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

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

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/15-09/OA/2020

DIN-20210764WT0000888C76

आदेश की तारीख / Date of Order : 13 .07.2021

जारी करने की तारीख / Date of Issue : 23.07.2021

द्वारा पारित/Passed by -

अमरजीत सिंह / AMARJEET SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-21/2021-22

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 करनें से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show Cause Notice no. VI/1(b)/CTA/Tech-29/SCN/Piramal Enterprise/2019-20/5805 dated 17.10.2020 issued to M/s. Piramal Enterprise Ltd, 18, Pharmaceutical Special Economic Zone, Sarkhej Bavla Road, Village-Matoda, Taluka: Sanand, Ahmedabad-382213 .

BRIEF FACTS OF THE CASE:

M/s Piramal Enterprises Ltd 18, Pharmaceutical Special Economic Zone, Sarkhej-Bavla Road, Village: Matoda, Taluka: Sanand, District: Ahmedabad 382 213 (herein after referred to as 'said assessee') is holding a Service Tax Registration Number AAACN4538PSD017. The assessee are engaged in providing/receiving Technical Inspection and Certification Agency Service, Rent-a-cab Service and Works Contract Service.

2 Audit of the records of the assessee was conducted for the period from June 2015 to June 2017. The following revenue para was raised.

3 On scrutiny of the ST3 returns (RUD 2) filed by the assessee for the period from June 2015 to June 2017, it was noticed that the assessee had provided Technical Inspection and Certification Agency Services to various foreign clients and have not paid service tax on the premise that they were export of services.

4 It was noticed that the assessee has entered into a Contract Research Agreement effective from 1.9.2015 with M/s Verseon Corporation, California, United States of America (RUD 3) for providing Technical Inspection and Certification Agency Service. The relevant text to the contract is detailed below:

"The Provider is a drug discovery services Company. Provider provides medicinal chemistry, project management, and customized chemistry services to support Client's discovery chemistry efforts.

Scope of Services

The scope of chemistry activities which will be performed by the Provider of the Company 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 compounds on a scale of 0.2-5 g and purity of ~95-98% (> 98% 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 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% when relevant) unless otherwise agreed upon in advance.

The Fully Allocated Chemist ('FTE') cost includes the following:

- *Manpower (Provider will dedicate a Project Leader at PhD level for each group of 12 FTEs and the ratio will be 1 PhD FTE for every 5 MSc FTEs)*
- *Supervision and intellectual contribution by Project Leader and Group Leader*
- *Analytical Support*
- *Infrastructure (for every 12 FTEs Provider will offer a fully access controlled dedicated laboratory)*
- *Common bench chemicals and common research consumables (List is given at end of Appendix 1) for small scale synthesis (upto 50 g)*

The cost of project specific chemicals, cost of shipping of finished and approved compounds, import costs, if any, incurred on shipments from Company to Provider are not included in the above FTE cost and would be reimbursable on actual landed costs. Procurement of certain expensive materials by Provider (those with a price exceeding 500 USD per sellable unit) shall be subject to Company's specific approval.

b) Payments

In consideration of the services to be performed by the Provider under this Agreement, Company shall pay Provider at the rate per Fully Allocated Chemist ('FTE' as defined below) per year as specified in each Appendix. Such rate shall include common bench chemicals and other common research consumables; information technology infrastructure and scientific literature search; hazardous waste disposals and use of general instrumentation. An example list of common bench chemicals is provided in Appendix 1 to this agreement.

Invoicing of Payment: Payment by Company will be due net thirty (30) days from the date of the invoice for the services, project specific chemicals, shipments and other expenses"

5 It was also seen that the assessee has entered into a Master Services Agreement effective from 15.2.2017 (Task Order No Piramal-NIBRI-2017-chemistry FTE) with M/s Novartis Institutes for Biomedical Research, Inc., Massachusetts, United States of America (RUD 3) for providing Technical Inspection and Certification Agency Service. The relevant text to the contract is detailed below:

A "Project Title: FTE Based Chemistry synthesis Services

B Description of Services

Appendix I

Custom Synthesis Projects: From time to time during the term of Task Order No Piramal-NIBRI-2017-chemistry FTE, Novartis will request Company to conduct custom synthesis projects to produce various desired compounds.

(a) Novartis will provide

(1) the structure of the desired compounds;
(2) a potential chemical pathway to the desired compounds;
(3) the required amount of the desired compounds; and
(4) the required specifications the desired compounds must meet.

Company shall be responsible for the cost of all reagents and laboratory supplies and consumables, including common solvents and laboratory chemicals (inclusive of silica gel). Project specific reagents that exceed $ 500.000 per gram will be provided by Novartis. All customs duties and taxes payable upon importation of such materials shall be paid by Company.

The total professional fees for the project described in this Task Order shall be no more than $ 752,000. Company may submit to Novartis invoices on a monthly basis commensurate with the FTE rate detailed in Section Part I C and based on the total number of FTE contracted in the month"

6 It appeared that the assessee have issued invoices for different months for claiming amounts for FTEs as well as the starting materials costs from the service receivers. On a sample basis, a few invoices issued by the assessee are mentioned and relied on for the purpose of this notice (Invoice No 3498501537 dated 30.3.2016, Invoices No 3498501966 and 3498501967, both dated 31.1.2017 (RUD 4), all in the name of M/s Verseon Corporation, USA and Invoices No 3498501443 dated 31.1.2016, 3498501729 dated 31.8.2016, 3498501963 dated 31.1.2017 and 3498501905 dated 31.12.2016 (RUD 4), all in the name of M/s Novartis Institute for Biomedical Research, USA).

7 From the above two agreements, one with M/s Verseon Corporation, USA and another with M/s Novartis Institute for Biomedical Research, USA, it appears that the assessee has to be provided with raw materials for working on each product. In certain cases, the required amount of the desired compounds are to be provided by the service receiver and in some cases, the assesse can source it and claim reimbursements.

8 Rule 6A (1) of the Service Tax Rules, 1994 ('Rules') governing export of services reads as under:

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

(a) the provider of service is located in the taxable territory,
(b) the recipient of service is located outside India,
(c) the service is not a service specified in the section 66D of the Act,
(d) the place of provision of the service is outside India,
(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and
(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act".

discussion on 20.1.2020. Mr Mehul Jivani and Ms Manali Butala appeared for the pre consultation discussions on 20.1.2020. It was stated in their submissions dated 20.1.2020 (RUD 6) that two conditions have to be satisfied in terms of Rule 4(a) of the POPR. First, the goods should be made physically available by recipient of service to the service provided and service should be provided in respect of the goods. Second, the goods which are physically made available by recipient of service on which service has been performed by the service provider should be returned to the service receiver in the same form i.e. without altering its form to the service recipient. The question No 5.4.1 to Guidance Note 5 of the Education Guide was also highlighted to clarify the scope of Rule 4(a) of the POPR. The rulings in the case of Advinus Therapeutics Ltd reported at 2016 (12) TMI 34 passed by the Appellate Tribunal and the Order No PI/ADC/ST/ADJ/11/2015 of 12.6.2015 in the case of Hikal Limited, passed by the Appellate Commissioner were cited to say that both conditions mentioned above were not satisfied in their case. It was contended that Rule 4(a) of the POPR would not apply to their case. It was further argued that they had not received materials from their clients and therefore, the provisions of Rule 4(a) of the POPR were not applicable to their case. It was further mentioned that though the issue had been raised with respect to FTE, the figures taken included FPP and ADME FPP, which do not fall within the issue raised.

21 For the purpose of issue of this notice, two of the sample agreements in the case of M/s Verseon Corporation and M/s Novartis Institute have been referred which pertain to FTEs. However, it is seen from the records that that the assessee have provided their services to various other clients. It is seen that the assessee have shown gross taxable amount under Part B1 (B1.7) in their ST3 returns. Further, they have shown the amounts under the head 'Amount charged against export of service provided or to be provided' in Part B1 (B1.8) of their ST3 returns. The entire amounts shown under Part B1 (B1.8) have been fully claimed as deduction in their ST3 returns, under Part B1 (B1.13) which is totally valued at Rs 1880860899 for the audit period. The Audit Group under a communication dated 11.4.2019 had conveyed to the assessee that they had provided technical inspection and certification agency services valued at Rs 1880860899 for the period from June 2015 to June 2017, as shown in their ST3 returns. It was also stated in the letter that the activities for which the deduction has been claimed, could not be considered as export of service. It appears that the assessee have not come up with any bifurcation of services provided by them under different heads like 'FTE', 'FPP' and 'ADME FPP' at the material time. Even otherwise, as the assessee have claimed the entire gross taxable amount as 'export of service', the gross value of the services amounting to Rs 1880860899 would have to be taken for the purpose of calculation of service tax. The value of Rs 1880860899 is the services provided by the assessee to all their clients and includes all heads like 'FTE', 'FPP' and 'ADME FPP' which has been claimed as 'export of service'. Accordingly, the contentions made on this count do not appear to be justified. Rule 4(a) of the POPR says that wherever the services are provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, in order to provide the service, the place of provision of following services shall be the location where the services are actually performed. It appears that the Rule nowhere states that the goods received from the recipient of service for providing the service has to be returned back in the same form. It appears that the assessee has tried to draw an inference which is not written or meant in the Rule. The Education Guide nowhere draws any implication that the goods have to be returned back in the same form as argued by the assessee. Further, the Education Guide is only for the purpose of guidance and therefore, would not override the provisions of Rule 4(a) of the POPR, which is specific and explicit. It, therefore, appears that the contentions made by the assessee on this count are not justified. It is seen from the agreement with M/s Verseon Corporation that the cost of project specific chemicals, cost of shipping of finished and approved compounds, import costs, if any, incurred on shipments from Company to Provider are not included in the above FTE cost and would be reimbursable on actual landed costs. Procurement of certain expensive materials by Provider (those with a price exceeding 500 USD per sellable unit) shall be subject to Company's specific approval. It is also seen from the agreement with M/s Novartis that the Company shall be responsible for the cost of all reagents and laboratory supplies and consumables, including common solvents and laboratory

chemicals (inclusive of silica gel). Project specific reagents that exceed $ 500.000 per gram will be provided by Novartis. All customs duties and taxes payable upon importation of such materials shall be paid by Company. From the text of these two agreements, it appears that the assessee has to be provided with raw materials for working on each product. Accordingly, the assessee appears to come within the ambit of the provisions of Rule 4(a) of the POPR and the contentions made by them on this count do not appear to be justified. The ruling in the case of M/s Advinus Therapeutics and M/s Hikal Limited are based on the issue of refund and therefore, it appears that they cannot be directly connected with the present case on hand.

22 M/s Piramal Enterprises Ltd 18, Pharmaceutical Special Economic Zone, Sarkhej-Bavla Road, Village: Matoda, Taluka: Sanand, District: Ahmedabad 382 213 are hereby called upon to show cause before the Principal Commissioner/Commissioner of Central Tax, Ahmedabad North Commissionerate, having his office at 1st Floor, Custom House, Near All India Radio, Old Gujarat High Court Lane, Navrangpura, Ahmedabad 380 009 as to why:

(i) service tax amounting to Rs 27,62,26,230/- (Rupees Twenty seven crore sixty two lacs twenty six thousand two hundred thirty only), should not be demanded and recovered from them, under the category of Technical Inspection and Certification Agency Service, in terms of the proviso to Section 73(1) of the Act;

(ii) interest should not be demanded and recovered under the provisions of Section 75 of the Act on the proposed demand at (i) above;

(iii) penalty should not be imposed upon them under the provisions of Section 78(1) of the Act against the proposed demand at (i) above.

23. DEFENCE REPLY:

Vide their letter dated 23.11.2020, the assessee has filed their reply to the Show Cause Notice vide F.No. VI/1(b)/CTA/Tech-29/S.C.N./Piramal Enterprise/2019-20/5805 dated 17/10/2020, wherein they interalia stated as under:

1) The nature of service of the company:

(a) The Company 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 company 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 Company based on the CAS number. The company procures the material based on the route and subsequent research on the same.

(b) The Chemical Synthesis Quote dated June 22, 2015 bearing no. PDSQ395(Revised) was attached as **annexure-5**. The quote is for undertaking synthesis on Fixed Price basis. This quote was submitted at the time of pre-consultation hearing. It will be evident that the company has provided synthesis plan in the quote. The plan contains 3 schemes. These schemes are the chemical synthesis route to develop the compound. The company has provided three likely routes which can be used to develop the compound to the client. It

will be evident from the synthesis route that chemical structure of starting material alters after each chemical process. Thus starting material is used to make compound.

(c) The Company had submitted Contract Research Agreement of VerseonInc dated September 1, 2015 at the time of EA 2000 audit. This agreement has also been referred in para 4 of the showcause notice. The copy of the agreement was attached as **annexure-6**. As per this agreement, the activities required to be undertaken by the Company shall be specified in the Appendices issued under the agreement. The Appendix-1 to the agreement specifies the services to be provided by the company. The 'project outline' and 'scope of service' paragraph of the appendix provides as follows:

*"**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 Company specific compounds and/ or libraries as requested by Company and described in the research plans. For avoidance of doubt, "FTE" means a Fully Allocated Chemist, approved in advance by Company, 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 Company 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. Thechemical structure of intermediate can be altered to develop the compound. The company is not required to undertake synthesis of starting material again to develop the compound. The company has developed such intermediates in past for the client. In the current appendix, the company is required to synthesis such intermediates to develop the compound.

(ii) Point II of scope of services:
The compounds developed by the company 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.

Till the time of approval is not received, the compounds are not available commercially. However, at times companies have undertaken synthesis of a

starting material to develop the compound and publish the literature of said synthesis on public domain. Therefore, in case any other company requires the compound then they can undertake synthesis as per the published literature. The client has requested the company to synthesis the starting material as per the stated route to obtain compound. The compound so obtained is called 'reference compound'. Hence, it has been stated that company will undertake synthesis of reference compound in point (II) of the scope of service para of the appendix-1 to the agreement. It means synthesis of starting material to obtain the reference compound.

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

Once, the compound has been developed, the company can change the chemical structure to create variety of compound with similar chemical structure. This is known as focused compound libraries. The client has asked the company 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:**

As mentioned earlier, 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 company to scale-up the quantity of compounds selected by them to 5-100 g to undertake the testing activity.

Therefore, it will be evident that the company provides services of synthesis of chemical substance to develop the compounds. They also assist the client in developing the compound of desired types and quantity to undertake various testing activities.
However, the company does not undertake any testing activities. The limited testing undertaken by company is of analysis of intermediate in case where synthesis is undertaken from starting material and of compounds developed by them. The analysis of intermediate is undertaken to verify that 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.

(d) The company had submitted their profile in letter dated 8/2/2019 to explain the above nature of service. The copy of same is already attached as annexure-2. The fact that the company undertakes chemical synthesis for early phase drug discovery activity has been stated in the 'Revenue part 02' of the audit report no: 1808/2018-19 dated 21/5/2019 also. The copy of audit report was attached as **annexure-7**.

2) **The testing undertaken by company is incidental to service of development of compounds:**

The department in para 14 and 15 of the showcause notice has stated that the company has undertaken technical testing and analysis services on the desired compounds. The department has not provided any explanation to allege that the company provide technical testing and analysis service.

However, it is submitted that it will evident from above that nature of service of the company is not technical testing and analysis. It 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 company is correct to develop the compound. This testing is incidental to the process of synthesis. The services of the company cannot be considered as testing merely on this basis. The company relies 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.***"

Hence, it is submitted that the testing is incidental to process of development of compounds. The company is not engaged in provision of technical testing and analysis services.

3) **The company enters 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 company 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 company 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 provides 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 company to develop the compound is known to the client and the company. 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 company improvise the synthesis route or may have to re-start the process again. Hence, the company is not in position to provide costing for the material. Therefore, the client and company 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 company. These are commonly available solvents which are low on cost. Hence, the company 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 Company enters into an agreement to develop the compound for an agreed lumpsumprice. This price includes the entire cost of the Company to develop the said compound.
Therefore, it is evident that the cost of starting material is included in the fees of the company for FPP projects. There is no condition for client to provide the material or pay for it on actual basis.

4) **The company does not receive any compounds/samples from the client:**

(a) M/s. Verseon Corporation-FTE agreement:

(i) The scope of service provided by the Company has been stated in the para 'Project Outline' and 'Scope of Service' in Appendix-1 of the Contract Research Agreement. The services to be provided by the Company is as per this Appendix which has been explained in para 1(b) above. The consideration payable to the Company has been stated in the consideration para of the appendix-1. The consideration is payable based on the number of FTEs assigned by the Company to the client. It will be evident that the rate of FTE includes 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 Company 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.

No. of FTEs	***Price Term*****	***Rate/FTE/annum (USD)***
18-23	*Two Years*	*$53,000 + Chemicals*
24-35*	*Two Years*	*$52,000+ Chemicals*
36-47	*Two Years*	***$51,000 + Chemicals***
48+	*Two Years*	*$50,000 + Chemicals*

**With the understanding that the rate per FTE per annum will be $52,000 + Chemicals from the signing and execution of this agreement even while the Provider ramps up operations to 24 FTEs from prior allocation of 12 FTEs.*

*** Price Term: FTE rates as listed in the above table are applicable for a period of two (2) years starting from the Effective Date (1st September 205 to 31st August 2017) and such rates shall increase by 2% per annum starting with the third year of the Agreement which begins with 1st September 2017.*

In case that the number of FTE's are below the agreed number of FTEs in the above table then the parties shall negotiate new ratees for such FTEs.

The FTE cost includes the following:

- *Manpower (Provider will dedicate a Project Leader at PhD level of each group of 12 FTEs and the ratio will be 1PhD FTE for every 5 MSc FTEs)*
- *Supervision and intellectual contribution by Project Leader and Group Leader*
- *Infrastructure (For every 12 FTEs Provider will offer a fully access controlled dedicated laboratory)*
- *Common bench chemicals and common research consumables (List is given at end of Appendix 1) for small scale synthesis (up to 50g),*

The cost of project specific chemicals, cost of shipping of finished and approved compounds, import costs, if any, incurred on shipments from company to provider are not included in the above FTE cost and would be reimbursable on actual landed costs. Procurement of certain expensive materials by provider (those with a price exceeding 500 USD per sellable unit) shall be subject to company's specific approval."

It will be evident that the cost of manpower, infrastructure, common bench chemicals and consumables form part of the rate of FTEs. However, the cost of the project specific chemicals, shipping of approved finished compound and import cost are not included in the above rate. This cost will be paid to the company on actual basis and any expensive material which has price of US$ 500 per unit can be purchased, subject to the approval of the client.

It is evident from the rate of FTE provided in the consideration para that the cost of chemical is on actual basis. This fact has been stated in the exclusion clause also. However, the cost of chemicals forms part of the consideration for the company. It has been stated separately, as the company is unable to determine the cost of the same at the beginning of the synthesis.

The company had raised three invoices for the month of January-2017 bearing number 3498501965, 3498501966 and 3498501967. The copy of the invoices was attached as **Annexure-8.** Each invoice was raised for 12 FTEs assigned for the month of January-2017. Hence in total 36 FTEs were assigned by the Company to the client. As per the consideration clause the rate of 36 FTEs for each month is US$ 51,000 plus chemicals. Hence, each invoice has been raised for USD 51,000 plus cost of starting material i.e. chemicals. The company has provided the breakup of the starting material along with the invoices. For example, for invoice no. 3498501965 the cost of starting material was US$ 5,017.

The purchase order wise breakup of each material obtained by the Company was attached to the invoice. The copy of the Purchase Order No. 4400025280 was attached as **Annexure-9**. It will be evident that the Company has raised the Purchase Order on M/s. Pharma Block (USA) Inc. on 31/12/2016. The Purchase Order was raised for item code no. 13003720 and 10405618. The copy of the invoice of M/s. Pharma Block (USA) bearing No. 2016IN00358 dated 14/12/2016 was attached as **Annexure-10**. The copy of the payment voucher to the supplier was attached as **Annexure-11**.It will be evident that the Company has made payment to the supplier.

Similarly, the Company has issued Purchase Order No. 4400025447 dated 03/01/2017 on M/s. Astatech Inc., USA. The Company had purchased Item Code No. 13004349. The copy of the invoice of M/s. Astatech Inc., USA bearing No. 17015053 dated 3/1/2017 was attached as **Annexure-12**. The copy of the payment voucher to the supplier was attached as **Annexure-13**. Hence, the Company has made payment to the supplier.

(ii)The department has also quoted invoice no. 3498501537 dated 30/03/2016 in para 6 of the showcause notice to allege that the company has received reimbursement of material cost. This invoice is also for 12 FTEs for which the company has charged USD 51,000 plus cost of starting material. The company has charged USD 51,000, as even in the month of March-2016 the company has assigned 36 FTEs. The Company had raised Invoice No.3498501535 and 3498501536 dated 30/03/2016 for the balance 24 FTEs. The copy of invoice no. 3498501537, 3498501535 and 3498501536 was attached as **annexure-14**. The breakup of the starting material for each of the invoice was attached to the invoice.

The company had issued the Purchase Order No. **4400022980** dated 18th February 2016 for purchase of material. The copy was attached as **Annexure-15**. It will be

receipt of material, e.g. the service of repairs cannot be provided unless goods are received from provider of services.
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.

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

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 loose its existence. It is evident from the submission made above that the starting material is synthesis to develop compounds.The company 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.
It is submitted that Hon'ble Tribunal in the case of PRINCIPAL COMMISSIONER OF C. EX., PUNE-I versus ADVINUS THERAPEUTICS LTD2017 (51) S.T.R. 298 (Tri. - Mumbai) has also upheld this view. The relevant extract is reproduced below:

> *"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."*

In the case of M/s Indeus Life Science Pvt Ltd VERSUS Commissioner of Central Excise & Service Tax, Belapur as reported in 2018 (11) TMI 848 – CESTAT Mumbai, it was held that:

> *"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. ....."*

Similarly, the Commissioner (Appeals) in the case of M/s Hikal Limited, Oreder-in-Appeal no. PI/ADC/ST/ADJ/11/2015 dated 12.06.2015, it was held two essential conditions for classifying the place of provision of service is that Goods should be made physically available by recipient of service to the service provider on which service provider will provide the service and said should be return to the service receiver in the same form i.e. without altering its form to the service recipient.

The company further relies on the following judgments:

(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

Hence, it is submitted that Rule 4(a) will not apply to instant case. Hence, the place of provision of service should not be determined as per this rule. Therefore, the place of provision of service cannot be place of performance i.e. in India.

(iv) <u>The services of the company are not in respect of starting material:</u>

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 company undertakes synthesis on the starting material to alter its chemical structure to develop a compound. Hence, the company does not provide any service in respect of starting material. The service of the company is to research and develop the manner in which synthesis can be undertaken to develop the compound. The company 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 company are not in respect of starting material. Therefore, even if it is assumed that the company has received the starting material from the client, even then the services of the company cannot be covered under this rule.

10) <u>The department has alleged that the services of the company are covered under Rule 4(a) of the Place of Provision of Service Rules, 2012 based on the following allegations:</u>

a) The essential characteristics of service to be covered under this rule is that the goods should come into the physical position or control of the service provider and without this happening the services cannot be rendered. In this case, it is evident from the agreement that the desired compound/samples are made physically available by the recipient of service to the company to provide the service (para 13 and para 14 of the show cause notice).

b) The rule nowhere states that the goods received from the recipient of service have to be returned back in the same form. This inference has been drawn from the clarification made in the Education Guide. The Education Guide is only for the purpose of guidance and cannot override the provisions of Rule 4(a) of the Place of Provision of Service Rules, 2012 (para 21 of the scn).

It is submitted that the above allegations are not tenable in law for the following reasons:

(a) The company has made elaborate submissions to substantiate that they do not receive material from the client. The company purchases the material from the supplier on principal to principal basis. The value of material forms part of the consideration for the services provided by the company. The ownership of the material is with the company and not the client. Therefore, the company has not received any material from client nor have they purchased any material on behalf of client. Hence, this allegation is not tenable in law.

(b) It is evident from Rule 4(a) that the service is provided in respect of goods that are imperative to be made physically available by the recipient to the provider of service. Therefore, the services have to be provided on the goods received from the recipient of service. After the provision of service, the goods have to be returned to the client. There will be no provision of service if the goods on which service is provided are retained by the provider of service. The goods come only in temporary position of the provider of service.

Therefore, the Education Guide does not override the provision of Rule 4(a) in any manner. It has only provided an elaborate clarification on the interpretation of the Government of Rule 4(a) of the said Rules. It is evident from above that the Tribunal has also relied on the clarification to interpret this rule. Therefore, the allegation of the department that the Education Guide overrides the provision of Rule 4(a) of the said rules and is not correct in law. It is submitted that the above

submissions were also made at the time of pre-consultation hearing for issuing of Show Cause Notice.

Hence, it is submitted that the allegation of the department is not tenable in law.

11) <u>The services are classifiable under Rule 3 of Place of Provision of Service Rules, 2012:</u>

The Rule 3 of the POPS Rules is the general rule determining the place of provision of service. The general rule will apply when none of the specific rules are applicable to determine the place of provision of service. The specific rules are laid down in Rule 4 to Rule 12 of said rules. The rule 14 provides that the general Rule is applicable only in cases where none of the other specific Rules (i.e. Rule 4 to Rule 12) are applicable for determining the place of provision of services. The said rule is reproduced below:

*"RULE 3. Place of provision generally. — The place of provision of a service shall be the **<u>location of the recipient of service</u>** :*

Provided that in case of services other than online information and database access or retrieval services, where 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."

It is evident from above that rule 4 of the POPS Rules is not applicable in instant case. Therefore, it is submitted that the place of provision of service should be determined as per rule 3 of the POPS Rules. As per this rule, the place of provision of service is location of service recipient. In this case, there is no doubt that the service recipient is located outside India. Therefore, it is submitted that the place of provision of service is outside India. Hence, the provision of service of the company should be considered as export of service.

12) <u>The nature of service has not been stated correctly in the showcause notice:</u>

It has been stated in para 3,4 and 17 of the showcause notice that the company provides Technical Inspection and Certification Agency Services to their clients and in para 14 and 15 of the notice that the company undertakes technical testing and analysis services on the compounds/samples received from clients.

The department has reproduced the scope of service stated in the Verseon and Novartis agreement in paragraph 4 and 5 of the showcause notice. It is evident from extract that the agreement clearly provides that the Company will undertake chemical synthesis to develop compounds. The Department have noted the nature of services provided by the Company in the audit report issued vide F. No. VI/1(b)-193/IA/AP-38/Cir-VI/18-19/630 dated 21/5/2019. The copy of audit report was attached as annexure-3. It has been clearly stated that in the 'revenue para 02' of the report that the company is engaged in business of providing contract research service for carrying out early phase discovery work in chemistry synthesis. Therefore, the company does not provide inspection services or technical testing services.

Further, the department in para 21 of the Show Cause Notice has reproduced the extract of the consideration clause of the agreement of M/s. Verseon Corporation and M/s. Novartis Institute of Biotech Medical Research Inc. Based on this, the department has alleged that the company was provided raw material for working on each product. It is submitted that the department has made no efforts to understand the nature of service provided by the company and the manner in which the company raises invoice for the same.

It is evident from the agreement itself that the company develops compound from the starting material by undertaking chemical synthesis. It is stated that the cost of chemicals will be added to the FTE in consideration clause of M/s. Verseon Corporation. In case of M/s. Novartis Institute of Biotech Medical Research Inc., the agreement clearly states that the entire responsibility of the synthesis is of the company. Inspite of that the department has loosely stated that the company develops product from the raw materials provided by the client.

In view of above, it is submitted the department has not made any attempt to understand the nature of service of the company.It is submitted that such allegations made on no factual data or examination of documents is bad in law. The showcause notice is factually incorrect. Hence, the demand should be dropped.

13) <u>The onus to prove is on the department:</u>

It is evident from submission in above paragraphs that Department has alleged that the company has provided technical testing and technical inspection and certification service. We request you to please let us know the basis of such allegation. The company had submitted agreements of M/s Mission Therapeutics, Novartis Intitute of BioMedical Research Inc, Verseon Corporation vide letter dated 10/4/2019. The agreements submitted by company does not state provision of any such service. Furthermore, there is no evidence placed on record to substantiate as to how the department arrived at the conclusion that the Company provides these services. There is no reference placed on any agreements, work orders, invoices of the Company.
In view of the above, it is submitted that the revenue has not discharged the onus to prove the allegations made in the showcause notice. Therefore, the showcause notice should be quashed. This view has been upheld by Larger Bench in the case of BAJAJ AUTO LTD.VersusCOLLECTOR OF CENTRAL EXCISE, PUNE as reported in 1995 (75) E.L.T. 382 (Tribunal). The relevant extract of judgement is reproduced below:

> *"27..... It is seen from the facts of this particular case that the department has not produced any evidence, to determine the 'waste and scrap' of the appellant's factory is not so, but it is the original goods alone. There is a great love for labour, to collect the statements from several persons, but unfortunately no efforts have been done either to analyse the statements or to consider the entire contentions of the appellants in the light of the controversy and evidence placed by them. <u>It is a settled law that one who alleges should prove his case, and in absence of any proof or materials placed in support of the allegation, then, it is to be presumed that the allegations are bald and that there is no substance in the case and that case is required to be rejected</u>. It is also well settled that when material facts are not controverted and placed by either side, then also it should be presumed that there is no substance in the allegation or the defence taken and, therefore, the case is required to be rejected or accepted, as the case may be. In this case, the department has not sent the samples for any chemical analysis for test, nor have they produced any expert opinion or evidence on trade or commercial understanding of the term 'waste and scrap' vis-a-vis M.S. Sheet. Besides, the department has not also controverted the evidence produced by the appellants. Therefore, on this ground alone, the contentions of the appellants required to be accepted and impugned order are required to be set aside."*

The above judgment has been upheld by the Honourable Supreme Court in the case of Collector v. Bajaj Auto Ltd. - 1997 (94) E.L.T. A148 (S.C).Therefore, it is submitted the demand should be dropped on this ground alone.

14) <u>The category of service is not relevant in instant case:</u>

The show cause notice in para 3 alleges that the company has provided the services of Technical Inspection and Certification Agency services. They have not discussed the nature of services provided by them.

The demand is for the period June,2015 to June,2017. After July 2012, the category of service was abolished. As per section 66B, tax was levied on all services except the services mentioned in negative list (section 66D). The taxpayer had to pay tax under specific accounting code and file return category of service wise for statistical analysis purpose. This fact has been clarified by Government vide Circular No. 165/16/2012-S.T., dated 20-11-2012. Hence, the company had filed the return under the category Technical Inspection and Certification Agency. However, the nature of service cannot be determined by mere mention of category of service.

It is submitted that the nature of service should be determined on the basis of activity carried out by the company and not on the basis on category under which the return has been filed by the company. The company relies upon the following judgment:

(i) LOTUS SHIPPING LTD. versus COMMISSIONER OF C. EX., CUS. & S. TAX, COCHIN 2015 (38) S.T.R. 1148 (Tri. - Bang.)
(ii) SPL DEVELOPERS (P) LTD. versus COMMISSIONER OF S.T., BANGALORE 2015 (39) S.T.R. 455 (Tri. - Bang.)
(iii) RADIOWANI versus COMMISSIONER OF SERVICE TAX, MUMBAI-I 2019 (21) G.S.T.L. 157 (Tri. - Mumbai)

15) <u>The showcause notice is vague in nature:</u>

It is evident from above that the Company had explained the services provided by them in detail to the Department. The department has stated that the company provides synthesis services in audit report also. However, the department has not stated this nature of service in the showcause notice. On the contrary, the department has alleged that the company provides the following two types of services:

a) Technical Inspection and Certification agency services. There is no explanation has to what is the nature of service.
b) Conducting technical testing and analysis on compounds/sample in India.

It is submitted that the department has not explained the exact nature of services provided by the Company in the entire Show Cause Notice. They have vaguely stated that the Company provides Technical Inspection and Certification agency services. However, there is no explanation on provision of service of the company. Further, provision of technical inspection and conduction technical testing and analysis are two very different services. However, the department has alleged the company provides both of the above services.

Thus, it is submitted that there is no specific allegation in the show cause notice to raise the demand. The show cause notice is vague and bad-in-law.The Supreme Court in the case of COMMISSIONER OF C. EX., BANGALORE Versus BRINDAVAN BEVERAGES (P) LTD. 2007 (213) E.L.T. 487 (S.C.) has held that SCN is foundation on which the Department has to build up its case. If allegations in show cause notice not specific and on the contrary vague, lack details and/or unintelligible, it is sufficient to hold that noticee not given proper opportunity to meet allegations indicated in show cause notice and therefore the notice is to be set aside.The relevant paragraph is reproduced below:

> *"**10.** There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. **If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns.** That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted."*

In the case of ALLELI & CO. P. LTD. Versus COMMISSIONER OF C. EX., MUMBAI-II 2000 (124) E.L.T. 1122 (Tribunal) wherein Hon'ble Tribunal has held that when the notice merely alleged that manufacturing expenses and manufacturing profits not added in price list without specifying as to which manufacturing charges and as to what portion of manufacturing profits not included, the allegations are required to be held to being made without any explanation and therefore the show cause notice not valid. The ratio of the said judgement squarely applies to the facts of our case.

In the case of UNITED TELECOMS LTD. Versus COMMISSIONER OF SERVICE TAX, HYDERABAD 2011 (22) S.T.R. 571 (Tri. - Bang.), the SCN was issued to classify the services under BAS and BSS. The Hon'ble tribunal has held that the impugned order could not have confirmed the demand under BAS based on such a weird and vague proposal and set aside the order confirming the demand. It can be said that the SCN did not provide foundation for levy of service tax in respect of activity carried out by the appellant and therefore the same was not sustainable.

Additionally,the company also rely on the following:

a. V.S. DISTRIBUTORS Versus COMMISSIONER OF CENTRAL EXCISE, JAIPUR 2010 (17) S.T.R. 530 (Tri. - Del.).
b. TIL LTD. Versus COMMISSIONER OF SERVICE TAX, KOLKATA 2008 (10) S.T.R. 405 (Tri. - Kolkata).

The ratio of the above judgments is also applicable in the case of the company also. Therefore,it is submitted that the SCN is vague and defective and the same is required to be dropped.

16) **Without prejudice to submissions made above, it is submitted that the unit is located in SEZ-The services provided by them are considered as export as per SEZ Act, 2005-Hence, as per section 51 the provisions of service tax cannot apply in instant case:**

It is submitted that the company is an SEZ unit located at Ahmedabad. The SEZ Act has defined the term export in section 2(m) of the Special Economic Zone Act, 2005 as follows:

"(m) "export" means –
*(i) **taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise**; or*
(ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or
(iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone;"

Hence, as per the above definition export means providing service out of India from SEZ by any mode whether physical or otherwise. In instant case, the clients of the company are located outside India. The company carries out synthesis of chemical substance to develop compounds for their client. Therefore, the service is provided outside India. The SEZ Act consider the provision of service of company as export of service. Hence, they have been issued LOP under this Act to set up unit in SEZ. The export of services should be interpreted as defined in section 2(m) of SEZ Act and not as per Rule 6A of the Service Tax Rules, 2004. The company relies on the judgment of ESSAR STEEL LIMITED versus UNION OF INDIA2010 (249) E.L.T. 3 (Guj.). This judgment has been upheld by Hon'ble Supreme Court as reported in Union of India v. Essar Steel Ltd. - 2010 (255) E.L.T. A115 (S.C.)].

Further, the section 51 of the SEZ Act, 2005 provides that provision of SEZ Act will apply notwithstanding anything inconsistent contained in any other law for the time being in force. The relevant extract of the section is reproduced below:

"51. (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

Therefore, it is submitted that provision of service of company is considered as export under SEZ Act. Hence, assuming without admitting, the services are not considered as export as per provision of service tax, it will be considered as export by virtue of provision of SEZ Act. Therefore, the demand should be dropped on this ground alone.

17) <u>The demand defeats objective of the SEZ:</u>

In instant case, the department has interpreted rule 4(a) of the POPS Rules, 2012 to allege that the place of provision of service of service of the company is in India. Hence, the conditions specified under Rule 6A of STR, 1994 is not fulfilled and services cannot be considered as export of service. Therefore, tax is payable by the company on these services. It is already submitted above that the place of provision of service is outside India and hence, the services are considered as export of service. However, it is also submitted that demand made on these bases defeats the objective of the SEZ. The preamble of the Special Economic Zone Act, 2005 reads as follows:

"An Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto."

It is evident from above that the primary objective of the act is promotion of export. This demand is clearly opposed the preamble of the Act. Therefore, it is submitted that the demand is not substantiable.

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. <u>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.</u>** 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.*

The Part-II of the agreement provides for cost and payment schedule. The following is evident from the same:

- The total fees for the services provided under the Task Order shall be no more than USD 1,15,200.
- The company 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 company is responsible for cost of analysis and the shipment of compound.
- The utility expenses of the company 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.

The agreement clearly states that the company 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 company can charge them for the services. The company 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. However, the client and the company have an internal arrangement that the cost of material should not exceed USD 8,000 per FTE per year. In case, the company 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 company provides the list of materials purchased by the company for the project. The list contains the purchase order wise details of each material procured by the company to provide synthesis services for the month.

This Task Order was amended to add three FTEs from 11/04/2016 and three FTEs from 01/05/2016. The amendment to task order was attached as **annexure-20**. Hence, the total value of the Task Order increased to US$ 14,64,000. Hence, the company was required to assign 24 FTEs (18+3+3+3) to the client. The company further executed Task Order No. Piramal NIBRI-2016-Chemistry-FTE forperiod 15/09/2016 to 14/02/2017to add two FTEs.The copy of this task order was attached as **annexure-21**. Hence, the company had assigned total 26 FTEs to the client for period 15/09/2016 to 14/02/2017.

The company raised Invoice No. 3498501963 dated 31/01/2017 for 20 FTEs and Invoice No. 3498501964 dated 31/01/2017 for 6 FTEs. The copy of invoice number was attached as **annexure-22**. It will be evident that as per the Task Order the cost of each FTE for a year was US$ 64000. Hence, for each month it is USD 5333. The Company has used this rate to compute the invoice value on monthly basis. Hence, they have raised the invoice of the following amounts:

Sr. No.	Invoice no.	FTE no.	Amount of invoice in USD (5333.33* no of FTE)
1	3498501963	15	80000
2.		5	26667
3.	3498501964	3	16000
4.		3	16000

It will be evident from above that the value of material has not been charged separately to the client. However, the company had shared the purchase order wise break-up for each month vide email to the client. The break-up of the starting material for the month of January 2017 was shared vide email dated 3rd February 2017. The copy of the email and statement showing break-up of starting material was attached as **annexure-23**. The statement provides bifurcation of the material under the head *"starting material"* and *"solvent"*.

The company had issued the Purchase Order No. 4400025428 dated 30-12-2016 for purchase of material. The copy was attached as **Annexure-24**. It will be evident that the Company has raised the Purchase Order on M/s. TCI Chemicals (India) Pvt. Ltd. The Purchase Order was raised for item code no. 10404576 and 10415585. The copy of the invoice of M/s. TCI Chemicals (India) Pvt. Ltd. bearing No. 05216-17013314 dated 02-01-2017 was attached as **Annexure-25**. The copy of the payment voucher to the supplier was attached as **Annexure-26**.

It will be evident that all the items purchased by the Company are chemical substances which are starting material for the company and company has purchased them on principal to principal basis. The company has not placed order on behalf of the client. The material is the property of the company. They do not send the leftover material to the client.

(ii) It is submitted that the company has not received any material from the client. The clause E of the task order clearly provides that the client 'may' provide the material

evident that the Company has raised the Purchase Order on M/s. Combi-Blocks, Inc. The Purchase Order was raised for item code no. 10418327. The copy of the invoice of M/s. Combi-Blocks, Inc. bearing No. 4418108 dated 18th February 2016 was attached as **Annexure-16**. The copy of the payment voucher to the supplier was attached as **Annexure-17**.

The statement provides bifurcation of the material under the head *"starting material" and "solvent"*. It will be evident that all the three items purchased by the Company are chemical substances which are starting material for the company. Thus, it will be evident from above that the Company 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 company. 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 company to obtain replacement or purchase new stock to complete the synthesis timely. The client is not responsible for the same.

Therefore, it is submitted that the material has been purchased by the company. The amount of material is recovered by the company as part of the consideration for the provision of service.

(iii) Further, it is submitted that the Appendix-1 to the agreement nowhere provides that the client will provide the material, or the company is allowed to purchase the material on behalf of the client. There is absolutely no understanding between the client and the company that the material has been purchased on behalf of the client.

In view of the above, it is submitted that the cost of material forms part of the consideration. Hence, the company has stated the same along with the FTE rate.

(b) <u>M/s. Novartis Institute of Biotech Medical Research Inc (FTE agreement)</u>:

(i) The client had entered into the Master Service Agreement with the Company on 14/02/2013. This agreement was renewed on 10/02/2016. The copy of agreement dated 14/2/2013 and 10/2/2016 was attached as **annexure-18**. 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 Company is stated in Appendix-1 of the Task Order. The Task Order No. Piramal-NIBRI-2016-Chemistry-FTE was attached herewith as **Annexure-19** on specimen basis.

As per the Appendix-1 to this Task Order, the company 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 company is required to contribute to the design and synthesis of the compound and deliver them to the client. The company 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). The said para is reproduced below:

"C. Full Time Equivalent ("FTE")

The Company will provide FTEs to M/s. Novartis 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.

Number of FTEs	*:*	*18*
FTE levels assigned to project	*:*	*4 doctoral* *14 associates*
Amount per FTE	*:*	*US$64,000*

It will be evident that the company is required to assign 18 FTEs and the rate of each FTE on yearly basis will be USD 64,000.

The clause (D) provides that that Task Order is valid for this period i.e. 15/02/2016 to 14/02/2017.

The clause (E) provides 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.

cause notice is based on such erroneous facts. Hence, it is submitted that demand should be dropped.

5) **The amount of starting material is received as consideration and not as reimbursement-**

The department in para 7 and 14 has alleged that the Company will be reimbursed to cost of desired compounds/samples procured on behalf of the client. It is evident from the invoices that the company has raised invoices along with the reimbursement of starting material. It is submitted that the allegation that the Company has procured material on behalf of the client has no factual backing. The department has not placed a single documentary evidence which substantiates that the material has been purchased for the client and not on principle to principal basis. They have neither placed any reliance on the agreement submitted by the company. Therefore, such allegation is frivolous in nature.

Moreover, it is evident from the above submissions that the cost of starting material forms part of the consideration for the company. The company has purchased the material on principle to principle basis. The Hon. Larger Bench of Tribunal in the case of M/s. Bhagwati Traders v/s. Commissioner of C.Ex, Cochin reported in 2011 24 STR 290 (Tri.) has held that in case where the manufacturer has no role about choosing the source of material procured or the price at which it is procured, then manufacturer is not legally obliged to pay the supplier. Thus, the recovery of such amount from the buyer will be considered as 'reimbursement'. However, if the manufacturer procures the raw material from the source of his choice at a price negotiated by him, then the question of reimbursement does not arise. The relevant extract of the judgment is reproduced below:

"6.1 Having analyzed the various decisions cited on behalf of the assessee and on behalf of the department, it would be appropriate to consider the scope of the term "reimbursements" in the context of money realized by a service provider. A person selling the goods to another cannot treat cost of raw materials or the cost of labour or other cost components for inputs services, which went into the manufacture of the said goods as reimbursements. If the buyer enters into a contract for supply of raw materials after negotiating prices from the supplier for the raw materials and the raw materials are received by the manufacturer and the manufacturer pays the amounts to the supplier of raw materials and recovers the same from the buyer, it can certainly be considered as reimbursements. It is to be noted that in such a case, the manufacturer has no role about choosing the source of the materials procured or the price at which the materials procured and the manufacturer is not under any legal or contractual obligation to pay the amount to the supplier. However, if the manufacturer procures raw materials from a source of his choice at a price negotiated between him and supplier of the raw materials and uses the material for manufacture of the final products which he sells, the question of his collecting the cost of raw materials as reimbursement does not arise. ***The concept of reimbursement will arise only when the person actually paying was under no obligation to pay the amount and he pays the amount on behalf of the buyer of the goods and recovers the said amount from the buyer of the goods."***

It is evident from above that the Company had identified the supplier, placed the order for the material and is obligated to pay the supplier for the same. The supplier has no knowledge of the client of the company. The client of the company is under no obligation to pay the supplier for the material. Therefore, it is submitted that it is evident from the above that the recovery of cost of starting material is not the reimbursement. This amount is recovered separately as the company is unable to determine the cost of material that will be used in the synthesis. However, the cost of material is part of consideration for the company.

6) **Absorption, Distribution, Metabolism and Excretion (ADME) research services:**

The main service of the company is to undertake synthesis of chemical substance to develop compounds. However, certain select clients request the company to provide Absorption, distribution, metabolism and excretion (ADME) research services. In this case the Company develops solution from the compound. The company uses the compound which was already been developed by them. The Company develops solution from the compound to administer it to plasma of animals for testing the effects of the same. The report containing the entire analysis is sent to the client.

The service of ADME is provided under separate contract. The contract is entered into on basis of proposal/Quote sent to the client. The client has signed the proposal/quote to confirm the terms of service. In few cases the client has signed the work order. The company has undertaken the work on basis of same and raised the invoice as per the quotation.

The entire showcause notice is on basis that company has received the compounds/samples from the client. However, it is evident that in case of ADME the company does not receive any compound from the client. This nature of service has not

to the company. Therefore, there is no prerequisite on supply of material. Further, the department has not provided any documentary evidence which substantiates that the client had provided the material to the client. The receipt of material cannot be presumed from mere mention of the same in clause in the task order. Such presumption is bad in law especially since the company has submitted documentary evidence of purchase of material. In view of above, it is submitted that the company has not received any material from the client.

(iii) The department has relied on Invoice No. 3498501443 dated 31/01/2016 and 3498501905 dated 31/12/2016 in para 6 of the show cause notice to allege that the company has received material from the client.

The Task Order No. Oxygen-NIBRI-2015-Chemicals-FTE was applicable for the period of January 2016. The copy of task order was attached as **annexure-27**. As per this Task Order the Company had assigned 18 FTEs to the client. Therefore, the Company had raised Invoice No. 3498501530 dated 31/03/2016 for 12 FTEs and Invoice No. 3498501531 for 6 FTEs. The copy of invoices was attached as **annexure-28**.

The Task Order No. Piramal-NIBRI-2016-Chemicals-FTE as amended was applicable for December-2016. Therefore, the Company had raised Invoice No. 3498501905 dated 31/12/2016 for 20 FTEs and Invoice No.3498501922for balance 6 FTEs. The copy of invoices was attached as **annexure-29**.

The statement showing the Purchase Order wise breakup of starting material used for each of the above month was attached to each invoice. The details of purchase order and payment made by company to supplier for these invoices are as follows:

- 3498501530 dated 31/03/2016:
  The company had issued the Purchase Order No. 4400022989 dated 19-02-2016 for purchase of material. The copy was attached as **Annexure-30**. It will be evident that the Company has raised the Purchase Order on M/s. Astatech Inc. The Purchase Order was raised for item code no. 13001958. The copy of the invoice of M/s. Astatech Inc. bearing No. 16026164 dated 19-02-2016 was attached as **Annexure-31**. The copy of the payment voucher to the supplier was attached as **Annexure-32**.

- 3498501905 dated 31/12/2016:
  The company had issued the Purchase Order No. 4400025182 dated 1st December 2016 for purchase of material. The copy was attached as **Annexure-33**. It will be evident that the Company has raised the Purchase Order on M/s. Angene International Limited. The Purchase Order was raised for item code no. 13000636. The copy of the invoice of M/s. Angene International Limited bearing No. AGN2016-9224 dated 8th December 2016 was attached as **Annexure-34**. The copy of the payment voucher to the supplier was attached as **Annexure-35**.

It is evident from the statement that all of the above-mentioned items are starting material for the company. In view of the above, it is submitted that the company has purchased the entire material required for the provision of service. They do not receive any material from the client.

(c)<u>M/s. Exarca Pharmaceuticals LLC (FPP agreement):</u>

The Company had sent Quote No. PDSQ395 (revised) dated 22/06/2015 to M/s. Exarca Pharmaceuticals LLC. The copy of the quotation was attached as **annexure-36**. The quotation was provided to undertake synthesis for development of five compounds. The structure of the compound and synthesis route was illustrated in the quote. As per the quotation, the fees of the company was US$ 4870. It is clearly stated that this cost includes of all labour, chemicals and one shipment. Only special shipping requirements like dry ice will be charged on actual basis. This quotation was approved by the client. Hence, the company completed the synthesis and raised Invoice No. 3498501310 dated 19/10/2015 for US$ 4870. The copy of invoice was attached as **annexure-37**. Therefore, under FPP, the amount of consideration is on lumpsum basis. There is no receipt of material from the client.

Hence, it is evident from above, that the company does not receive any material from the client. The company purchases the starting material for provision of service. Hence, the entire allegation that the company has received the material from client is baseless. Further, it has been alleged in para 14 that the samples/compounds are made available physically to service provider at the taxable territory and technical testing is done on the samples. The said statement in para 14 is totally erroneous and not based on any facts. We request you to please let us know on what basis this statement has been made by department. The company has not received any samples from the client. As mentioned above, the company procures the starting material and carries out the activity which are specified in the work order. Therefore, the allegation that the testing is carried out on the samples is totally erroneous. The entire basis on this part of show

been specified in the showcause notice also. Therefore, it is submitted that the demand for value of service of ADME services should be dropped.

7) **Without prejudice to above, the demand for the FPP and ADME should be dropped:** The department in their audit report has stated that the company provides the services under the head FTE, FPP and ADME. The company at the time of pre-consultation hearing has explained that the consideration for FPP and ADME are inclusive of material cost. They do not receive any material from client. They submitted agreement of M/s. Exarca Pharmaceuticals LLC to substantiate this point. The bifurcation of the amount of tax for FPP, FTE and ADME was also submitted as Annexure-1 to the pre-consultation submission. However, it has been stated in para 21 of the Show Cause Notice that the company has not provided any bifurcation of service under the head FTE, FPP and ADME. The submission was attached as annexure-4. Hence, the department has stated factually wrong information to avoid reduction in amount of demand. It is evident from above that the allegations made in the Show Cause Notice are not applicable to the services provided under this agreement. Therefore, without prejudice to the above submissions made above, the value of service for FPP and ADME agreements amounting to Rs3,68,88,348/- should be dropped.The statement showing manner of computation of amount of demand was attached as **annexure-38**.

The department has further stated in para 21 that the company had disclosed the entire value of service provided under the above mentioned three heads as export of service in the ST-3 return. Hence, the demand had to be raised on the entire value of service. It is submitted that this observation is incorrect as the allegation made in the Show Cause Notice are not applicable to the services provided under FPP and ADME agreement. The company does not receive any material for synthesis service provided under FPP agreement and ADME services. Hence, it is submitted that the department has provided frivolous reasons to raise the demand.

8) **<u>The interpretation of Rule 4(a) of the Place of Provision of Service Rules, 2012:</u>**

The Place of Provision of Service Rules, 2012 has been notified to determine the place of provision of service. The Rule 4 prescribes for determination of place of provision for performance-based services. The said rule is as reproduced below: -

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

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

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

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

(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."

Hence, it will be evident from above that services should be provided in respect of goods that are required to be made available by the service receiver. The service should be related to the said goods.

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 <u>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</u> 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".

It will be 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.

Therefore, it is submitted 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.

9) **The services of the company are not covered under rule 4(a) of POPS Rules, 2012:**

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

The use of words '**required to be**' in rule 4(a) makes it clear that without 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. 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*

It is submitted that instant case also, the goods are procured by the company for provision of services of development of compound for the client. The department in para 4 and 5 of the showcause notice has referred to the Contract Research Agreement entered with M/s. Verseon dated 01/09/2015 and the Master Service Agreement (Task Order No. Piramal-NIBRI-2017-Chemistry PTE) of M/s. Novartis Institute for Bio-Medical Research Inc., Cambridge, Massachusetts to state that the Company has received material from the client. It is submitted that this is factually incorrect. The submissions for same are as follows:

(a) 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 Company on actual basis. The company has purchased the material and raised invoice for the same as consideration for the service.

(b) Similarly, in case of M/s. Novartis Institute for Bio-Medical Research Inc., Cambridge, Massachusetts, the Company had procured the material for them. In this case, the cost of FTE includes the cost of materials used to make the compound.

Therefore, it is submitted that the materials are not received by the company from the client. Thus, service will not be covered under Rule 4(a) of the Place of Provision of Service Rules, 2012.

ii) Services that are related to goods and 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):

It is evident from the wording of Rule 4(a) 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

9 The relevant text to Section 65B (44) of the Act defining 'service' reads as under:

"'service' means any activity carried out by a person for another for consideration, and includes a declared service"

10 'Taxable Service' defined under Section 65B (51) of the Act reads as under:

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

11 Section 66B of the Act reads as under:

"SECTION [66B.Charge of service tax on and after Finance Act, 2012.—There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] 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.]".

12 The relevant Rules of the Place of Provisions Rules, 2012 ('POPR') reads as under:

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

Provided .....

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"

13 Rule 4 of the POPR means that services that are related to goods and those which require the goods to be made available to the service provider or a person acting on behalf of the service provider. The essential characteristic of a service to be covered under this rule is that the goods come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered.

14 It appeared from the agreements that the desired compounds/samples are required to be made physically available by the recipient of the service to the provider of service, in order to provide the service. It was also mentioned in the agreements that the assessee will be reimbursed the cost of the desired compounds/samples procured on their behalf. It also appeared that the invoices submitted by the said assessee also reflect that they have billed their service recipient for reimbursement of cost of starting material (desired compounds/samples). The service provider, in this case, is located within the taxable territory. **The desired compounds/samples are made physically available to the service provider at the taxable territory. The technical testing and analysis is done by the service provider in the taxable territory on the desired compounds/samples physically made available by M/s Verseon Corporation and M/s Novartis Institute for Biomedical Research. 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.**

15 It appears 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. As stated above, the desired compounds/samples have to be made physically available to the assessee in the taxable territory. The technical testing and analysis of the desired compounds/sample is then carried out in the taxable territory and therefore, the provision of service is carried out in the taxable territory.** As can be seen from the provisions of Rule 6A(1) of the Rules, a service can be considered as export of service only if all the conditions of the rule are satisfied. All the provisions from (a) to (f) to Rule 6A(1) of the Rules must be satisfied in order to avail the status of export of service. **In the present case, condition (d) to Rule 6A(1) of the Rules is not satisfied as the place of provision of the service is not outside India and is in the taxable territory.** Accordingly, it appears that the assessee cannot get the benefit of not paying service tax as the services provided by them are not export of services. 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, 1994 ('Act').

16 On scrutiny of the ST3 returns (RUD 2) filed for the period from June 2015 to June 2017 under the category of Technical Inspection and Certification Agency Service, the month-wise details of service provided and service tax payable are tabulated below:

(Rupees in actuals)

No	Year	Period	Gross value of export of service	Value for the purpose of service tax	Service tax payable
1	2015-16	June 15 to Nov 15 (@14%)	384870428	384870428	53881860
		Dec 15 to March 16 (@14.5%)	274212417	274212417	39760800
2	2016-17	Apr 16 to May 16 (@14.5%)	136627599	136627599	19811002
		June 16 to March 17 (@15%)	805193527	805193527	120779029
3	2017-18	Apr 17 to June 17 (@15%)	279956927	279956927	41993539
		TOTAL	1880860899	1880860899	276226230

17 It appears from the above table that the assessee has not paid service tax to the tune of Rs 27,62,26,230/- for the period from June 2015 to June 2017, under the category of Technical Inspection and Certification Agency Service by wrongly considering the same as export of services.

18 From the above facts and discussions, it appears that the assessee has contravened the provisions of:

- Rule 6A(1) of the Rules as they have failed to fulfill all the conditions for considering the services provided by them as export of services;
- 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 66B in such manner and within such period as may be prescribed as a service provider in case of Technical Inspection and Certification Agency 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 Inspection and Certification Agency Service.

19 It appears that the assessee, at no point of time have disclosed in their ST3 returns that they had provided services in the taxable territory, as per the provisions of Rule 4(a) of the POPR. They have wrongly considered their services as 'Export of Services' even though they knew that they had not fulfilled all the conditions of Rule 6A(1) of the Service Tax Rules, 1994. This fact of non-payment of Service tax came to notice of the department only at the time of audit. This appears to be an act of suppression of facts with an intention to evade payment of Service tax. Accordingly, the service tax amounting to Rs 27,62,26,230/- is liable to be demanded and recovered from the assessee by invoking the extended period of time, under the proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. By the above mentioned acts of omission and commission and also by the act of not disclosing the fact of non-payment of service tax on the services provided in the taxable territory, the assessee is liable for penal action under Section 78(1) of the Finance Act.

20 As per Board's Instruction No 1080/09/DLA/MISC/15 dated 21.12.2015 and Instruction No 1080/11/DLA/CC Conference/2016 dated 8.7.2016, pre consultation with the adjudicating authority has been made mandatory before issuance of a show cause notice involving an amount of over Rs 50 lacs. Based on these instructions, a communication was made to the assessee fixing the date for pre-consultation

*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."*

The company also relies on the judgment of COMMISSIONER OF C. EX., BANGALORE Versus BIOCON LTD.2011 (267) E.L.T. 28 (Kar.)

Therefore, in view of above, it is submitted that the demand defeats the very objective of SEZ Act. Therefore, the same should be dropped.

18) The demand for the period June 15 to March 17 is barred by limitation:

(a) The department was aware of facts of case. Hence, extended period of limitation cannot be invoked in this case:

It is submitted that there is no suppression of facts on part of the company, since the department was well aware of the dispute. This can be understood from the fact that the Department issued showcause notice issued vide F.No. VI/1(b)/CTA/Tech-32/S.C.N./Oxygen/2018-19 dated 23/10/2018for period April 13 to May 15 to the company. Still, the department has alleged suppression of facts in para 19 of the present showcause notice.

In the case of Nizam Sugar Factory versus COLLECTOR OF CENTRAL EXCISE, A.P 2008 (9) STR 314 (SC), the Hon'ble Supreme Court has held that when the first show cause notice was issued all relevant facts were in the knowledge of the authorities. While issuing the second and the third show cause notices the same/similar facts could not be taken as suppression of facts on part of the assessee as the facts were already in the knowledge of the authorities. The observation of the Supreme Court was as follows:

> ***"8.** Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in (2003) 3 SCC 599 = 2003 (153) E.L.T. 14 (S.C.) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follow:*
>
> *"14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period."*

It is submitted that ratio of above judgment is squarely applicable to instant case. The Apex Court has held that extended period cannot be invoked for matters for which show cause notice has already been issued by the department. The language of section 73 and

section 11A is parimateria. Both the section provides that malafide intention with an intent to evade duty is pre-requisite. In instant case, the department was aware of the matter as they have already issued show cause notice to demand tax on this matter. Therefore, it is submitted that malafide intention cannot be alleged in this case. The penalty is liable to be dropped

The proviso to section 73(1) was amended w.e.f. 14/5/2016 to provide that showcause notice can be issued within a period of thirty months from the relevant date. The periodical showcause notice has been issued for the period June 15 to June 17 on 17/3/2020. The appellant has filed ST-3 return for the period April to Sept 16 on **22nd Oct 2016** and for the period April to June 17 on 9th August 2017. The copy of the returns was attached herewith as **annexure-39.** Hence, it is submitted that the demand has been raised beyond thirty months for period June 15 to June 17. Therefore, the demand for this period is barred by limitation. The demand should be dropped on this ground alone.

(b) Bonafide Belief:

The extended period under the proviso of section 73(1) of Finance Act read has been invoked to uphold the demand for reversal of credit arising on account of fraud, collusion, willful misstatement, suppression of facts etc.

The wordings in this rule is similar to the wordings used in proviso to section 11A which provides for serving of show cause notice within a period of five years from the relevant time. The Hon. Supreme Court has consistently held that provision of section 11A applies only when the manufacturer had malafide intention in non-payment of duty. It is submitted that the ratio of these judgments apply with equal force to the provisions contained in proviso to section 73(1) also. The company relied on following judgment:

i. **Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay 1995 (75) ELT 721 (SC).**
ii. **In CCE Vs. Chemphar Drug and Liniments 1989(40) ELT 276 (SCIn Pushpam Pharmaceuticals company VS. CCE Bombay 1995 (78) ELT 401 (SC)**
iii. **Tamil Nadu Housing Board 1994 (74) ELT 9 (SC)**
iv. **Continental Foundation Jt. Venture, 2007 (216) ELT 177 (SC)**
v. **Mahakoshal Beverages Pvt. Ltd. v. Commissioner of Central Excise, Belgaum[2007 (6) STR 148**
vi. **Pahwa Chemicals Private Limited vs. Commissioner of C. Ex., Delhi [2005 (189) E.L.T. 257 (S.C.)],**
vii. **AnandNishiKawa Co. Ltd. vs. Commissioner of Central Excise Appeal, Meerut [2005 (188) E.L.T. 149 (SC)**
viii. Apex Electricals versus Union of India 1992 (61) ELT 413 (Guj)
ix. M/s SUZICA COLOR LABORATORY Vs COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX 2020-TIOL-1176-CESTAT-KOL & Others

19) Penalty:

(a) Section 80:

The section 80 of the Service Tax empowers the Commissioner of Central Excise to waive the penalty if the assessee proves that there was a reasonable cause for non-payment of service tax. The words 'reasonable cause' has been defined as follows:-

"Reasonable cause can be reasonably said to be a cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bonafides – AzadiBachaoAndolan v. Union of India 2001 (116) Taxman249 /252 ITR 471."

The demand in the present show cause notice is for a period April 2015 to June 2017. During this period, chapter V of Finance Act, 1994 contained provisions of section 80. This section empowers adjudicating authority to waive penalty under section 76 and 78. During this period, section 80 of the Act empowered the Central Excise Officer to waive penalty when there was reasonable cause for non-payment of service tax. This section has been deleted w.e.f. 14-5-2015 and section 78B has been introduced.

It is submitted that levy of penalty for any offence adjudged on the basis of provisions contained in the respective statute at the time when offence is committed. Article 20(1) of Constitution of India reads as follows:

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, ***nor be subjected to a penalty greater than that which might have*** *been inflicted* ***under the law inforce*** *at the time of commission of the offence"*

The assessee has relied on judgment passed by the Hon. Supreme Court in the case of Md. Abdul Sufan Laskar & Ors. Vs State of Assam reported in 2008-(009)-SCC-0333-SC

(b) Section 78:

The impugned Show Cause Notice has imposed penalty under section 78 of the Finance Act. The penalty under section 78 is levied where the demand for service tax arises on account of fraud, collusion, wilful misstatement, suppression of facts etc. The wordings in these sections are similar to the wordings used in proviso to section 11A which provides for serving of show cause notice within a period of five years from the relevant time.

The assessee has relied upon the following judgments:

(a) Cosmic Dye Chemicals Vs Collector of Central Excise, Bombay, 1995 (75) ELT 721 (SC)
(b) CCE Vs Chemphar Drugs & Liniments, 1989 (40) ELT 276 (SC)
(c) Pushpam Pharmaceuticals Co Vs CCE, Bombay, 1995 (78) ELT 401 (SC)

As explained in above paras, that the department was already aware of the nature of service of the company and has issued show cause notice to raise demand for the same. Further, the company had the bonafide belief that they were not liable to pay tax. Hence, no penalty under section 78 shall be levied.

(c) Interpretation of statue:

The issue involved in the instant case relates to interpretation of the statute. The Hon'ble Tribunal has consistently held that the penalty should not be imposed where the question of interpretation of any statutory provision are involved. The company relied upon the following judgments for the above proposition:

- Uniflex Cables Ltd. 2011 (271) ELT 161 (SC)
- Sonar Wires Pvt ltd. Vs. CCEx. 1996 (87) ELT 439 (T)
- Synthetics & Chemicals Ltd. 1997 (89) ELT 793 (T)
- Man Industries Corporation 1996 (88) ELT 178 (T).
- Sports & Leisure Apparel Ltd. CCE., Noida 2005 (180) ELT 429.
- Aquamall Water Solutions Ltd. 2003 (153) ELT 428.
- Blue Cross Laboratories Ltd. vide order no. A/1529/C-IV/SMB/2007

Further vide their letter dated 14.6.2021, the assessee had filed additional submissions, wherein they interalia stated as under:

1. **Nature of impugned activity provided of the company**

The company is engaged in providing services of drug discovery system. The company synthesize various chemicals substance to create new compounds specified by the customer. The activity carried out by the company is combining the chemical substance to form the complex compound which is unified entity of all the elements. The company must carry out various experiments with different type of material to obtain the desired compound. The customer specifies structure of the compound and likely chemical pathway for developing compound. At this stage,the starting materials required by the company to synthesize cannot be ascertained with complete certainty. The permutation, combination of different materials is made to obtain the desired compound. Therefore, it is practically impossible for the service recipient to provide the material. Therefore, contract normally provide for reimbursement of cost of material which cannot be estimated at the beginning of the research.

The company relies upon the judgment in case of ***DOW CHEMICAL INTERNATIONAL PVT. LTD. 2020 (2) TMI 1001 - CESTAT MUMBAI*** whereon tribunal in para 4 has held that reimbursement of material cost is a method of pricing considered in the agreement, since the result from research & development activity performed by the service provider cannot be determined at any point of time. The relevant extract is reproduced below:

4. The reading of the provision of Rule 4 of Place of Provision Service Rules, 2012 makes it clear that the said Rule is applicable when the service is to be

provided with respect to goods which are physically made available by the recipient of service to the provider of service. In the instant matter, as per agreement dated 03/11/2007 between the Appellant i.e. Service Provider and Dow International Technology Corporation, USA (DITC)i.e. Service receipient, DITC shall be reimbursing the cost incurred by Appellant, including material cost for performing research & development activities at a mark up of 10%. Only on the basis of this Clause, the ld. Commissioner has come to the conclusion that goods/material have been purchased by the Appellant on behalf of DITC and therefore in a way the goods are made physically available by DITC to the Appellant and as such Rule 4 is applicable. It is not disputed that in the instant matter, the goods were purchased by the Appellant themselves for Research & Development as per their own choice/decisions. There is nothing in the agreement that the Appellant are bound to purchase particular goods or materials as per the instruction of DITC nor any clause/document have been brought on record which suggest that the Appellant is bound to purchase the material/goods as per the direction of DITC i.e. the service recipient. I have gone through the agreement and there is no clause in the agreement which mention that service recipient was to provide goods/material for research & development carried out by the Appellant. The CBEC vide Education Guide has explained the services which shall be covered under Rule 4(a) of Place of Provision of Service Rules, 2012. According to the said Education Guide, the essential characteristics 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. So far as reimbursement of material cost plus a mark-up of 10% on the same is concerned, it is a method of pricing considered in the agreement, since the result from research & development activity performed by the Appellant cannot be determined at any particular point of time. In my view, the aforesaid pricing method cannot be treated as reimbursement of expenses. Reimbursement means paying the service provider exact cost incurred by him on behalf of service recipient, therefore there is no reimbursement of goods involved in the matter. Since the research activity performed by the Appellant leads to formation of a new product different from the original raw material therefore Rule 4 of Place of Provision Of Service Rules, 2012 (hereinafter referred to as "Rules, 2012") will not be applicable. In my opinion, the research & development service falls under Rule 3 of Rules, 2012, according to which, the location of service provided shall be constructed as the location of recipient. In the present case, the location of service recipient i.e. DITC is outside India and therefore the said service shall be treated as export of service.

Applying the ratio of the above judgment it is submitted that the clause regarding reimbursement of cost of material by company from its customer cannot be considered that such materials are provided by service recipient. Therefore, the demand in the present case shall be dropped.

2. **Show cause notice does provide the details of compounds/samples provided by the customers and nature of activity carried out by company**

The show cause notice in para 14 alleges that the customer has physically made available the desired compounds/samples to the company in the taxable territory. Further it is alleged that the technical testing analysis is done by the company in the taxable territory on such desired compounds/samples physically made available by customer.

It is submitted that the show cause notice does not provide the name/description/quantity of the compounds/samples provided by the customers. Further it also does not provide any documentary evidence such as PO/invoices/Bill of Entry evidencing that such goods are made available by the customer. Further it does not provide the nature of activity carried out by the company on such sample/compound which are alleged to be in nature of technical testing and analysis services.

The entire demand of service tax in present show causenotice is based on the allegation that the compound/samples are provided by customer and company has carried on technical testing and analysis services on it.

However, it will be evident from the submissions made above that no details/documents are provided to support the said allegation. It is submitted in the absence of the above

information/document the company is not able to rebut the allegations made in the show cause notice. It is submitted that kindly provide us the said details for us to make submission in this behalf.

3. The para 2 of the said audit report records the observation made by during with respect to the impugned services. It will be evident from the said para

- That there is no observation with respect of manner of testing/certifying any materials or any documentary evidence relied on to substantiate the technical testing and inspection service were provided by the company.
- That the exact clause of the agreement which specifies that the company has undertaken testing and inspection agency services is not mentioned.
- That the name of the materials and its corresponding documents such as invoice/ PO/ Bill of Entry substantiating that such materials were provided by the customers of the company on which the technical testing and inspection service was carried out.

24. PERSONAL HEARING:

Personal hearing in the matter was held on 14.06.2021, wherein Ms. Manali Butala, General Manager, Finance, Mr. Premal Bhimani, Chief Manager, Finance, and Shri S.S. Gupta, C.A(in virtual mode), appeared before me on behalf of the assessee and reiterated their submissions made vide their letter dated 24.11.2020. They also submitted additional submissions.

DISCUSSION AND FINDINGS

25 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, compounds/samples provided or made available to them by their foreign clients.

26. 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.

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

28. 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.

29. The Chemical Synthesis Quote dated June 22, 2015 bearing no. PDSQ395(Revised) was for undertaking synthesis on Fixed Price basis. This quote was submitted at the time of pre-consultation hearing. It will be evident that the assessee had provided synthesis plan in the quote. The plan contained 3 schemes. These schemes are the chemical synthesis routes to develop the compound. The assessee had provided three likely routes which can be used to develop the compound to the client. It will be evident from the synthesis route that chemical structure of starting material alters after each chemical process and that the starting material is consumed to make compound.

30. The assessee had submitted Contract Research Agreement of VerseonInc dated September 1, 2015, 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 defence 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."*

30.1 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.

31. 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:

32. 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.

33. 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.****"*

34. 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.

35. I find that the **assessee had 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 lumpsum price. 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.

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

(a) M/s. Verseon 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 statement Annexure-17 submitted by the assessee, I find that the assessee has provided bifurcation of the material under the head "starting material" and "solvent". It is evident that all the three items purchased by the Assessee are chemical substances which are starting materials for the assessee. Thus, it is evident from above 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 Appendix-1 to 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. Novartis Institute of Biotech Medical Research Inc (FTE agreement):

(i) The client had entered into the Master Service Agreement with the Assessee on 14/02/2013. This agreement was renewed on 10/02/2016. 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. Novartis 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.

Number of FTEs	*:*	*18*
FTE levels assigned to project	*:*	*4 doctoral*
		14 associates
Amount per FTE	*:*	*US$64,000*

(iv) 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 total fees for the services provided under the Task Order shall be no more than USD 1,15,200.
- 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:

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."

56. 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....."

57. 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.

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.

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.

52. 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.***

53. 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.***

54. 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.

55. 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. <u>There is no dispute that the recipient of service is located outside India and that the consideration is received in foreign convertible currency</u>. 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; <u>it is upon the consumption of the service by the recipient</u>*

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.

48. 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.

49. 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."*

50. 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.

51. 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

46.2 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."*

46.3. 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. ....."*

46.4 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

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

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.

44.2 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*

44.3 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.

45. 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):

45.1 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.

45.2 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.

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

46.1 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.

Sr. No.	Invoice no.	FTE no.	Amount of invoice in USD (5333.33* no of FTE)
1	3498501963	15	80000
2.		5	26667
3.	3498501964	3	16000
4.		3	16000

37. 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.

38. 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.

39. 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*'.

39.1. 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"

40. 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.

40.1 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]

41. "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".*

42. 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.

43. 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.

44. 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:

44.1 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,

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.

58. 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.

59. Lastly I observe that the the assessee is an SEZ unit.**The services provided by them are considered as export as per SEZ Act, 2005.** The SEZ Act has defined the term export in section 2(m) of the Special Economic Zone Act, 2005 as follows:

> *"(m) "export" means –*
> *(i) **taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise**; or*

(ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or
(iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone;"

59.1 Hence, as per the above definition export means providing service out of India from SEZ by any mode whether physical or otherwise. In instant case, the clients of the assessee are located outside India. The assessee carries out synthesis of chemical substance to develop compounds for their client. Therefore, the service is provided outside India. The SEZ Act consider the provision of service of assessee as export of service. Hence, they have been issued LOP under this Act to set up unit in SEZ. The export of services should be interpreted as defined in section 2(m) of SEZ Act and not as per Rule 6A of the Service Tax Rules, 2004. The assessee relied on the judgment of ESSAR STEEL LIMITED versus UNION OF INDIA2010 (249) E.L.T. 3 (Guj.). This judgment has been upheld by Hon'ble Supreme Court as reported in Union of India v. Essar Steel Ltd. - 2010 (255) E.L.T. A115 (S.C.)].

59.2 Further, the section 51 of the SEZ Act, 2005 provides that provision of SEZ Act will apply notwithstanding anything inconsistent contained in any other law for the time being in force. The relevant extract of the section is reproduced below:

"51. (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

60. Therefore, in view of the above, even in case the services are not considered as export as per provision of service tax, it can still be considered as export by virtue of provision of SEZ Act. Therefore, the demand should be dropped on this ground alone.

61. 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."*

62. 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.

63. 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).

64. 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-29/S.C.N./Piramal Enterprise/2019-20/5805 dated 17/10/2020, issued by the Commissioner, Central Tax Audit, Ahmedabad.

(AMARJEET SINGH)
COMMISSIONER
CGST & CEX,
AHMEDABAD NORTH

F No.STC/15-09/OA/2020 Date: 13.07.2021

By Registered Post AD
To
M/s Piramal Enterprises Ltd
18, Pharmaceutical Special Economic Zone
Sarkhej-Bavla Road,
Village: Matoda, Taluka: Sanand
District: Ahmedabad 382 213

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