handed over. In the instant case, the Client has never provided goods/materials to the Company for carrying the TTA activities. Moreover, the goods or material so used in services has to have significance in value, which in the instant case does not happen.

15.7 We would like to bring to Your Goodself attention on the recent decision in case of ***Commissioner of Central Excise Pune-I Vs. M/s. Sai Life Sciences Limited(2016-TIOL-433-CESTAT-MUM)***, wherein M/s. Sai Life Sciences Limited has provided the 'Scientific and Technical Consultancy Service' by way of research and development expertise in new compounds of pharmaceutical products. The refund application was filed for refund unutilised CENVAT Credit under Rule 5 of CENVAT Credit Rules 2005 by the respondent and the same was rejected on ground that in accordance with Rule 4 of POPS Rules, performance of the service was within the country (India) and hence, the activities of M/s Sai Life Sciences Ltd did not amount to export of services. The Hon'ble Tribunal pursued the case and held that the benefit of R&D services accrued to the foreign clients outside India and therefore, it would be treated as 'Export of Services' and accordingly, rejected the appeal of revenue.

15.8 The aforesaid facts of the case of Commissioner of Central Excise Pune-I Vs. M/s. Sai Life Sciences Limited (supra.) are *parimateria* to the present case in hand and accordingly, the place of provision of R&D services provided by the Company would be the location of the service recipient and accordingly, it would be regarded as 'Export of Service'.

15.9 Further, the Company is relying on the case of ***Ms/. Fertin Pharma Research and Development India Private Limited Vs. Commissioner of CGST, Navi Mumbai(2018-TIOL-3281-CESTAT-MUM)*** wherein, the Appellant has provided the 'Scientific and Technical Consultancy Service'. The inputs/raw materials on which research and development activity was undertaken by the appellant had been purchased from their parent company against valid consideration and imported into India on payment of appropriate Customs Duty. The Appellant undertook research activity on the said goods and exported the services viz. "Technical Testing and Analysis Service/Scientific and Technical Consultancy Service", against convertible foreign exchange. The Appellant had availed CENVAT Credit on various input services used in providing the output taxable services. Since the output services were exported, the Appellant claimed the refund of accumulated CENVAT Credit under Rule 5 of the CENVAT Credit Rules 2004. The adjudicating authority rejected their refund claims on the ground that the services provided by the appellant to their overseas customer cannot be considered as an 'export service' and secondly the input services on which credit was availed do not fall within the scope of 'input service' as prescribed under Rule 2(l) of the CENVAT Credit Rules, 2004.The Appellant had filed an appeal and submitted that the services rendered by the appellant squarely covered under the scope of Rule 3 of the Place of Provision of Services Rules and as the recipient of service is located in Denmark, the said service is an export service since it satisfies the condition (d) of Rule 6A of the Service Tax Rules, 1994 and also place the reliance of Education Guidance Note published by the CBEC for Rule 4 of POPS Rules. The Hon'ble Tribunal while reading the provisions of Place of Provision of Service Rules 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. After the detailed study of case, the Hon'ble Tribunal held that appellants are eligible to cash refund of the accumulated CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004 and accordingly, the matters are remanded to the adjudicating authority to calculate the admissibility of refund amount.

15.10 The ratio of judgement of the case of Ms/. Fertin Pharma Research and Development India Private Limited Vs. Commissioner of CGST, Navi Mumbai (supra.) would be applicable to the present case in hand and accordingly, the place of provision of R&D services provided by the Company would be the location of the service recipient.

15.11 It is also pertinent to place reliance of the decision of Hon'ble Supreme Court in the case of ***All India Federation of Tax Practitioners Vs. Union of India & Others*****[2007(2) S.T.R. 625 (S.C.)]**, wherein it has been held that where the relevant conditions of export of services have been satisfied, denying the benefit of export merely on the basis of Rule 4 of POPS, completely defame the scheme of taxation and the intention of the Government. The relevant extract of the decision is reproduced herein below:

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.

...

(emphasis supplied)

15.12 In the present case, the Client *(as alleged in the SCN)*of the Company has not provided any goods/materials to the Company to provide the TTA Service and therefore, in the view of the above submissions, the provisions of Rule 4(a) of POPS Rules would not be applicable to TTA Service provided by the Company.

16. **<u>Without prejudice to other submissions, even if the contention of the Impugned SCN accepted that the goods/materials has been made available by the Service Recipient then also TTA Service provided by the Company would be treated as 'Export of Service'</u>**

16.1 The Impugned SCN alleged that the TTA Service provided by the Company are covered under the provisions of Rule 4(a) of POPS Rules and as per the said provisions, the place of provision of service will be location of performance of service which is in taxable territory (i.e. in India) and therefore, Service Tax will be applicable on the TTA Service in terms of provisions of Section 66B of Finance Act.

16.2 Without prejudice to other submissions, the Company submits that even if the contention of Impugned SCNis accepted that the goods/materials has been made available by the Client of the Company on which Company has performed TTA Service and the said TTA Service is covered under the provisions of Rule 4(a) of POPS Rules then also said service would treatedas 'Export of Service' in the light of the decision of the Hon'ble Tribunal (Divisional Bench) of Mumbai in the case of ***Principal Commissioner of C. Ex., Pune-I versus M/s. Advinus Therapeutics Limited*** **reported in *2017 (51) S.T.R. 298 (Tri.-Mumbai).***

16.3 In the case of *M/s. Advinus Therapeutics Limited ('Respondent')*, the Hon'ble Tribunal has found that the Respondent has received the goods from its client for the purpose of research and analysis. Further, the Hon'ble also found that the Respondent has received the consideration in foreign convertible exchange and the location of service recipient is located outside India and the same has not been disputed by the revenue. The Hon'ble Tribunal also found that the Respondent has rendered the impugned service by way of analysis on goods within own organization or territory in which it exists and principally, satisfaction of customer occurs upon outcome possessed by Respondent and even if some of activities carried out in India then also fulfilment of activity not to be considered to be in India. In view of the said findings, the Hon'ble Tribunalheld that Rule 4(a) of the POPS Rules relates to goods that require some activity to be performed without altering its form and sent back to the receiver of service. However, in instant case, the goods has not been sent back to the receiver of service whether in altered or unaltered form and therefore, Rule 4(a) of POPS Rules would not attracted and the Impugned service would be treated as 'Export of Service' in terms of provisions of Rule 6A(1) of ST Rules.

16.4 In the light of the above aforesaid judgment (as applicable to the present case) and facts stated above, it is evident that the TTA Service provided by the Company would be treated as 'Export of

Service'in terms of Rule 6A(1) of ST Rules as the Company has not sent back the goods, in alter or unalter form, to its Client.

16.5 Therefore, in the view of the above submissions, the Service Tax would not be leviable andthe Impugned SCN is liable to be set-aside completely.

17. **Place of provision of TTA Service would be outside India in terms of Rule 3 of POPS Rules and therefore, Service Tax would not be levied in terms of Section 66B of Finance Act**

17.1 The Impugned SCN alleged that the TTA Service provided by the Company are covered under the provisions of Rule 4(a) of POPS Rules and as per the said provisions, the place of provision of service will be location of performance of service which is in taxable territory (i.e. in India) and therefore, Service Tax will be applicable on the TTA Service in terms of provisions of Section 66B of Finance Act.

17.2 The Company submits that they have provided the TTA Service to its Client located outside India and the place of provision of service is location of service in term provisions Rule 3 of POPS Rules. Therefore, Service Tax should not applicable in terms provisions of Section 66B of the Finance Act.

17.3 The provision of Section 66B of the Finance Act provides the levy of Service Tax on provision of taxable services in a taxable territory. The relevant extract of provision of Section 66B read as follow:

"There shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of fourteen percent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

17.4 In the view of the above provision, the Service Tax will leviable on the value of all services, other than those services specified in Negative List (Section 66D of Finance Act), which has been provided or agreed to be provided in the taxable territory (i.e. India other than State of Jammu & Kashmir). In other words, Services tax would not be applicable on services which has been provided or agreed to be provided in non-taxable territory (i.e. Outside India).

17.5 As stated above, the TTA Service provided by the Company *inter alia* includes scientific route design, scheme preparation, chemical quantity calculation, chemical price calculation, completion of medicinal chemistry research activity, preparation & checking of scientific reports, review and communication of productivity numbers of the scientists, review of scientific data prepared in the log books etc. The result of such analysis is required to be provided in the form of report i.e. study report / certificates. Further, the Company is not doing the research on any material/substances provided by its clients.

17.6 As stated above, to determine whether the service has been provided or agreed to be provided in taxable territory or non-taxable territory, the Central Government has prescribed the POPS Rules. The POPS Rules plays an important role to determine whether the service has been provided in taxable territory or non-taxable territory. Rule 4 to Rule 12 of POPS Rulesprovides different provisions for determination of place provision of different kind/type of services. If the service which does not falls under any provisions from Rule 4 to Rule 12 of POPS Rulesthen such service would fall under Rule 3 of POPS Rules which also known as 'default Rule'. As per the provisions of Rule 3, the place of provision of service would be the location of service recipient. The provisions of Rule 3 areread as follows:

"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."

17.7 In view of the above provision, the place of provision of services would be the location of service recipient. However, if the location of service recipient is not available in the ordinary course of the business then the place of provision of service would be location of service provider.

17.8 As per the above analysed provisions of Rule 4 and Rule 3 of POPS Rules, the TTA Services provided by the Company is not in respect of goods supplied by the Client as well as not provided to any Individual, wherein physical presence is required. The Company has performed the TTA Service on the projects of its Client sitting in India and not on the goods sent by the clients. Alleging that the clients have provided the material / goods for undertaking research and development, completely defeats the purpose of R&D Industry and intention of the Government. Therefore, the provisions of General Rule 3 of POPS Rules would be applicable to TTA Service provided by the Company and accordingly, the place of provision of services would be the location of recipient of service i.e. outside India.

17.9 Therefore, the Service Tax would not be leviable on TTA Service provided to the Client in terms of provisions of Section 66B and accordingly, the Impugned SCN, demanding the demanding the Service Tax& Cesses, should be set-aside completely.

18. **<u>The TTA Service provided by the Company would treated as 'Export of Service' in terms of provisions of Rule 6A(1) of ST Rules and therefore, Service Tax should not be applicable</u>**

18.1 The Impugned SCN alleged that the TTA Service provided by the Company should not be treated as 'Export of Service' in terms of provisions of Rule 6A(1) of ST Rules because the TTA Service provided the Company is not qualifying the condition of clause (d) by virtue of provisions of Rule 4(a) of POPS Rules.

18.2 The Company submits that the TTA Service satisfied all the conditions enumerated in Rule 6A(1) of ST Rules and therefore, the TTA Service qualify as 'Export of Service' and accordingly, Service Tax will not be applicable on the exported service.

18.3 The provisions of Rule 6A(1) is provided herein below for reference:

"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"

18.4 In the view of the aforesaid provision, the service is regarded as export of service subject to fulfilment of conditions mentioned above i.e. the service provider should be located is in India, service recipient should be located outside India, the service should not be specified/listed in Section 66D of Finance Act (List of services on which Service Tax would not be applicable), the place of provision of service should be outside India, payment should be received in foreign convertible exchange and the service provider and recipient should not be merely establishments of a distinct person in accordance with the item (b) of Explanation 3 of clause (44) of Section 65B of the Act.

18.5 In the present case, the Company (service provider) is in India and the Client (service recipient) is located outside India (i.e. in England). Further, in case of TTA Service provided by the Company (as stated above), the place of provision of services is the location of the Client which is outside India, the Company has received the consideration in convertible foreign exchange and the Company and Client are not merely an establishment of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of Section 65B of the Act. Therefore, the service so provided by the Company would be regarded as 'Export of Services'.

18.6 The Company also referring the para 11 of the Impugned SCN wherein, the Audit Team, during the scrutiny of project order/invoices, has noticed that the TTA Service provided by the Company

qualify all the conditions except condition of clause (d) of Rule 6A(1). Further, in view of the above submissions, it has been duly concluded that the place of provision ofTTA Service provided by the Company is outside India.

18.7 Further, as submitted above, the provision of Section 66B of Finance Act provide that the Service Tax would be applicable on the service provided or agreed to be provided in the taxable territory (i.e. in India). If the service provided or agreed to be provided outside India then, Service Tax would not be applicable on said service.

18.8 Further, the Company would also like to submit that the Company is engaged in the business of provision of TTA Services over a decade and the Service Tax Authority and CERA Audit Team has already conducted and concluded the audit of the books of accounts of the Company for the period 2010 to 2015. During the said audits, no such observation or objection was made on the export of TTA Services by the Company. The copy of the Report on audit conducted for the period 2010 to 2015 is annexed hereto and marked as **Exhibit-3.**

19. In the view of the above submission, it is evident that the TTA Service provided by the Company during the disputed would too be regarded as 'Export of Service' as there is no change in the manner of conducting the business and therefore, Service Tax should not be levied on TTA Service provided by the Company and accordingly, the Impugned SCN is liable to be set-aside.

20. **Without prejudice to other submissions, the Impugned SCN has not referred or provided the legal provisions basis of which Audit Team is treating the goods/materials has been made available by the recipient of service and therefore, the Impugned SCN issued by the Audit Team is *ultra virus***

21.1 The Impugned SCN alleged that the Company has provided the TTA Service on the goods/materials made available by the Client in India to the Company as the Company has reimbursed the cost of materials/goods by issue of invoice and therefore, TTA Service provided by the Company covered under the provisions of Rule 4(a) of POPS Rules and accordingly, TTA Service performed in India and liable to Service Tax& cesses. Moreover, the observations made are raised on the basis of review of just one sample invoice / contracts.

21.2 As stated above, the Company has performed the TTA Service on materials/goods procured by the Company itself. Thereafter, the Company has issued the invoices for the said provided service to its Client which includes the charges towards fees and reimbursement of cost of materials/goods etc. used for providing said service, which is an Industry Practice. The said facts have not been disputed by the Audit Team in the Impugned SCN and audit conducted by the earlier Audit Team.

21.3 As per the Impugned SCN, the goods/materials for which reimbursement has been claimed by the Company would be treated as goods/materials are made available by the Client of the Company. However, the Audit Team has not provided or referred any provisions of Finance Act and rules framed thereunder, in support of their contention/theory in the Impugned SCN.

21.4 Making decision on the basis of review of just one sample invoice and applicable to the entire business is also not appreciated. This shows the narrow approach adopted on undertaking any investigation. It is judiciously decided before various forum that the Authorities ought to have undertaken comprehensive review of books of accounts before concluding allegations or raising demand. However, relying on one sample contract and one invoice and blanketly applying to the entire business, clearly shows that the principle of natural justice has not been followed and on this basis the appended SCN requires to be set aside.

21.5 Therefore, in view of the above submissions, the Impugned SCN is *ultra virus, non-speaking* and liable to be quashed for want of authority to determine that the reimbursement of the cost of materials/goods from the recipient of service should be treated as goods/materials are made available by the service recipient.

21. **Once the consideration for a given service has been agreed upon between the parties in their commercial wisdom, the Department cannot question or undermine the same**

22.1 The Impugned SCN alleged that the Client of the Company has reimbursed the cost of materials/goods to the Company in accordance with the terms of clause relating to reimbursed of cost of materials/goods in the Contract and therefore, such arrangement will be treated as goods/materials made available by the Client to the Company for providing TTA Service.

22.2 The Company submit that the TTA Service provided by the Company satisfies the conditions which is required to be fulfilled for a services to be treated as 'Export of Services'. The Audit Team, by relying on the terms of Contract with regards to reimbursement of cost of materials/goods, has erroneously concluded that the Goods/materials has been provided by the Client on which Company has performed the TTA Service and thereby, liable to Service tax and cesses.

22.3 With due respect, the Company submits that mere relying on the manner of consideration/reimbursement agreed between the parties i.e. charges towards service provided along with reimbursement of cost of materials/goods, for the determination place of provision of service and tax liability thereon is incorrect and bad-in-law.

22.4 In the present case, The Company has linked their consideration for TTA Service along with reimbursement of cost of materials/goods, which is an industry practice, and the same cannot be questioned by the Audit Team so as to bring it into the net of tax as judiciously held in many cases.

22.5 In this regard, it is a settled position in law that once the consideration for a given service has been agreed upon between the parties in their commercial wisdom then, the tax authority cannot seek to question or undermine the same.

22.6 The Company is relying on the decision of the Hon'ble Supreme Court in ***Union of India v. Mahindra and Mahindra [1995 (76) E.L.T. 481 (S.C.)]***, in which it was unequivocally held that, unless the revenue can show that some other consideration, monetary or otherwise, flowed from the service recipient to service provider, there would be no basis to question the agreed upon price. The relevant extract of the said decision is set out below.

"...There is no material nor was it suggested that the dealings between the parties are not at arm's length. No evidence is available to show that the payment of royalty to the collaborator induced any extra commercial obligation for the price of CKD packs, parts and components. 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 the real and that the price for the sale of the CKD packs is not the true price, and the price was determined by reckoning or taking into consideration the lumpsum payment made under the collaboration agreement in the sum of 15 million French Francs.

...

The collaboration agreement entered into between the parties is clear and it is not open to the revenue to construe it differently by reading into it something which is not there. In the result, we hold that the Judgment appealed against does not merit interference and this appeal deserves to be and is hereby dismissed with costs, which we quantify at Rs. 10,000/-..."

22.7 The ratio of above judgment would be squarely applicable in this case and to the present facts of the case and accordingly, the Company is not liable to pay tax Export of TTA Service.

22. **There is no revenue loss to the Government due to non-submission/reflection of amounts pertaining to export of TTA Service**

23.1 The Impugned SCN alleged that the Company has not furnished the amounts pertaining to TTA Serviceas 'Export of Service' in their Service Tax Returnsand also not claimed exemption from payment of Service Tax under any notification in the said filed Service Tax Returns for said period with an intention evade the Service Tax& cesses.

23.2 The Company submits that non-submission of details of export of service or exempted transactions in the Service Tax Returns erroneously should not be presumed as taxable service or taxable transactions for purpose of gathering/generating of revenue. There have been instances

where such lapses have been ignored so long as the assessee was bonafide and did not defraud the Government.

23.3 As evident from the foregoing submissions, the TTA Service provided by the Company is 'Export of Service' and Service Tax will not be applicable thereon in terms of provision of Section 66B of Finance Act. Therefore, there is no revenue loss to the Government due non-submission of amount of TTA Service as Export of Service in Service Tax Returns.

23. **The Impugned SCN has been issued solely on the basis of audit observations without preceding any investigations and therefore, the Impugned SCN should be set aside**

24.1 The Company submits that Impugned SCN had been issued pursuant to the audit objections by the Audit Team without undertaking any independent investigation/inquiry.

24.2 The larger bench in the case of ***SWASTIK TIN WORKS Versus COLLECTOR OF CENTRAL EXCISE, KANPUR [1986 (25) E.L.T. 798 (Tribunal)]*** has held as that in case of demand based on the audit objection/observation, an investigation/inquiry must precede the issue of Show Cause Notice and Impugned SCN issued without proper inquiry and merely on basis of audit objection is without jurisdiction.

24.3 Also, the Hon'ble Tribunal in the case of ***RAM STEEL ROLLING & FORGING MILLS Versus COMMISSIONER OF C. EX., MUMBAI-II[2006 (204) E.L.T. 87 (Tri. - Mumbai)]*** has held that the Demand based only on audit objection and not on any evidence by way of investigation is not sustainable.

24.4 Further, the Hon'ble Tribunal in the case of ***KIRLOSKAR PNEUMATIC CO. LTD. Versus COMMISSIONER OF C. EX., PUNE-III [2011 (22) S.T.R. 121 (Tri. - Mumbai)]*** has held that audit objections cannot sustain into show cause notice without preceding investigations as the internal auditors of Department cannot act *as investigation agency, jurisdictions of both being distinct*.

24.5 In the present case also the Impugned SCN has been issued solely on the basis of the audit objection/observation. There was not even further effortswere made to determine the actual nature of services provided by the Company. The Audit Team has not conducted any detailed investigation inspite of the replies/clarification to the audit observation. Moreover, the previous Audit Team has conducted the Audit without raising such objection.

24.6 Thus, the Impugned SCN is contrary to the settled legal position in law and with an intention to harass the Company. Since, no investigation has preceded the issue of Impugned SCN and therefore, the same should be set aside on this ground alone.

24. **Without prejudice to other submissions, the Impugned SCN has been issued after the prescribed period and therefore, the same is time barred**

25.1 The Company submits that the Impugned SCN is time barred. The provisions of Section 73(1) of the Finance Act provides the time limit of *Eighteen Months* for issue of notice for recovery short/not paid Service Tax. The said time limit for issue of notice was prevailing during the periods 2015-2016 and April 2016. The Impugned SCN was issuedon 08.07.2019 and received on12.07.2019 and therefore, in the view of the provisions of Section 73(1) of the Finance Act, the Impugned SCN is time barred.

25.2 The Company further submit that the provisions of Section 73(1) of the Finance Act has been amended vide Finance Act 2016 which extended the time limit from *Eighteen Months* to *Thirty Months* for issue of notice for recovery short/not paid Service Tax. The said time limit for issue of notice was prevailing during the periods from May 2016 to September 2016. The Impugned SCN was issued on 08.07.2019 and received on 12.07.2019 and therefore, in the view of the provisions of Section 73(1) of the Finance Act (as amended), the Impugned SCN is time barred.

25.3 In the present case, the extended period of five years has been invoked under the proviso to Section 73(1) of the Finance Act alleging that the Company has suppressed the facts. In this regard, Company wish to submit that in order to invoke proviso to Section 73 (1), Suppression, fraud, collusion, misrepresentation with an intent to defraud revenue is the essential conditions.

In this case, the extended period of limitation would not be applicable as the entire facts were known to the Department during the Audit for the prior period i.e.2010 to 2015 and disclosure with respect to export of service has been already been made in the books of accounts and other relevant records of the Company since the 2010.

25.4 The Company submits that in order to invoke the proviso to Section 73(1), it is essential that the SCN should allege *mala fide* conduct of the Company. The Company relies on the case of ***COLLECTOR OF CENTRAL EXCISE Versus H.M.M. LIMITED [1995 (76) E.L.T. 497 (S.C.)]*** wherein it has been specifically held that the Limitation for extended period is not invokable unless show cause notice puts appellant to notice specifically as to which of the various commissions or omissions stated in the proviso to Section 11A(1) of Central Excises & Salt Act, 1944 had been committed. It was further held that in the case of that appellant the SCN does not allege any commissions or omissions as stated in section 11A(1) and therefore the extended period is not invokable.

25.5 The Company also relies on the case of ***Tulsyan NEC ltd V/s CCE- Chennai [2008 (224) ELT 423 (T)]***.

25.6 It is evident from the Impugned SCN that there is no allegation of *malafide* conduct with respect to demand of Service Tax and therefore, the Impugned SCN is time barred.

25.7 The Company also places reliance on the following judgments:

i. ***Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay [1995 (75) ELT 721 (SC)].***

- The court held that 'intent to evade duty must be proved for invoking proviso to section 11A(1) of the Central Excise Act, 1944' which deals with the provisions for extended period of limitation. In this case, it was held that mis-statement or suppression of fact in the SSI declaration cannot be called wilful, unless it is proved that it was done wilfully with an intent to evade duty, for the purpose of invoking the extended period of limitation.

- The Supreme Court has observed in the above case that –
  - intent to evade duty is built in to the expressions 'fraud' and 'collusion';
  - 'mis-statement' and 'suppression' have been qualified by immediately preceding words 'wilful';
  - 'contravention of any of the provisions of this Act or rules' has been qualified by the immediately following words 'with intent to evade payment of duty';

- Thus, to invoke the proviso to the Section and the extended period of limitation it should be proved that the Company made a misstatement or suppression which is 'wilful' or has acted with 'intent to evade payment of duty'.

ii. ***CCE Vs. Chemphar Drug and Liniments [1989(40) ELT 276 (SC)].***

- The court held that something positive, rather than mere inaction or failure on the part of manufacturer, has to be proved before invoking the extended period of limitation as per proviso under section 11A(1). Also it has been held that where department has full knowledge about the facts and the manufacturer's action or inaction was based on the belief that they were required or not required to carry out such action or inaction, the extended period cannot be made applicable.

iii. ***Pushpam Pharmaceuticals Vs. CCE Bombay [1995 (78) ELT 401 (SC)]***

- In thiscase the Hon'ble Supreme Court has held that it is important in construing the meaning of the words 'suppression of facts' as used in the proviso to section 11A(1) of the Act. The gist of the judgment is as follows: -

the expression 'suppression of facts' has been used in the assessee of strong words such as fraud, collusion or wilful default. In fact, it is the mildest expression used in the proviso. Yet in the surroundings in which it has been used, it has to be construed strictly. It does not mean any omission. The act must be deliberate. It taxation, it can

have only one meaning and that is 'that the correct information was not disclosed deliberately to escape from payment of duty'.

- *the assessee cannot be held guilty on the mere 'suppression of facts' when the law itself is not clear or there are conflicting judgments or when the position is not settled in law, unless it can be proved that the intention of the assessee was to evade payment of duty.*

25.8 As stated above, the Company is exporting the TTA Service since over a decade and the Company was under *bona-fide* belief that the TTA Service provided by the Company qualified as 'Export of Service' and therefore, as per Foreign Trade Policy, the TTA Service exported by the Company is not taxable under the provision of 66B of Finance Act.

25.9 The *bona-fide* belief of the Company is evident from the report of Audit conducted for the period 2010-2015 wherein, the Audit Team has not disputed on Export of TTA Service for the period 2010-2015.

25.10 It is evident from the above submissions that in order to invoke the larger period of limitation there has to be a positive act of concealment or evasion on the part of the Company with an intention to defraud the Government. The act of suppression or concealment must be with intent to evade payment of Service Tax.

25. **<u>The interest demanded under Impugned SCN is not payable as the Service Tax itself not payable under the Impugned SCN</u>**

26.1 The Company submits that the Company is not liable to pay Service Tax& cesses on the TTA Service on the basis of above submissions and therefore, the Company is also not required to pay interest on the demanded Service Tax& cesses under the provisions of Section 75 of the Finance Act.

26.2 Without prejudice to any submission made above, the Company also submits that even if the demand for Service Tax& cesses arises, no interest can be demanded as there are no provisions for such recovery under the Finance Act or rules framed thereunder. The Impugned SCN has demanded the interest under the provisions of Section 75 of the Finance Act. The provisions of Section 75 of the Finance Act, as prevailing during the said period, is reads as follows:

"SECTION [75. Interest on delayed payment of Service Tax. — Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, 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 per cent. and not exceeding thirty-six per cent. 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:]

[Provided that in the case of a person who collects any amount as Service Tax but fails to pay the amount so collected to the credit of the Central Government, on or before the date on which such payment is due, the Central Government may, by notification in the Official Gazette, specify such other rate of interest, as it may deem necessary:

Provided further] that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three per cent. per annum.]."

26.3 In the view of the above provisions, every person who is liable to pay the tax and failed to pay the same then, such person has to pay interest. However, the quoted provisions in SCN do not provide the powers to any Authority to collect/recover the interest.

26.4 The demand is made under the provisions of Section 73(1) of the Finance Act. The provision of said Section provides for the recovery of Service Tax not levied or paid or short levied or short paid or erroneously refunded. However, the provisions of Section 73(1) does not provides for

recovery of interest as payable under the provisions of Section 75 of the Finance Act. The relevant extract of the provision of said Section reads as follows:

"SECTION [73. Recovery of Service Tax not levied or paid or short-levied or short-paid or erroneously refunded. — (1) Where any Service Tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, [Central Excise Officer] may, within [eighteen/thirty months] from the relevant date, serve notice on the person chargeable with the Service Tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any Service Tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —
(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax,

by the person chargeable with the Service Tax or his agent, the provisions of this sub-section shall have effect, as if, for the words ["eighteen/thirty months"], the words "five years" had been substituted."

26.5 It can be seen from the above provisions that the provisions of said Section only provides for recovery of Service Tax and not the interest. It is submitted that there are no provisions in Section 75 or any other Section/Rule for recovery of interest on short/non-payment of Service Tax.

26.6 The same can be substantiate from the provisions of Section 28 of the Customs Act, 1962 which provides for recovery of interest on short payment of duty. The relevant extract of said provisions is reads as follows:

*"SECTION 28. Notice for payment of duties, interest etc.. 1) When any duty has not been levied or has been short-levied or erroneously refunded, **or when any interest payable** has not been paid, part paid or erroneously refunded, the proper officer may, -*

a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
b) in any other case, within six months,"

26.7 It is evident from the above stated provisions that specific provision has been made for recovery of interest under the said Section. However, similar provisions are missing under the provisions of Section 73 as well as Section 75 of the Finance Act. Hence, no interest can be demanded under the said Section.

26.8 The Company also relying on the provision of Section 73(1B) of the Finance Act which provides that tax liability would be recovered along with interest. The provision of Section 73(1B)is read as follows:

"[(1B) Notwithstanding anything contained in sub-section (1), in a case where the amount of Service Tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1).]"

26.9 In view of the above provision, in case where anassessee who has self assessed his tax liability and furnished the same in its Service Tax Return but not paid the tax liability in full or part then in such case the tax along with interest would be recoverable from the assessee without serving of notice under the provisions of Section 73(1) of the Finance Act. That meant Section 73(1B) of Finance Act specifically provides the provision for recovery of tax along with interest.

26.10 Without prejudice to other submissions, in present case the Impugned SCN has been issued under the provisions of Section 73(1) of the Finance Act which does not provides the recovery of interest on tax which not paid due to any reasons.Therefore, demand and recovery of interest by the Audit Team in the Impugned SCN is misplaced and *ultra virus*.

26.11 The Company placed the reliance on the decision in the case of ***M/s. Pushpaman Forgings vs. Commissioner of Central Excise, Mumbai VII reported in [2002 (149) E.L.T. 490 (Tri. - Mumbai)] (Divisional Bench)*** wherein, the Hon'ble Tribunal has made similar observations with respect to Section 11A of the Central Excise Act 1944.

"3. The contention raised by the assessee before us is that the amount demanded under Rule 57CC is not a duty. Therefore, there is no machinery for collecting the amount sought to be demanded provided under the Act and Rules. Ld. Counsel specifically says that Section 11A of the Central Excise Act deals with the recovery of the duty only. It is not duty here. It is also emphasized that under the Board circular it is specifically stated that it is not Modvat Credit which is sought to be recovered. That is being indicated in the said Ministry of Finance's letter that it is not Modvat Credit which is sought to be claimed from the assessee. Once that is the position as explained above, the contention raised by the assessee before us is that such an amount of money cannot be claimed or sought to be recovered from them. Ld. DR reiterated the grounds.

4.We have considered the interesting submission made by the assessee before us. It is true that the amount sought to be recovered is neither duty nor Modvat credit. That is specifically made clear by the Board circular referred above. When that is so in our view, in the absence of a recovery proceedings machinery provided under the Act and Rules, the amount cannot be claimed from the assessee. Hence we set aside the impugned order by allowing the appeal."

This case has been upheld by the Hon'ble Supreme Court reported in 2003(153) ELTA89 (SC).

26.12 Thus, in view of the above submissions and cited case laws, it is submitted that in the absence of the machinery for recovery of interest, the Impugned SCN demanding the interest is misplaced and should be set aside.

26. **Penalty under Section 78 of the Finance Act should not be imposed as there is no evasion of tax on account of supersession of facts or wilful misrepresentation or fraud or collusion etc.**

27.1 The Impugned SCN imposing the penalty under the provisions of Section 78 of Finance Act. The Section 78 of the Finance Act provides the provisions relating to impose of penalty where the demand for Service Tax arises on account of fraud, collusion, wilful misstatement, suppression of facts etc.

27.2 The Companyhas made submissions with respect to invocation of extended provisions of demand under Section 73. The wordings of section 73 are similar to the wordings of Section 78 and therefore, the submissions made against extended period of demand are relied for non-levy of penalty under Section 78.

27.3 The Audit Team failed to appreciate that the non-payment of Service Tax was not deliberate with the intent to evade payment of the same. The Audit Team ought to have appreciated that there was no suppression on the part of the Company as the Company had maintained all records and had not actively concealed anything. Even, the Company has fully co-operated with Audit Team during the Audit and provided the all records/statement/books of accounts as directed/instructed by the Audit Team from time to time.

27.4 As stated above that theTTA Service provided by the Company is qualifying as 'Export of Service' and no Service Tax would be applicable on said service. Further, there was no revenue loss to the Government. Therefore, the Audit Team erred in imposing equivalent penalty under Section 78 of the Finance Act.

27.5 The Impugned SCN has been issued with blatant disregard to the judgment of the Hon'ble Apex Court in ***U.O.I. v. Rajasthan Spinning and Weaving Mills — 2009 (238) E.L.T. 3 (S.C.)*** wherein it was held that mandatory penalty under Section 11AC of Central Excise Act, 1944 *(akin to Section 78 of the Finance Act)* is not applicable to every case of non-payment or short-payment of duty unless the conditions mentioned in Section 11AC exist for penalty thereunder.

27.6 Section 78 being *parimateria* to Section 11AC of the Central Excise Act, 1944, the ratio of the aforesaid judgment in Rajasthan Spinning Mills (supra) applies in the case of the Company. Both Section 11AC of the Central Excise Act, 1944 and Section 78 of the Finance Act require fraud, collusion, wilful misstatement; suppression of facts with the "intent to evade" as necessary ingredients to attract mandatory penalty thereunder.

27.7 The Impugned SCN is in the teeth of the judgment of the Hon'ble Chhattisgarh High Court in ***Mahadev Logistics vs. Cus. & C. Ex. Settlement Commission, New Delhi - 2017 (3) G.S.T.L. 56***wherein it was held that presence of *mens rea* is an absolutely necessary ingredient for imposing penalty under Section 78 of the Finance Act.

27.8 The Impugned SCN fails to consider the judgment of this Hon'ble Tribunal in ***Walchandnagar Industries Ltd. vs. Commissioner of C. Ex., Pune-III - 2016 (46) S.T.R. 615 (Tri. - Mumbai)***wherein it was held thatthere should be a *mens rea* on the part of the appellant to evade tax in order to attract imposition of equivalent penalty under Section 78 of the Finance Act.

27.9 The Impugned SCN ought to have respectfully followed the judgment of this Hon'ble Tribunal in ***Mohan Poddar vs. CCE, Raipur - 2015 (38) S.T.R. 980 (Tri. - Del.)*** wherein it was held that penalty under Section 78 of the Finance Act cannot be imposed in the absence of *mens rea*.

27.10 The Audit Team failed to appreciate that the mere fact that the factum of non-payment of Service Tax was discovered during audit does not *ipso facto* tantamount to suppression on the part of the Company. Reliance is placed on the order of this Hon'ble Tribunal in ***Landis + Gyr Ltd. vs. CCE, Kolkata – V - 2017 (49) S.T.R. 637 (Tri. - Kolkata)*** wherein it was held that mere finding that had the Audit not pointed out, the tax would have remained unpaid cannot be accepted as reasoning alone or ground for confirming suppression, mis-statement or mis-declaration of facts etc. by the appellant.

27. Further, vide their additional submissions dated 306.2021, the assessee has submitted that they are doing scientific research and development services so the clients authorise them to procure starting material. However, no goods are made physically available by client directly or indirectly to the assessee.They stated that as per CBEC Guidance on service tax videTRU Circular dated 20.6.2012, note 5 of clarifies that it is essential that to cover under Rule 4, the goods should temporarily come under the physical possession or control of the service provider and without such effect, the service cannot be termed as rendered in India. In their case, since the goods have been ordered, purchased and paid from Oxygen Healthcare Research Pvt. Ltd. In other words, ownership of the materials is with the assessee and they at its own discretion can use this material or reuse or scrap.

28. As per MSA para 3.1. Oxygen Healthcare Research Pvt. Ltd., by way of the team made available to the company, will carry out the Project(s) in accordance with the Project Brief(s). Oxygen Healthcare Research Pvt. Ltd. Will use its best efforts to carry out the Project(s) in accordance with the agreed timetable. In any event, it will notify the Company promptly if it becomes aware that the Team cannot meet any particular time scale.

29. They are doing scientific research and development services so client authorise us to procure starting material. However, no goods are made physically available by client directly or indirectly to service provider "o2h". As per CBEC Guidance on service tax vide TRU Circular dated 20.6.2012, note 5 of clarifies that it is essential that to cover under Rule 4, the goods should temporarily come under the physical possession or control of the service provider and without such effect, the service cannot be termed as rendered in India. In our case, since the goods have been ordered, purchased and paid from Oxygen Healthcare Research Pvt. Ltd. In other words, ownership of the materials is with them and they at its own discretion can use this material or reuse or scrap.

30. They are engaged in early phase drug discovery activities. They provide medicinal chemistry, project management and customized chemistry services to support client's chemistry discovery efforts. Therefore, the company provides service of discovery of drug and other allied services to support the client's discovery efforts. The activity of drug discovery means that we synthesis

various chemical substances (starting material) to create a compound. The activity of combining the chemical substances/simple compound (starting materials) to form a complex compound which is a unified entity of all the elements is called synthesis.The route of synthesis is the chemical process undertaken to alter the chemical structure of the starting material to develop the compound. The examples of chemical processes are heating the starting material to a specific temperature in controlled environment, adding solvent to reduce the strength of starting material and maintain it at certain temperature for certain period of time, mixing the starting material with the solvent at a specific heat for certain period of time etc to alter the structure of the starting material to develop a compound. The client gives us target compound structure based on that our scientist draw possible synthetic route by using his technical skills and identify which chemical require to create or develop the compound. The starting material are recognized by Chemical Abstract Substance (CAS) number worldwide. The CAS number is a unique numerical identifier assigned by the Chemical Abstracts Service to every chemical substance. These starting materials are procured by us on the basis of the CAS number. The company procures the material based on the route and subsequent research on the same.

31. They had submitted Contract Research Agreement of Cashew project dated March 22nd, 2016, the activities required to be undertaken by us had been specified in the Appendices issued under the agreement. The Appendix-1 to the agreement specified the services to be provided by the company.

*"**Project Outline:***
***Provider will provide a team of FTEs, who shall be fully and exclusively dedicated to chemical synthesis work for Company.** The FTEs shall produce and deliver to client specific compounds and/ or libraries as requested by client and described in the research plans. For avoidance of doubt, "FTE" means a Fully Allocated Chemist, approved in advance by client, employed by Provider working on the Project(s) with such time and effort to constitute the equivalent of one chemist working on a full time basis, a fractionally allocated Supervisory Support and utilizing appropriate shared manpower resources at Provider's facilities in a manner consistent with normal business practice.*

Scope of Services

The scope of chemistry activities which will be performed by the service provider in this collaboration are as follows:

I. *Synthesis of key intermediates on a scale of 5-50 g and a purity of ~95% unless otherwise agreed upon in advance.*
II. *Synthesis of reference compound on a scale of 0.2-5 g and purity of ~95-98% (>98% ee when relevant) unless otherwise agreed upon in advance.*
III. *Synthesis of focused compound libraries (typically 20-200 compounds per library) on a scale of 10-50 mg and a purity of no less than 95% unless otherwise agreed upon in advance.*
IV. *Scale-up of selected compounds for advanced in vivo studies on a scale of 5-100 g and a purity of at least 95% (>98% ee when relevant) unless otherwise agreed upon in advance."*

The scope of work specified above is explained as follows:

(i) Point I of scope of services:
During the process of synthesis, each chemical reaction alters the chemical structure of the starting material to certain degree. The alternation of structure of starting material to an extent that it possesses certain characteristic of compound and is stable for storage is called an intermediate. The chemical structure of intermediate can be altered to develop the compound. Weare not required to undertake synthesis of starting material again to develop the compound. We have developed such intermediates in past for the client. In the current appendix, weare required to synthesis such intermediates to develop the compound.

(ii) Point II of scope of services:
The compounds developed by us are novel in nature i.e. there is no research or literature available on such compounds. The compounds are sent to the client who does following test to ascertain whether it has properties to be termed as API and get approval from authorities, following are the major steps for drug discovery process:

(a) **Pre-clinical Development:** In this phase, the client tests the compound for its mutagenicity i.e. effect of compound on DNA; Metabolic stability, Acute Pharmacology i.e. use of compound as medicine etc

(b) **Clinical Trials:** In this phase, the compound is developed into a medicine and tested for its effect; stability; long term impact on human health & body etc.

(c) **FDA Drug Review:** If a client has evidence from its early tests and preclinical and clinical research that a drug is safe and effective for its intended use, the client can file an application to market the drug. The FDA review team thoroughly examines all submitted data on the drug and makes a decision to approve or not to approve it.

(iii) **Point III of scope of services:**

Once, the compound has been developed, we can change the chemical structure to create variety of compound with similar chemical structure. This is known as focused compound libraries. The client asksus to create the library on a scale of 10-50 mg. The client has specified that the compounds should have 95% purity.

(iv) **Point IV of scope of services:**

The client has to undertake testing of the compound to obtain approval of it as API from FDA. One of the forms of testing is 'in vivo' wherein the compound is administered to the plasma of living organism to test the effect of the same. The client requires substantial quantity of the compound to undertake these tests. Hence, they have asked us to scale-up the quantity of compounds selected by them to 5-100 g to undertake the testing activity.

They do not receive any compounds/samples from the client:

(a) With respect to project Cashew-II Corporation-FTE agreement:

(i) The scope of service provided by them has been stated in the para 'Project Outline' and 'Scope of Service' above. The consideration payable to them is payable based on the number of FTEs assigned by o2h to the client. It is evident that the rate of FTE included the cost of chemicals on actual basis. This para also provides for the cost that will be included and excluded from the rate of FTEs. The relevant extract is reproduced below:

"Consideration
Provider shall be paid at the rate shown in the table below for each FTE ("Rate") under this Project. Provider shall send an invoice to client on the last business day of every month during the duration this Agreement is in effect. In case of early termination of the Agreement Provider shall send an invoice for the actual work done within fifteen (15) days of the termination of this Agreement.

(ii) This material is the property of the assessee. In case there is a defect in the material, the procured material is short in quantity, the order has not been placed properly, then it is the responsibility of the assessee to obtain replacement or purchase new stock to complete the synthesis timely. The client is not responsible for the same.

(iii)Therefore, it is apparent that the material has been purchased by the asssessee and that the cost of material is recovered by them as part of the consideration for the provision of service.

(iv) As per the agreement, it has not been mentioned that the client will provide the material, or that they are allowed to purchase the material on behalf of the client. There is absolutely no understanding between them and their client and that the material has been purchased on behalf of the client.The cost of material forms a part of the consideration. Hence, the assessee has stated the same along with the FTE rate.

M/s. o2h Limited with respect to Cashew-II project of Chemistry synthesis Research Inc (FTE agreement):

(i) The client had entered into the Master Service Agreement with us on 1st April 2015. This agreement was renewed on 01/04/2016. As per this agreement, the client will execute Task Order for provision of service. The client has a practice to issue a yearly task order in the month of February. The services to be provided by o2h is stated in Appendix-1 of the Task Order.

(ii) As per the Appendix-1 to this Task Order, our scientist has to conduct custom synthesis project to produce various desired compounds. The client will provide the structure of the compound, potential chemicals pathway from where the desired amount and specification of the compound is made. We are required to contribute to the design and synthesis of the compound and deliver them to the client. We are also required to provide all the records of the synthesis to the client. The consideration for this service has been stated in Part-I(C).

(iii) The said para is reproduced below:

"C. Full Time Equivalent ("FTE")
The company will provide FTEs to M/s. o2h Ltd.,UK with respect to project Cashew-II as set forth below. For purposes of this Task Order an FTE shall mean a fully allocated chemist employed by company and working on the project(s) pursuant to this Task Order with such time and effort to constitute the equivalent of one (1) chemist working on a full time basis for 12 months. From the month of August there were 2 FTEs worked up to November and it were increased with 6 FTEs from December to March2017

August to November 2016

Number of FTEs	:	*2*
FTE levels assigned to project	:	*1 doctoral*
		1 associate
Amount per FTE	:	*US$59,090.88*

December to March 2017

Number of FTEs	:	*4*
FTE levels assigned to project	:	*1 doctoral*
		3 associates
Amount per FTE	:	*US$59,090.88*

PERSONAL HEARING:

21. Personal hearing in the matter was held on 29.6.2021, wherein Shri Pragnesh Thakker, Head of Finance, appeared before me on behalf of the assessee and reiterated their written submission dated 7.8.2019 and also furnished additional submissions dated 28.6.2021. He explained that their activities qualify for export of services. Therefore, the instant demand is not legal.

DISCUSSION AND FINDINGS

22 I have carefully gone through the records of the case, including the Show Cause Notice,the defence reply as well as the additional submissions made by the assessee. I find that the issue to be decided in this case is whether the specified services provided by the assessee should be considered as "*Export of Services*" for the purposes of Rule 6A of the Service Tax Rules, 1994 or if the same should be considered a "Performance based Service", 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 find that it has been proposed 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 the assessee on the ground that the assessee, as a service provider, has undertaken such services in respect of the specific goods provided or made available to them by their foreign clients.

23. It is the contention of the department that the compounds/samples are made physically available to the assessee, the assessee had then undertaken Technical Testing and Analysis on the compounds/samples provided by their clients. Considering the place of actual performance of service is the place of provision of service, in this case, the service appeared to have been provided in India. Hence, the services provided by the company cannot be considered as export of service as the place of provision of service is within the taxable territory. This implies that the condition of clause (d) of Rule 6A (1) of the Service Tax Rules, 1994 ('Rules') governing export of services has not been satisfied and hence the services provided by the assessee appeared to be covered under Rule 4 of the Place of Provision of Service Rules, 2004.

24. For deciding the issue, it is pertinent to examine the precise nature of services provided by the said assessee. which is as follows.

24.1 The assessee is engaged in the business of provisions Research and Development ('R&D') Services relating to drugs discovery. There are two type of researches (1) Organic Chemistry Research and (2) Integrated Drug Research. The Company has a full-fledged laboratory facility in Ahmedabad and has employed personnel to perform Scientific Research activities.

24.2. The R&D activities *inter alia* includes scientific route design, scheme preparation, chemical quantity calculation, chemical price calculation, completion of medicinal chemistry research activity, preparation & checking of scientific reports, review and communication of productivity numbers of the scientists, review of scientific data prepared in the log-books etc.

24.3. The assessee had entered into a Contract with one of the Clients for providing aforesaid activities. The Clients of the assessee are located outside India. The contractual obligation mandates provision of analysist report i.e. study report/certificate is sent after undertaking the detailed investigation. Please be informed that the assessee does not carry out research or analysis activities on goods/materials provided by the Client located outside India.

24.4. On scrutiny of the amount of Rs. 32,57,46,290/- shown in their records, it was noticed that the assessee had provided the "Technical Testing and Analysis Service" (hereinafter referred as "TTA Service") to its clients located outside India. Further, on perusal of project work, it was noticed that the said service has been carried out on the goods/materials purchased by the assessee and the cost of said materials/samples had been reimbursed by the assessee in the invoices issued to the Client.

24.5 Therefore, it had appeared that for providing the TTA Service to the Client, the sample required for the same were made available by the Client and the cost of samples, procured by the Company on behalf of the Client, were reimbursed to the assessee.

24.6 In the present case, the assessee had provided services of research and development and not performance-based services as alleged in the SCN. Further, even after performing such research, there are probabilities that they may not yield any results and all efforts are wasted.

24.7 As clearly provided in the above para, the essential character of a service to be covered under Rule 4(a) of POPS Rules is that the goods temporarily come into the physical possession or control of the services provider and are returned post completing the activity. The original identity of the products remains and are handed over. In the instant case, the Client has never provided goods/materials to the Company for carrying the TTA activities. Moreover, the goods or material so used in services has to have significance in value, which in the instant case does not happen.

24.8 As stated above, the TTA Service provided by the assessee *inter alia* includes scientific route design, scheme preparation, chemical quantity calculation, chemical price calculation, completion of medicinal chemistry research activity, preparation & checking of scientific reports, review and communication of productivity numbers of the scientists, review of scientific data prepared in the log books etc. The result of such analysis is required to be provided in the form of report i.e. study report / certificates. Further, the assessee is not doing the research on any material/substances provided by its clients.

24.9 The Impugned SCN alleged that the Client of the assessee had reimbursed the cost of materials/goods to the Company in accordance with the terms of clause relating to reimbursed of cost of materials/goods in the Contract and therefore, such arrangement will be treated as goods/materials made available by the Client to the assessee for providing TTA Service. The assessee submitted that the TTA Service provided by the assessee satisfies the conditions which is required to be fulfilled for a services to be treated as 'Export of Services'. The assessee has stated that the Audit Team, by relying on the terms of Contract with regards to reimbursement of cost of materials/goods, had erroneously concluded that the Goods/materials had been provided by the Client on which assessee had performed the TTA Service and thereby, liable to Service tax.In the present case, the asessee had linked their consideration for TTA Service along with reimbursement of cost of materials/goods.

24.10 The assessee has submitted that once the consideration for a given service has been agreed upon between the parties in their commercial wisdom then, the tax authority cannot seek to question or undermine the same. They relied on the decision of the Hon'ble Supreme Court in ***Union of India v. Mahindra and Mahindra [1995 (76) E.L.T. 481 (S.C.)]***, in which it was unequivocally held that, unless the revenue can show that some other consideration, monetary or otherwise, flowed from the service recipient to service provider, there would be no basis to question the agreed upon price. The relevant extract of the said decision is set out below.

> *"...There is no material nor was it suggested that the dealings between the parties are not at arm's length. No evidence is available to show that the payment of royalty to the collaborator induced any extra commercial obligation for the price of CKD packs, parts and components. 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 the real and that the price for the sale of the CKD packs is not the true price, and the price was determined by reckoning or taking into consideration the lumpsum payment made under the collaboration agreement in the sum of 15 million French Francs.*
>
> ...
>
> *The collaboration agreement entered into between the parties is clear and it is not open to the revenue to construe it differently by reading into it something which is not there. In the result, we hold that the Judgment appealed against does not merit interference and this appeal deserves to be and is hereby dismissed with costs, which we quantify at Rs. 10,000/-..."*

25. As per MSA para 3.1. Oxygen Healthcare Research Pvt. Ltd., by way of the team made available to the company, carried out the Project(s) in accordance with the Project Brief(s). They are engaged scientific research and development services,therefore the client authorized the assessee to procure starting material. However, no goods are made physically available by client directly or indirectly to the assessee. CBEC Guidance on service tax vide TRU Circular dated 20.6.2012, note 5 of clarifies that it is essential that, to be covered under Rule 4 of Place of Provision of Service Rules,2012, the goods should temporarily come under the physical possession or control of the service provider and without such effect, the service cannot be termed as rendered in India. In this case, the goods have been ordered, purchased and paid by the assessee. In other words, ownership of the materials is with the assessee and that the assessee at its own discretion could use this material or reuse or scrap.

26. The assessee is engaged in early phase drug discovery activities. They provide medicinal chemistry, project management and customized chemistry services to support client's chemistry discovery efforts. Therefore, the company provides service of discovery of drug and other allied services to support the client's discovery efforts. The activity of drug discovery means that the assessee synthesis various chemical

substances (starting material) to create a compound. The activity of combining the chemical substances/simple compound (starting materials) to form a complex compound which is a unified entity of all the elements is called synthesis.The route of synthesis is the chemical process undertaken to alter the chemical structure of the starting material to develop the compound. The examples of chemical processes are heating the starting material to a specific temperature in controlled environment, adding solvent to reduce the strength of starting material and maintain it at certain temperature for certain period of time, mixing the starting material with the solvent at a specific heat for certain period of time etc to alter the structure of the starting material to develop a compound. The name of the chemical substance and chemical structure of the required compound is sent by the client. The starting material are recognized by Chemical Abstract Substance (CAS) number worldwide. The CAS number is a unique numerical identifier assigned by the Chemical Abstracts Service to every chemical substance. These starting materials are procured by the assessee on the basis of the CAS number. The company procures the material based on the route and subsequent research on the same.

27. The assessee had submitted that vide Contract Research Agreement of Cashew project dated March 22nd, 2016, the activities required to be undertaken by the assessee had been specified in the Appendices issued under the agreement. The Appendix-1 to the agreement specified the services to be provided by the company. I have gone through the the 'project outline' and 'scope of service' as detailed in the defense reply of the assessee, which is as under:

*"**Project Outline:***
***Provider will provide a team of FTEs, who shall be fully and exclusively dedicated to chemical synthesis work for Company.** The FTEs shall produce and deliver to Assessee specific compounds and/ or libraries as requested by Assessee and described in the research plans. For avoidance of doubt, "FTE" means a Fully Allocated Chemist, approved in advance by Assessee, employed by Provider working on the Project(s) with such time and effort to constitute the equivalent of one chemist working on a full time basis, a fractionally allocated Supervisory Support and utilizing appropriate shared manpower resources at Provider's facilities in a manner consistent with normal business practice.*

Scope of Services
The scope of chemistry activities which will be performed by the Provider for the Assessee in this collaboration are as follows:

V. *Synthesis of key intermediates on a scale of 5-50 g and a purity of ~95% unless otherwise agreed upon in advance.*
VI. *Synthesis of reference compound on a scale of 0.2-5 g and purity of ~95-98% (>98% ee when relevant) unless otherwise agreed upon in advance.*
VII. *Synthesis of focused compound libraries (typically 20-200 compounds per library) on a scale of 10-50 mg and a purity of no less than 95% unless otherwise agreed upon in advance.*
VIII. *Scale-up of selected compounds for advanced in vivo studies on a scale of 5-100 g and a purity of at least 95% (>98% ee when relevant) unless otherwise agreed upon in advance."*

28 The scope of work specified above is explained as follows:

(v) Point I of scope of services:

During the process of synthesis, each chemical reaction alters the chemical structure of the starting material to certain degree. The alternation of structure of starting material to an extent that it possesses certain characteristic of compound and is stable for storage is called an intermediate. The chemical structure of intermediate can be altered to develop the compound. The assessee is not required to undertake synthesis of starting material again to develop the compound. The assessee has developed such intermediates in

past for the client. In the current appendix, the assessee is required to synthesis such intermediates to develop the compound.

(vi) **Point II of scope of services:**
The compounds developed by the assessee are novel in nature i.e. there is no research or literature available on such compounds. The compounds are sent to the client who does following test to ascertain whether it has properties to be termed as API and get approval from authorities, following are the major steps for drug discovery process:

(d) **Pre-clinical Development:** In this phase, the client tests the compound for its mutagenicity i.e. effect of compound on DNA; Metabolic stability, Acute Pharmacology i.e. use of compound as medicine etc
(e) **Clinical Trials:** In this phase, the compound is developed into a medicine and tested for its effect; stability; long term impact on human health & body etc.
(f) **FDA Drug Review:** If a client has evidence from its early tests and preclinical and clinical research that a drug is safe and effective for its intended use, the client can file an application to market the drug. The FDA review team thoroughly examines all submitted data on the drug and makes a decision to approve or not to approve it.

(vii) **Point III of scope of services:**
Once, the compound has been developed, the assessee can change the chemical structure to create variety of compound with similar chemical structure. This is known as focused compound libraries. The client asks the assessee to create the library on a scale of 10-50 mg. The client has specified that the compounds should have 95% purity.

(viii) **Point IV of scope of services:**

The client has to undertake testing of the compound to obtain approval of it as API from FDA. One of the forms of testing is 'in vivo' wherein the compound is administered to the plasma of living organism to test the effect of the same. The client requires substantial quantity of the compound to undertake these tests. Hence, they have asked the assessee to scale-up the quantity of compounds selected by them to 5-100 g to undertake the testing activity.

29. From the above, it is evident that the assessee provided services of synthesis of chemical substance to develop the compounds. They also assisted their client in developing the compound of desired types and quantity to undertake various testing activities. However, the assessee does not undertake any testing activities. The limited testing undertaken by assessee is that of analysis of intermediates in cases where synthesis is undertaken from starting material and of compounds developed by them. The analysis of intermediates is undertaken to verify whether the chemical route of synthesis is altering the chemical structure of starting material in desired manner. Similarly, the analysis of compounds is undertaken to verify its structure and purity. On satisfactory results of analysis, the compound is shipped to the client.

The testing undertaken by assessee is incidental to service of development of compounds:

30. I find that it has been alleged in the Show Cause Notice that the assessee had undertaken Technical testing and analysis services on the desired compounds.However, from the description of the nature of service of the assessee in the foregoing paras, I find that the service provided by the assessee is discovery of drugs by undertaking chemical synthesis. The intermediates are developed at different stages in the process of synthesis. These intermediates are required to be tested to

ensure that they are of the requisite chemical formula, quality, and purity. The testing also ensures that the synthesis route adopted by assessee is correct to develop the compound. This testing is incidental to the process of synthesis. The services of the assessee cannot be considered as testing merely on this basis.

31. The assessee has relied on the judgment of MIDAS CARE PHARMACEUTICALS PVT LTD versus COMMISSIONER OF CENTRAL EXCISE, AURANGABAD 2014-TIOL-1484-CESTAT-MUM. The relevant extract is reproduced below:

> *"6. From the reading of the definitions provided under the Finance Act, the definition of 'taxable service' is to any person, by a technical testing and analysis agency, in relation to technical testing and analysis. As the appellants are manufacturing the medicines as per the formulae developed by them or provided by the principal and during the manufacture,* ***the appellants are undertaking certain test to find out whether the products are as per the formulae hence it cannot be said that the appellants are technical testing and analysis agency****."*

32. I concur with the view expressed by the Tribunal in the above case and hold that the testing is incidental to process of development of compounds and that the assessee is not engaged in provision of technical testing and analysis services exclusively with reference to the impugned services under contention in the Show Cause Notice.

33. I find that the **assesseehad entered into the following kinds of agreement for provision of synthesis service:**

i. Full Time Equivalent (FTE basis):

The FTEs refers to the human resource of the assessee recruited to undertake the chemical synthesis to develop the compound. In this type, the FTEs are allotted on part- or full-time basis to work for the client. The assessee enters into Master Service Agreement (MSA) for a year to three-year period. The MSA is entered to agree on the terms and conditions for provision of service. During, the tenure of the agreement, the client, on periodic basis, will provide the structure of the compound required to be developed by them and the description of starting material that has to be used for the same. The MSA provides for execution of work orders/engagement letters/purchase orders/appendix, etc (work order) to undertake synthesis for development of each compound.

The FTEs carry out the synthesis to develop the said compound. Hence, the manpower used by the assessee to develop the compound is known to the client and the assessee. However, the quantity of starting material used will depend on number of chemical process in the synthesis route. Based on the research and results of synthesis the assessee improvises the synthesis route or may have to re-start the process again. Hence, the assessee is not in position to provide costing for the material. Therefore, the client and assessee agree to charge for material on actual basis. The only material included in the FTE cost are the common solvents and reagents which are always in stock of the assessee. These are commonly available solvents which are low on cost. Hence, the assessee has agreed to include the cost of same in the FTE and not charge separately for the same. The consideration for synthesis on FTE basis is the sum of the rate of each FTE for the year and value of material on actual basis. This can be explained as follows:

ii. Fixed Price Project (FPP):

In this type of agreement, the Assessee enters into an agreement to develop the compound for an agreed lumpsumprice. This price includes the entire cost of the Assessee to develop the said compound.

Therefore, it is evident that the cost of starting material is included in the fees of the assessee for FPP projects. There is no condition for client to provide the material or pay for it on actual basis.

34. The assessee does not receive any compounds/samples from the client:

(a) Project Cashew-II Corporation-FTE agreement:

(i) The scope of service provided by the Assessee has been stated in the para 'Project Outline' and 'Scope of Service' above. The consideration payable to the Assessee is payable based on the number of FTEs assigned by the Assessee to the client. It is evident that the rate of FTE included the cost of chemicals on actual basis. This para also provides for the cost that will be included and excluded from the rate of FTEs. The relevant extract is reproduced below:

"Consideration
Provider shall be paid at the rate shown in the table below for each FTE ("Rate") under this Project. Provider shall send an invoice to the Assessee on the last business day of every month during the duration this Agreement is in effect. In case of early termination of the Agreement Provider shall send an invoice for the actual work done within fifteen (15) days of the termination of this Agreement.

(ii) From the submissions of the assessee, it comes out clearly that all the materials purchased by the assessee are chemical substances which are starting materials for the assessee. Thus, it is evident that the assessee had purchased starting material to provide services stated in Point I to IV of the scope of service of Appendix-1. This material is the property of the assessee. In case there is a defect in the material, the procured material is short in quantity, the order has not been placed properly, then it is the responsibility of the assessee to obtain replacement or purchase new stock to complete the synthesis timely. The client is not responsible for the same.

(iii)Therefore, it is apparent that the material has been purchased by the assessee and that the cost of material is recovered by the assessee as part of the consideration for the provision of service.

(iv)Further, on scrutiny of the agreement, I find that it has not been mentioned that the client will provide the material, or the assessee is allowed to purchase the material on behalf of the client. There is absolutely no understanding between the client and the assessee that the material has been purchased on behalf of the client.In view of the above, I find that the cost of material forms a part of the consideration. Hence, the assessee has stated the same along with the FTE rate.

(b) M/s. Oxygen Healthcare with respect to Cashew-II project of Chemistry synthesis Research Inc (FTE agreement):

(i) The client had entered into the Master Service Agreement with the Assessee on 1st April 2015. This agreement was renewed on 01/04/2016. As per this agreement, the client will execute Task Order for provision of service. The client has a practice to issue a yearly task order in the month of February. The services to be provided by the Assessee is stated in Appendix-1 of the Task Order.

(ii) As per the Appendix-1 to this Task Order, the assessee has to conduct custom synthesis project to produce various desired compounds. The client will provide the structure of the compound, potential chemicals pathway from where the desired amount and specification of the compound is made. The assessee is required to contribute to the design and synthesis of the compound and deliver them to the client. The assessee is also required to provide all the records of the synthesis to the client. The consideration for this service has been stated in Part-I(C).

(iii) The said para is reproduced below:

"C. Full Time Equivalent ("FTE")
The company will provide FTEs to M/s. o2h Ltd with respect to project Cashew-II as set forth below. For purposes of this Task Order an FTE shall mean a fully allocated chemist employed by company and working on the project(s) pursuant to this Task Order with such time and effort to constitute the equivalent of one (1) chemist working on a full time basis for 12 months. From the month of August there were 2 FTEs worked up to November and it were increased with 6 FTEs from December to March 2017

August to November 2016

Number of FTEs	:	*2*
FTE levels assigned to project	:	*1 doctoral* *1associate*
Amount per FTE	:	*US$59,090.88*

December toMarch 2017

Number of FTEs	:	*4*
FTE levels assigned to project	:	*1 doctoral* *3 associates*
Amount per FTE	:	*US$59,090.88*

(i) The clause (E) provided that any material of the client to be used in this task order may be provided by the client or any of its affiliate. Any unused material should be returned back to the client.The Part-II of the agreement provides for cost and payment schedule. The following is evident from the same:

- The assessee shall be responsible for the cost of laboratory supplies, consumables, common solvent and lab chemicals. Only project specific reagents having cost of USD 500 per gram will be provided by the client.
- The assessee is responsible for cost of analysis and the shipment of compound.
- The utility expenses of the assessee like insurance, infrastructure, etc. forms part of the fees.
- The above arrangement does not include material for large scale synthesis, which is greater than 25 grams of delivered products.

(v) The agreement clearly states that the assessee is responsible for the cost of analysis and shipment of compound. The cost of analysis includes the entire cost of synthesis. The synthesis cost is cost of starting material, reagents, solvents, infrastructure and administration cost. The client has provided the maximum fees that the assessee can charge them for the services. The assessee cannot charge anything above this rate to the client. Therefore, they have to include the cost of material in the FTE rate. This is the only FTE agreement wherein the cost of project, specific chemicals, are also included in the FTE rate. In case, the assessee has to purchase any expensive material which has a cost

of USD 500 then they have to inform the client about the same. Therefore, the assessee provides the list of materials purchased by the assessee for the project. The list contained the purchase order wise details of each material procured by the assessee to provide synthesis services for the month.The assessee has raised the invoices for FTEs as under:

Sr. No.	Invoice no.	FTE no.	Amount of invoice in USD (4,924.24* no of FTE)
1	O2H1272/16-17	2	6,671.55
2	O2H1401/16-17	6	29545.46

35. It is evident from above that the value of material has not been charged separately to the client. The statement showing break-up of starting material (annexure-23 of the reply) also provides bifurcation of the material under the head *"starting material"* and *"solvent"*. It is evident that all the items purchased by the Assessee are chemical substances which are starting material for the assessee and assessee had purchased them on principal to principal basis. The assessee has not placed order on behalf of the client. The material is the property of the assessee. They also do not send the leftover material to the client.

36. I find that the assessee had not received any material from the client. The clause E of the task order clearly provides that the client 'may' provide the material to the assessee. Therefore, there is no prerequisite on supply of material. Further, there is no documentary evidence to substantiate that the client had provided the material to the client whereas the assessee has submitted documentary evidence of purchase of material. In view of above, I find that the assessee has not received any material from the client. Further from the statement of purchase orders and payments made by the assessee, it is evident that the assessee has purchased the entire material required for the provision of service and that they do not receive any material from the client.

37. From the records submitted by the assessee, I find that the value of material has not been charged separately to the client. It is evident that all the items purchased by the Assessee are chemical substances which are starting material for the assessee and assessee had purchased them on principal to principal basis. The assessee has not placed order on behalf of the client. The material is the property of the assessee. They also do not send the leftover material to the client.The assessee had not received any material from the client.

38. In view of the services provided by the assessee, I hereby examine the issue involved, in the light of Rule 6A of the Service Tax Rules, 1994 (STR) and Rule 4(a) of the Place of Provision of Services Rules, 2012 (POPS Rules).The 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 the same cannot be considered as '*export of service*'.

38.1. 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"

39. 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 Service Tax Rules, 1994.

39.1 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]

40. "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)

The CBEC has issued Guidance Note clarifying the provisions of POPS. The question no. 5.4.1 of guidance note no. 5 which clarifies scope of rule 4 (a) is reproduced below:-

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 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".*

41. It is evident from above that the Guidance Note has further clarified the interpretation of the Rule 4. It has been clarified that the following are the essential characteristic of a service to be covered under Rule 4:

(a)The goods should temporarily come into physical possession or control of the service provider and
(b) The service cannot be rendered without the physical possession of the goods.

42. Therefore, it is apparent that for any service to be covered under Rule 4, the service provider should receive the temporary physical control of the goods, the service should be provided in respect of said goods and provision of service is not possible without receipt of the goods.

43. Whether the services of the assessee can be covered under Rule 4(a) of POPS Rules, 2012:

(i) Service cannot be provided without receiving the goods from the service receiver:

43.1 The use of words '**required to be**' in Rule 4(a) makes it clear that without the receipt of goods from the service recipient, the services cannot be provided. Hence, the Rule 4(a) of the POPS Rules, 2012 will not cover services where the supply of goods by the receiver is not material to the rendering of service. If for providing any service, goods are not necessarily required to be received from the service recipient, then same will not be covered under the aforesaid Rule for e.g. service provider can purchase it from market and provide the service on the same.

43.2 The same can be evidenced from the following example given by the Education guidance note:

- *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*

43.3 In the instant case also, the goods are procured by the assessee for provision of services of development of compound for their client. In case of M/s. Verseon it has been specifically stated in Appendix-I of the agreement that the cost of subsequent chemicals, 'not approved compounds' will be reimbursed to the assessee on actual

basis. The assessee had purchased the material and raised invoice for the same as consideration for the service. Similarly, in case of M/s. Novartis Institute for Bio-Medical Research Inc., Cambridge, Massachusetts, the assessee had procured the material for them. In this case, the cost of FTE included the cost of materials used to make the compound. Therefore, the materials were not received by the assessee from the client. Thus, the service will not be covered under Rule 4(a) of the Place of Provision of Service Rules, 2012.

44. Services that are related to goods; and where service receiver is required to make such goods physically available to the service provider so that the service can be rendered, are only covered under Rule 4(a):

44.1 Rule 4(a) clearly states that services must be provided in respect of goods that are required to be physically made available by the recipient of the services to the provider of service. These services can be **provided only after the recipient has made the goods available to the provider of services.** Without this, provider of services is not in a position to provide the services. The use of words '**required to be**' in rule 4(a) makes it clear that without goods being made available by the service recipient, the services cannot be provided. The examples of services covered under Rule 4(a) are repairs & maintenance, storage and warehousing, technical testing and analysis, etc. It is not possible for the service provider to provide services without receipt of material, e.g. the service of repairs cannot be provided unless goods are received from provider of services.

44.2 It is evident from Rule 4(a) that services provided in respect of goods that are required to be made available by the recipient of service to the provider of service are covered under this rule. Therefore, the service has to be performed on the goods provided by the service receiver. Also, after the provision of service, the goods are either returned to the service recipient or to any other person on his behalf.

45. **The starting material is consumed in development of compound-Hence, the services are not provided on said goods:**

45.1 As per Rule 4(a) the service should be provided in respect of goods provided by the service receipt. In the present case, the starting material gets consumed in the development of compound and thus lose its existence. It is evident from the submission made above that the starting material is synthesis to develop compounds.The assessee carries out series of chemical reaction to alter the chemical structure of starting material to make compound. The original material gets consumed and can never be sent back to the customer.The starting material changes its structure in synthesis process. It can never be sent to the client in ***"as is"*** form. Therefore,this service cannot fall under Rule 4(a) of POPS Rules.

45.2 I rely upon the decision of CESTAT, in the case of ADVINUS THERAPEUTICS LTD., reported in 2017 (51) S.T.R. 298 (Tri. - Mumbai),wherein it was held as under:

> *"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."

45.3. I rely on the decision of CESTAT, in the case of M/s Indeus Life Science Pvt Ltd reported in 2018 (11) TMI 848 – CESTAT Mumbai, wherein it was held as under:

"9. Also, in the case of Advinus Therapeutics Ltd. (supra), this Tribunal more or less in similar circumstances, considering all aspects of the issue, interpreting Rule 3, 4 of Place of Provision of Services Rules, 2012, and Rule 6A of Service Tax rules, 1994, applying the principles of law laid down in this regard and the Board's clarification held that scientific or technical consultancy service provided in the development of drugs, to the overseas recipient of such service, is an 'export service'.....

***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 asseted. **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. ....."*

45.4 I also rely upon the following decisions of CESTAT, which augment the above decisions:

(i) M/s Fertin Pharma Research & Development India Pvt Ltd 2018 (10) TMI 1373- CESTAT Mumbai.

(ii) M/s Fertin Pharma Research & Development India Pvt Ltd 2017 (7) TMI 1238- CESTAT Mumbai .

(iii) Midas Care Pharmaceuticals Pvt Ltd 2014-TIOL-1484-CESTAT-MUM

45.5 CESTAT, Mumbai, in its decision in the case of M/s. MIDAS CARE PHARMACEUTICALS PVT LTD reported at 2014-TIOL-1484-CESTAT-MUM. The relevant extract has held as under:

*"6. From the reading of the definitions provided under the Finance Act, the definition of 'taxable service' is to any person, by a technical testing and analysis agency, in relation to technical testing and analysis. As the appellants are manufacturing the medicines as per the formulae developed by them or provided by the principal and during the manufacture, **the appellants are undertaking certain test to find out whether the products are as per the formulae hence it cannot be said that the appellants are technical testing and analysis agency.**"*

46. The services of the assessee are not in respect of starting material:

As per Rule 4(a) of the Place of Provision of Service Rules, 2012, the services should be provided in respect of goods received from the service recipient. In the present case, the assessee undertakes synthesis on the starting material to alter its chemical structure to develop a compound. Hence, the assessee does not provide any service in respect of starting material. The service of the assessee is to research and develop the manner in which synthesis can be undertaken to develop the compound. The assessee carries out series of chemical reaction as part of synthesis to alter the chemical structure of the starting material. Thus, the starting material loses its existence. The starting material cannot be separately identified in the compound. Therefore, it is submitted that the services of the assessee are not in respect of starting material. Therefore, even if it is assumed that the assessee has received the starting material from the client, even then the services of the assessee cannot be covered under this rule.

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

48. Therefore, in the absence of any specific ingredients which cast any doubt over the taxing jurisdiction of the subject services rendered by the assessee 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."*

49. 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 the assessee 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.

50. 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 Rules, it shall be determined in accordance with the Rule that occurs later among the Rules that merit equal 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 the assessee without any such goods provided by the clients. Since two different Rules from the POPS Rules are not '*equally applicable*' in this case, Rule 3 which 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 Service Tax Rules, 1994 as made out in the SCN and therefore, the services rendered by the assessee to their foreign clients would qualify as '*Export of Services*' as specified in the said Rule 6A ibid.

51. The Hon'ble Supreme Court 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.***

52. The Hon'ble High Court of Bombay, in its judgment in a similar case in the case of M/s. SGS India Pvt. Ltd. cited at 2014 (34) STR 554 (Bom) had observed that ***if a service is consumed outside India, it will be considered as exports and not taxable in India.***

53. Although the said judgments pertain to the period prior to introduction of POPS Rules, 2012. I am of the view that the said judgments delivered 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 are binding for deciding the 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.

54. Further, in the case of *Advinus Therapeutics Ltd. cited in 217 (51) STR 298 (Tri. Mum)*, Hon'ble Tribunal, as reproduced above, has examined almost of all the aspects as covered in the instant case. I find that the ratio of this decision is squarely applicable in the present case. The respondent, in this case also 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 following part of the decision settles the issue under contention in the instant Show Cause Notice.

"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."

55. 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....."

56. 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.

57. 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.

58. The Hon'ble Madras High Court in the case of ADVAIT STEEL ROLLING MILLS PVT. LTD.Versus UNION OF INDIA2012 (286) E.L.T. 535 (Mad.) has also upheld the above. The relevant extract of the judgment is reproduced below:

"19. It has been further stated that a reading of the statements and objects and the preamble of the Special Economic Zones Act, 2005, would make it clear that the said Act had been enacted only for the promotion of exports. *To use the definition of the term 'export' incorporated in the Special Economic Zones Act, 2005, in conjunction with the provisions of the Customs Act, 1962, to impose a levy, in respect of the goods in question, would clearly be against the intention of the legislature. It had also been stated that by imposing the levy on the goods in question, the Special Economic Zone unit would be made to bear an additional burden, contrary to the intention of the makers of the law, which is to encourage export of goods from the Special Economic Zones.*

20. It had been further stated that the ***levy of customs duty, by the authorities concerned, is clearly apposed to the statement made in the preamble to the Import-Export Policy (2004-2009). The objectives of the policy is to neutralize incidents of all levies and duties on inputs used in export products.*** *Section 12 of the Customs Act, 1962, enables the levying of the customs duties only in respect of goods exported from India to a place outside India. As such, the definition of Section 2(19) of the Customs Act, 1962,*

would confirm that the levy could be made only in respect of goods taken out of India, to a place outside India. Further, the Notification issued on behalf of the Department of Revenue, Ministry of Finance, Government of India, in Notification No. 66/2008-Customs, dated 10-5-2008, would show that the levy of duty of customs, being an Export Duty, would apply only in respect of goods exported to a place situated outside India."

59. I find that the aforesaid case laws irrefutably establish that the services provided to their clients by way of providing service of discovery of drug and other allied services to support the client's discovery efforts which include medicinal chemistry, project management and customized chemistry services to support client's chemistry discovery efforts, with or without any other goods or materials provided or physically made available by their foreign clients, should not be considered having rendered in respect of any goods, without which the service could not have been provided. Hence the services are not covered under the purview of Rule 4(a) of the POPS Rules, 2012. Consequently, such service are not excluded by way of condition (d) provided under Rule 6A of STR, 1994. Accordingly, I hold that the "*services*" rendered by the assessee 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 does not hold.

60. In light of the above discussion,a harmonious reading of the above Rule 4(a) of POPS Rules,the clarification given by CBEC, 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.Further, also relying on the various decisions of the Tribunal, judgments passed by the Hon'ble Supreme Court and High Court cited above, I decide that the place of provision of service in the instant case cannot be place of performance i.e. in India. Hence, I hold that Rule 4(a) of Place of Provision of Service Rules, 2012, is not applicable in this case and that the place of provision of service should not be determined as per this Rule. I hold that the specified services provided by the assessee should be considered as "*Export of Services*" under the provision of Rule 6A of the Service Tax Rules, 1994 and not in terms of Rule 4(a) of the Place of Provision of Services Rules, 2012 (POPS Rules).

61. In view of the above discussion, I hold that the demand is not sustainable and therefore, I do not consider it necessary to delve into the merits of invoking extended period of limitation and imposition of penalty. Therefore, I pass the following order:

ORDER

(i) I drop the demand and vacate the proceedings initiated under Show Cause Notice vide F.No. VI/1(b)/CTA/Tech-43/SCN/Oxygen/2018-19 dated 8.7.2019, issued by the Commissioner, Central Tax Audit, Ahmedabad.

(AMARJEET SINGH)
COMMISSIONER
CGST & CEX,
AHMEDABAD NORTH

DIN-20210764WT000000AC01

F No.STC/15-37/OA/2019 Date: 30.06.2021

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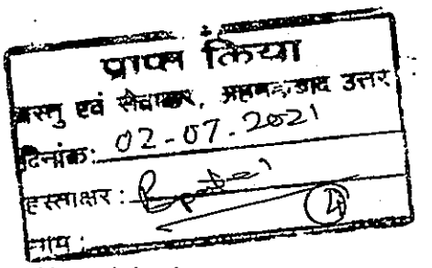
BAVLA ROAD, CHANGODAR, AHMEDABAD,
GUJARAT-382213



Copy to:

(i) The Chief Commissioner, CGST, Ahmedabad Zone,Ahmedabad.
(ii) The Deputy/Assistant Commissioner, Division IV, CGST, Ahmedabad (North)
(iii) The Range Superintendent, Range.-V, Division IV, CGST, Ahmedabad (North)
(iv) Guard File