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/15-63/OA/2019

DIN 20210764WT000000D94E

आदेश की तारीख़ / Date of Order : 28.07.2021

जारी करने की तारीख़ / Date of Issue : 28.07.2021

द्वारा पारित/Passed by -

अमरजीत सिंह / AMARJEET SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show Cause Notice no. DGGI/AZU/Gr.E/36-94/2019-20 dated 17.10.2019 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:

1. Piramal Enterprise Limited,is fully owned subsidiary (Formerly known as M/s Piramal Pharmaceutical Development Services Pvt. Ltd.) Plot No.19- 213 Pharmaceutical Special Economic Zone,Village-Matoda, Sarkhej -Bavla NH 8A Highway, Taluka-Sanand, Distt. Ahmedabad situated in Zydus Pharmaceutical SEZ and Piramal Pharmaceutical Development Services Pvt. Ltd. was a fully owned subsidiary of Piramal Enterprise Limited till 27.12.2014, however after the approval of scheme of amalgamation, it has merged into Piramal Enterprise Limited w.e.f. 28.12.2014.

1.1 M/s. **Piramal Enterprise Limited** (hereinafter referred to as "M/s PEL" and "the assessee" for sake of brevity") is situated in SEZ Area and they are performing the clinical tests, analysis for foreign clients and classified these services under the category of "Scientific and Technical Consultancy service" as defined under Section 65 (105)(za) of the Finance Act, 1994 and thereafter for provision of "service" erstwhile as defined under 65B(44) of the said Act, for which they were registered with the Service Tax Department and were having Service Tax Registration No.**AAECP6946MST001**.

2. Intelligence gathered by the officers of the Directorate General of Goods & Service Tax Intelligence (formerly known as Directorate General of Central Excise Intelligence), Zonal Unit, Ahmedabad (hereinafter referred to as "DGGI" for the sake of brevity) indicated that M/s **Piramal Enterprise Limited**, were providing theTechnical Testing and Analysis services to their foreign based client**who send or make available their own goods** such as **"drug" or "Molecule/API (Active Pharmaceuticals Ingredients)"**for the purpose of Testing and Analysis in SEZ, which is subject to provision under chapter V of the Finance Act, 1994 and is treated as "taxable territory". It was noticed that the M/s Piramal Enterprise Limited were acting as Testing & Analysis agency, they were conducting prescribed Tests and Analysis on the drugs/molecules received from their foreign clients in India and prepared "Dossier"/ Test Report's containing the outcome of test conducted by them and sent Product Development Report to their respective client. The payment by the foreign client to M/s Piramal Enterprise Limited, for the above activities, was made in convertible foreign currency. From the ST-3 Returns filed by them, it was observed that they were treating the aforesaid activity as Export of Service and accordingly, they had not paid the service tax payable thereon under the category 'Technical Testing and Analysis service" from the F.Y.2014-15 to 2017-18(Upto June 2017).

Investigation

3. Acting upon the intelligence, the officers initiated an investigation against M/s Piramal Enterprise Limited under summons proceedings and called for certain records viz. copies of all agreements between M/s **Piramal Enterprise Limited** and their foreign clients, Bill of Entries under which material/goods were imported, records/registers maintained in respect of Technical Testing & Analysis Service, Test/Analysis Reports submitted to the foreign clients, Invoices/bills issued to the foreign clients for provision of service, Bank Remittance Advice/Certificate showing amount received from foreign clients, Ledger Account of foreign clients to whom services have been exported and Month-wise Export of Service Income earned for providing aforesaid services to the overseas clients.

3.1 The authorized person of M/s **Piramal Enterprise Limited** vide letters dated 03.03.2016, 12.12.2017 and 01.05.2018 provided copies of certain works order/agreements/Bank Remittance Advice/Certificate, Service Tax Return, copies of some invoices/bills issued to their overseas clients.

4 Scrutiny of records provided by M/s. Piramal Enterprise Limited

4.1 On scrutiny of the Agreement dated 21.05.2015 **RUD-R-1**]entered into between M/s Key Pharmaceuticals Ltd.,Galan House,83 High ST, Somersham, Cambridgeshireand M/s PEL, it was noticed that Active substances were required to be sent/made available by M/s Key Pharmaceuticals Ltd. for further development of the formulation of the product by way of Testing and Analysis. Relevant section 8,of the said Agreement reads as –

8. Key Pharma Responsibility-

"Supply of API, empty capsule shells, excipients, packing material, RLD(s) reference standards, impurity standard and working standards".

Same has been observed from Section 12, Term and Condition, at Sr. No. 1, of the Agreement, which is reproduced as-

"API, RLD, working standards for API and impurities, reference standards for API, empty capsule shells, excipients, packing material for the project shall be provided by Key Pharma." (the client)

Thus, it appeared that the Active Substances were made available in India to M/s PEL by the client located abroad.

4.2 On scrutiny of the Project Proposal executed on 23.06.2015, **[RUD-R-2]** between M/s Tolero Pharmaceuticals, INC, 2975 W, Executive Parkway, Suit 320, Lehi, UTand M/s PEL, it was noticed that Active substances were to be sent/made available by M/s Tolero Pharmaceuticals, INC for development of the formulation of the product by way of Testing and Analysis. Same has been observed from Section 12, Term and Condition, at Sr. No. 1, of the Agreement, which is reproduced as-

'API, working standards for API and impurities, reference standards for API, empty capsule shells, excipients, packing material for the project shall be provided by Tolero". (the client)

Thus, it appeared that the Active Substances were made available in India to M/s PEL by the client located abroad.

4.3 On scrutiny of the Service Agreement executed on 08.02.2016**[RUD-R-3]** between M/s Helm AG, Germany and M/s Piramal Enterprise Ltd., it was observed that Active Substance were to provided/made available by their overseas clients for the project development by way of Testing and Analysis. Relevant section 2.12, of the said Agreement reads as –

2.12. Helem AG responsibility-

'Supply of API, empty capsule shells, excipients, packing material, RLD(s) reference standards, impurity standard and working standards'.

Same has been observed from section 12, Term and Condition, at Sr. No. 1, of the agreement, which is reproduced as-

'API, RLD, working standards for API and impurities, reference standards for API, empty capsule shells, excipients, packing material for the project shall be provided by Key Pharma"(the client)

Thus, it appeared that the Active Substances were made available in India to M/s PEL by the client located abroad.

4.4 On scrutiny of the Development Agreement executed on 23.09.2015**[RUD-R-4]** between M/sTheracos Holdings Ltd.(THL) and M/s PEL, it was observed that API (Active Pharmaceutical Ingredients) were to made available by the overseas clients for development of the product by way of Testing and Analysis. *Relevant Sr. No. 1 of Section 12 i.e. Term and Condition, of the said agreement reads as-*

"API, working standards for API and impurities, reference standards for API, empty capsule shells, excipients, packing material for the project shall be provided by THL".(the client)

Thus, it appeared that the Active Substances were made available in India (taxable territory) to M/s PEL by the client located abroad.

5. Scrutiny of the above terms of Agreements revealed that M/s Piramal Enterprise Limited, were providing theScientific & Technical Consultancyservice to their foreign based clients who were sending or making available goods such as **"Active Substances or "Molecule/API"**to M/s PEL located in thetaxable territory. It was observed that the M/s PEL were acting as Testing &Analysis Agency. They conducted prescribed Tests and Analysis on the drugs/ moleculessoreceived from their foreign clients and prepared a "Dossier"/Test Report containing

the outcome of the test conducted by them and finally sent Product Development Report to their respective client.

5.1 Summons dated 28.06.2019 were issued to M/s PEL to give oral statement in respect of the issue noticed during investigation.**Accordingly, statementof Smt.ManaliButala, Chief Manager (Finance) Manager – Piramal Enterprise Limited was recorded on03-07-2019**under Section 14 of Central Excise Act, 1944 read with Section 83of the Finance Act, 1994. The relevant portion of this statement is reproduced below:

Ques 3: Please describe in detail the various stages of provision of services, being classified under the taxable category of Scientific & Technical Consultancy service.

Ans 3: We have provided the Contract Research & Development service and have classified it under Scientific & Technical Consultancy Service. It includes following activities:

a) Product Design and Understanding

b) API and RLD evaluation and characterization

c) API Excipient compatibility studies

d) Screening and development batches

e) Pilot Batches and confirmatory batches

f) Process optimization

g) Scale of batches

h) Technology Transfer documentation

i) Product Development report

j) Analytical method development and validation

k) Stability analysis for various parameters

Depending upon the agreement with client and agreed scope technology package will be shared with client

Ques 4: Please state what internal records you are maintaining in relation to the provision of the service of Contract Research & Development.

Ans 4: Laboratory Notebooks containing the development activity of both R&D & Analytical service.

Ques 5: The material supplied by the foreign client is directly received at the R&D department. Please state the record maintained in respect of receipt of such molecules.

Ans 5: Piramal is directly or indirectly procuring material, In case of indirect procurement the material is received from third party vendors of customers Cost of the said material may or may not be reimbursed separately by the customer.

Ques 6: Before performing contract research & development under a particular contract, do you need to take permission/ license of Drug Licensing Authority for importing small quantities of drugs/ molecules on which the said research & development service is to be performed. If yes, please provide details of such application along with copies of the same.

Ans 6: Since unit fall in the jurisdiction of Special Economic Zone, we are exempted from Form -11(Test License) / import license.

Ques 7: Please state what are the records mandated by the Central Drug Control Organization (Test License Division) to be maintained in lieu of the Test Licenses issued by them.

Ans 7: Since unit fall in the jurisdiction of Special Economic Zone, we are exempted from Form -11(Test License) / import license.

Ques 8: Please provide the list of foreign clients to whom Services of "Contract Research & Development" have been provided by you.
Ans 8: All the agreement and contracts are already to office previously. The sales register for 2015-16 and 2016-17 were also provided to office.

Ques 9: Please state how the reports for the Contract Research & Development service are provided to the foreign clients.
Ans 9: We are providing product Development report of the technology pack to our foreign clients. At times as scope of activity we visit customer commercial site to do technology transfer of the product formulation method.

Ques10: How does M/s Piramal Enterprise Ltd. approaches to their foreign client to obtain contract in respect of performing the Scientific & Technical Consultancy service.
Ans.10: We approach our foreign client through Marketing Team.

Ques14: In your answer to question no. 3 you have said that there are different activities involved, can you list this activity as services or manufacturing activities separately, as you have shown them under export of service declared in our ST-3 returns for the period from 2014-15 to June 2017.
Ans.14: I shall internally check the end deliverable for each contract and share invoice wise bifurcation with reference to contract in one-week time for export of service declared in our ST-3 returns for the period from 2014-15 to June 2017

5.2 M/s PEL vide letter dated 02.08.2019submitted invoice wise bifurcation with reference to contract for export of service declared in ST-3 returns for the period from 2014-15 to June,2017. On scrutiny of the detail of the invoices provided vide letter dated 02.08.2019 (RUD-R-5),it is revealed that in many cases goods i.e API or molecule was sent/made available by their foreign clients and these instances have been covered during the present investigation. They conducted prescribed Scientific & Technical Consultancy on the drugs/ molecules received from their foreign clients and prepared development report of the technology pack containing the detailed report regarding the test conducted by them and sent it back to their respective clients.

6.LEGAL PROVISIONS:
Applicability of Chapter V of Finance Act, 1994 on a Unit located in SEZ:

6.1 Sub Section (1) of Section 53 of SEZ Act, 2005 reads as follows-

"A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations."

Sub-section (1) of Section 53 provides that a Special Economic Zone shall be deemed to be a territory outside the Customs territory of India for the purposes of undertaking the authorized operations. Effectively subsection (1) of Section 53 of SEZ Act is a policy declaration by a deeming fiction that the authorized operations undertaken in areas notified as Special Economic Zones under the SEZ Act shall be beyond the customs laws of the country. It does not state nor can it be inferred or implied that the area notified as an SEZ under the SEZ Act lies physically outside India as defined in the Constitution of India or that any law declared by Parliament to apply to whole of India shall not have effect in an SEZ except in respect of Custom Act, 1962.

EXEMPTIONS:

6.2 Section 7 of theSEZ Act, 2005 reads as follows-

7. Exemption from taxes, duties or cess

Any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by, -

i. a Unit in a Special Economic Zone; or
ii. a Developer, shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule.

First Schedule includes the following Enactments-

1. The Agricultural Produce Cess Act, 1940 (27 of 1940)

2. The Coffee Act, 1942 (7 of 1942)
3. The Mica Mines Labour Welfare Fund Act, 1946 (22 of 1946)
4. The Rubber Act, 1947 (24 of 1947)
5. The Tea Act, 1953 (29 of 1953)
6. The Salt Cess Act, 1953 (49 of 1953)
7. The Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955)
8. The Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957)
9. The Sugar (Regulation of Production) Act, 1961 (55 of 1961)
10. The Textile Committee Act, 1963 (41 of 1963)
11. The Produce Cess Act, 1966(15 of 1966)
12. The Marine Products Export Development Authority Act, 1972 (13 of 1972)
13. The Coal Mines (Conservation and Development) Act, 1974 (28 of 1974)
14. The Oil Industry (Development) Act, 1974 (47 of 1974)
15. The Tobacco Cess Act, 1975 (26 of 1975)
16. The Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978)
17. The Sugar Cess Act, 1982 (3 of 1982)
18. The Jute Manufactures Cess Act, 1983 (28 of 1983)
19. The Agricultural and Processed Food Products Export Cess Act, 1985 (3 of 1986)
20. The Spices Cess Act, 1986 (11 of 1986)
21. The Research and Development Cess Act, 1986 (32 of 1986)

As per this Section, the exemption to any SEZ Unit from service tax is available if it is export of service which is not fulfilled by M/s PEL. Similarly finance Act, 1994 is also not included the enactments shown in Schedule 1 of SEZ Act, 2005.Therefore, there is no such exemption is available to M/s PEL under Section 7 of SEZ Act, 2005.

6.3 Further, in respect of exemptions, clause 6(e) of Section 26(1) of the SEZ Act, 2005 reads as –

"exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone"

The exemption from service tax under clause 6 (e) of Section 26 (1) of the SEZ Act is intended for taxable services **"provided to"** a developer or a unit to carry on authorized operations in a Special Economic Zone but not for the services provided by the SEZ Unit.

6.4 Further, Section 51 of the SEZ Act, 2005 are as under:-

"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."

Provision of Section 51 of the SEZ Act relating to the said Act having an overriding effect would need to be invoked only if any inconsistency is noticed between the provisions of the SEZ Act and any other law for the time being in force. The question in the present case pertains to the applicability of the Chapter V of Finance Act, 1994 providing for levy of service tax in respect of operations carried out by a unit in a SEZ. Section 64 of the said Finance Act provides that Chapter V of the said Act extends to the whole of India except the State of Jammu and Kashmir. Thus, any service provided to and from an entity in a SEZ is liable to be treated as provided from India. Section 53(1) of the SEZ Act does not make the Finance Act, 1994 inapplicable to a SEZ. In the absence of any inconsistency there is no need to invoke section 51 of the SEZ Act.

6.5 Section 64(1) of Chapter V of Finance Act, 1994 is reproduced as:

SECTION 64. Extent, commencement and application –

(1) This Chapter extends to the whole of India except the State of Jammu and Kashmir.

So, the provisions of Chapter V of the Finance Act, 1994 relating to levy and collection of service tax are applicable to whole of India including the SEZs but excluding the State of Jammu and Kashmir.

6.6 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"

Rule 4 of the POPR means that services that are related to goods, and which require such goods to be made available in the taxable territory to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical **testing/inspection/certification/ analysis of goods**, dry cleaning etc.

In view of the above discussed provision,if Finance Act, 1994 and SEZ Act, 2005 are read in consonance it is clear that the provisions of Finance Act, 1994 are applicable on the services provided by a unit located in SEZ. Therefore there is no specific exemption, from payment of Service Tax, available to M/s PEL for taxable services of Technical Testing and Analysis provided by them as these services provided by M/s PEL cannot be considered as export of taxable services under the Rule 6A of Service Tax Rules, 1994, regarding "*Export of Services*" since in terms of condition (d) of the said Rule, *services* shall be considered as export only if the ***place of provision*** of such services outside India. ThereforE SEZs being part of India, performance of such services in the SEZs does not entitle them to be categorized as exports of taxable services.

Provision of Finance Act, 1994 with effect from 01.07.2012

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

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

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

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

(a) Such service is provided from India and used outside India; and
(b) Payment for such service is received by the service provider in convertible foreign exchange,
(c) the service is not a service specified in the section 66D of the Act,
(d) **the place of provision of the service is outside India,**
(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and
(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Ac.

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

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

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

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

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

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

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

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

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

11. Thus, as per the rule 4 (a) ibid the place of provision is the place where the service is actually performed, and in the instant case the services are actually performed in India. Therefore, M/s PEL is required to pay the service tax after introduction of Place of Provision of Service Rules, 2012 w.e.f. 01.07.2012. Thus, in terms of the Rule 4 (a) of the said rule, in the instant case the place of provision ofservice is India. Further, since M/s PEL has not fulfilled the condition laid down in Rule 6A(d) of Service Tax Rule, 2012, the provision of service provided in this instant case shall not be treated as Export of Service. Accordingly, the service tax is required to be paid by the M/s PEL, which had not been actually paid by them. Therefore, service tax is required to be charged from M/s. PEL in terms of Section 66B of the Finance Act, 1994.

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

The relevant extract of the said advance ruling is as under: -

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

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

Decision of Authority for advance Ruling (AAR) :

13. The Authority for Advance Rulings (central Excise, Customs & Service Tax), New Delhi vide their Ruling No. AAR/ST/06/20011 dated 13.05.2011 in the Application No. AAR/ST/44/13/2010 filed by M/s MAS-GMR Aerospace Engineering Company Ltd., Hyderabad has ruled that Service Tax will be chargeable on the services rendered within the SEZ unless specially exempted under the SEZ Act or under the Finance Act, 1994, or any Rules or Notifications there under. No such exemption available in respect of 'Scientific or Technical Consultancy Services" provided by M/s PEL.

Outcome of the Investigation.

14. The term "taxable service" has been defined under sub-section (za) of clause (105) of Section 65 of the Finance Act, 1994 which read as under:

(za) any service provided or to be provided to any person, by a scientist or technocrat, or any science or technology institution or organization, in relation to scientific or technical consultancy.

15. However, post 01/07/2012,sincethere is no service wise classification due to introduction of negative list, and the activity carried out by assessee falls under the purview of definition of " Service" in terms of Section 65B (44) and made taxable under Section 66B read with Section 66D of Finance Act, 1994, as the same is neither covered by negative list nor by any exemption notification. Further, as the service provided is Performance Based Service and actually performed in India the same comes under Rule 4 of Place of Provision of Service Rules, 2012 w.e.f. 01.07.2012.

16. Further, whereas the service provided to the foreign clients by performing scientific & technical consultancy service on API/Molecule provided/made available by their foreign clients in India, cannot be considered as 'export services' and hence taxable in terms of Rule 4 of Place of Provision of Service Rules, 2012. Therefore, no exemption for payment of service tax is available on the said services provided by the M/s PEL in this case as discussed above, the said services have been actually performed in India only.

17. Since M/s PEL carried out 'Service' regarding technical scientific & technical consultancyfor the purpose chemical testing of active substances and formulations in India and at the time of provision of the service, location of goods i.e. active substances/API were not situated outside India but actually the services i.e. scientific & technical consultancy were performed on the goods i.e. active substances/API in India (taxable territory) and therefore the service cannot be considered as an export of Service in terms of Rule, 4 of Place of Provision of Service Rules, 2012.

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

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

20. It appeared that M/s.PEL failed to pay the service tax Rs. 11,64,15,918/-(as shown in the table below) which is required to be demanded and recovered from them under Section 73(1) of the Finance Act, 1994, inasmuch as **M/s PEL has contravened the following provisions.**

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

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

F.Y.	Total Export	Export Valuein which API is received from foreign Clients	Service Tax(including cess)
2014-15	299853708	134066045	16570563
2015-16	277467964	152614569	21336159
2016-17	565390170	473633254	70930094
2017-18(upto June 2017)	80819528	50527337	7579101
Total	1223531370	810841206	116415918

21. Therefore, M/s. Piramal Enterprise Limited, (Formerly known as Piramal Pharmaceutical Development Services Pvt. Ltd.) was called upon to show cause as to why :

(a) the amount shown as received against export of Services total amounting toRs.81,08,41,206/- charged and received by them from their Foreign based clients should not be considered as the taxable value/gross amount charged and received by the service provider for "Taxable Service" in terms of Section 66B of the Finance Act, 1994 read with Rule 4 (a) of Place of Provision of Services Rule, 2012 in India;

(b) Service tax totally amounting to **Rs. 11,64,15,918/- (inclusive of Cess)** as detailed in Annexure-A attached to Show Cause Notice, on the value of taxable services amounting to Rs.81,08,41,206/- for the period 01.04.2014 to 30.06.2017 should not be demanded and recovered from them under Proviso to Section 73 (1) of the Finance Act, 1994 read with the Section 66B and the Section 68 of the erstwhile Finance Act, 1994 (as it existed up to 30/06/2017) read with Rule 6 of the STR, 1994, read with Section 174 of Central Goods And Service Tax Act, 2017;

(c) Interest as applicable on the amount of Service Tax liability of **Rs.11,64,15,918/- (inclusive of Cess)** should not be recovered from them for notmaking payment in time, under Section 75 of the Finance Act, 1994.

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

(e) Penalty should not be imposed upon them under the provisions of Section 76 and/or 78 of the erstwhile Finance Act, for willful mis-statement, suppressing the facts and contravention of statutory provisions with intent to evade payment of Service Tax demanded hereinabove.

22. DEFENCE REPLY:

Vide their reply dated 06.11.2020, received on 9.11.2020, the assessee had filed their reply to the Show Cause Notice and they filed further additional submissions on 29.6.2021. Vide the above submissions, the assessee has interalia submitted as under:

I. Facts of the Case:

1. M/s. Piramal Enterprises Limited (Formerly known as 'M/s. Piramal Pharmaceutical Development Services Pvt. Ltd.')(herein after referred as 'company')has an SEZ unit

located at Plot No. 19-213 Pharmaceutical Special Economic Zone, Village Matoda, Sarkhej Bavla NH 8A Highway, Taluka Sanand Dist. Ahmedabad situated in Zydus Pharmaceutical SEZ. M/s Piramal Pharmaceutical Development Services Pvt Limited was 100% subsidiary of M/s Piramal Enterprise Limited till 27/11/2014 and merged with them from 28/11/2014.

2. The Company is engaged in undertaking Contract Research & Development and Analysis services for clients located outside India. The services of the company are summarized as follows:
   (a) They are engaged in provision of development and technology transfer of solid oral formulations.
   (b) They evaluate and study the API, reference drug, excipient to develop formulations of various strengths and composition.
   (c) These formulations are evaluated to analysis its properties, stability, feasibility, shelf life etc.
   (d) Based on above research and analysis the formulation and the manner to manufacture it is optimized by the company.
   (e) Further test and analysis are carried out for scaling up batches, microbial study, pilot batch run etc.
   (f) The above research and analysis are documented in a report. The primary intent to prepare the report is to transfer the technology used by the company to develop the formulation and manufacture the same to the client.

   They received consideration in foreign convertible currency. The Company has considered this service as 'export of service' and disclosed the same in the ST-3 Return also.

3. The Director General of Goods & Service Tax Intelligence (DGGI) gathered intelligence that the Company has performed Technical Test and Analysis on drugs/molecules received from their clients located outside India. The company has prepared 'Dossier/Test Report' containing the outcome of test conducted by them and sent it to respective client.

4. The DGGI conducted investigation against the Company. They called for various documents like material imported, records maintained, reports made for foreign clients, invoices issued, copy of contracts, etc. The Company submitted the following details vide letter dated 03/03/2016, 12/12/2017 and 01/05/2018:

   (a) Letter dated 3/3/2016:
   The company had submitted the list of foreign clients, copy of agreements, copies of Bill of Entries for period 2012-2015; copies of invoice for period 2012-2015 and Bank remittance advices. The acknowledged copy of the letter was attached as **annexure-1.**The company had also submitted copy of ST-3 return and audit report for period 1/4/2012 to 31/3/2014.

   (b) Letter dated 12/12/2017:
   This submission was made with reference to personal hearing held on 1/12/2017. The company had explained the nature of service provided by them in the hearing. The officer asked the company to submit the profile of the company along with debit notes. The said detail was submitted by this letter. The copy of letter was attached as **annexure-2.** It is clearly stated in the profit of the company that the company is engaged in R&D activity of development and technology transfer of solid oral dose formulations. They have mentioned the stages of development of formulation in the profile and attached an annexure to explain the same in detail.

   (c) Letter dated 1/5/2018:
   The company was asked to submit the documents again by DGGI vide letter issued from F. No. DGCEI/AZU/12(4)130/2015-16/423 dated 14/2/2018. The company re-submitted copy of ST-3, all invoices raised for period 2012-2015 and copy of agreements vide letter dated 3/3/2018. The copy of letter was attached as **annexure-3.** They submitted the invoice wise details and contracts for the period April 2015 to June 2017 vide letter dated 1/5/2018. The copy of letter was attached as **annexure-4.**

5. The officers of DGGI scrutinized the contracts of various clients of the Company. They concluded that the API was agreed to be provided by clients to the Company for further development of the formulation of the product by way of Testing and Analysis. The department relied on the following clauses of the contract to state that API was supplied by clients:

(a) Clause 8 of Sr.No. 1 of Section 12 of the terms and conditions of the agreement dated 21/05/2015 with M/s. Key Pharmaceuticals Ltd. and M/s. Cambridgeshire.

(b) Clause 12 of Sr. No. 1 of Section 12 of the terms and conditions of the agreement dated 23/06/2015 with M/s. Tolero Pharmaceuticals ING.

(c) Clause 2.12 of Sr.No. 1 of Section 12 of the terms and conditions of the agreement dated 08/02/2016 with M/s. Helm AG, Germany.

(d) Clause 12 of Sr.No. 1 of Section 12 of the terms and conditions of the agreement dated 23/09/2015 with M/s. Theracos Holdings Ltd.

6. The DGGI also observed that company had provided Scientific and Technical Consultancy service to clients located outside India. The client sent the API/Molecules. The company acted as a Testing and Analysis Agency. They conducted prescribed test on molecules and prepared test report to send to the client.

7. Based on the above information, the statement of Smt. Manali Butala – Chief Manager Finance was recorded on 03/07/2019 u/s. 14 of the Central Excise Act, 1944. The gist of the statement is as follows:

(a) The Company undertook Contract Research & Development services which were classified under 'Scientific and Technical Testing Services'. It included various activities which have been listed at point 3 of the statement. They provided Product Development Report to client. They may have to visit client site to do technology transfer of product formulation method.

(b) It maintained laboratory notebooks containing development activities of both Research & Development and analytical services.

(c) The Company procured the materials directly or indirectly through third party vendors. The cost of the material may or may not be reimbursed separately by the clients.

(d) The company has submitted all the contracts and sales register for the period 2015-2017.

(e) The Company is exempt from obtaining test license/import license as they are a SEZ unit.

8. The Company submitted letter dated 02/08/2019 to provide invoice wise bifurcation of the value of service which was declared as export in the ST-3 return for the period April-2014 to June-2017.

9. The Rule 4 of the Place of Provision of Service Rules, 2012 prescribes the manner of determination of the place of provision of performance-based services. The DGGI has observed that the essential characteristics of a service to be covered under this rule is that the goods temporarily come into physical position or control of the service provider and these goods should be imperative for provision of service.

10. The Rule 6A of the Service Tax Rules, 1994 prescribes the conditions to consider any service as an 'export of service'. The said rule is reproduced below:

***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 the 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 services 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.
(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate

shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.]"

11. It has been alleged in the show cause notice that the place of provision of services of the company will be determined under Rule 4 of Place of Provision of Service Rules, 2012. As per this rule, the place of provision of service is the place where services are actually performed by the company. In instant case, the services have been performed in India. Hence, the services which were performed on the goods cannot be considered as 'export of service'. These allegations have been made based on following:

(i) The API/Molecule/Active Substance temporarily came into the physical possession or control of the company. The testing of Active Substances cannot be done in absence of physical or control of the service provider.

(ii) The services cannot be considered to be performed outside India merely because the company had sent reports to clients outside India.

Therefore, theconditions prescribed in Rule 6A(d) of the said rules has not been fulfilled. Hence, the Company is liable to pay tax on the services declared as 'export of service' in the ST-3 return. The DGGI has relied on the Advance Ruling in the case of M/s. Steps Therapeutics Ltd., Hyderabad (Ruling No. AAR/44/ST-1/27/2016 dated 12/07/2016).

12. The service tax liability was computed based on the details submitted by the Company vide letter dated 02/02/2019. The manner of computation of liability has been stated in Annexure-A to the Show Cause Notice. The summary of the same is as follows:

Financial Year	Total Export	Export Value in which API is received from foreign clients	Service Tax including cess)
2014-2015	299,853,708	134,066,045	16,570,563
2015-2016	277,467,964	152,614,569	21,336,159
2016-2017	565,390,170	473,633,254	70,930,094
2017-2018 (upto June-17)	80,819,528	50,527,337	7,579,101
Total	**12,23,531,370**	**810,841,206**	**116,415,918**

13. Based on the above allegations, the Company was issued Show Cause Notice vide F.No. DGGI/AZU/Gr.'E'/36-04/2019-20/8938 dated 17/10/2019. It was alleged that the Company has deliberately suppressed the facts of the actual place of provision of service in the ST-3 Return. Hence, the extended period of limitation was invoked to raise the demand.

14. Hence, the Company has been asked to show cause as to why:

(i) The amount shown as received against export of services total amounting to **Rs 81,08,41,206/-** charged and received by them from their Foreign based clients should not be considered as the taxable value/gross amount charged and received by the service provider for 'taxable service' in terms of Section 66B of the Finance Act, 1994 read with Rule 4(a) of the Place of Provision of Service Rules, 2012 in India.

(ii) Service tax totally amounting to **Rs 11,64,15,916/-** (inclusive of Cess) as detailed in annexure-A attached to Show Cause Notice, on the value of taxable services amounting to Rs 81,08,41,206/- for the period 01/04/2014 to 30/06/2017 should not be demanded and recovered from them under proviso to Secton 78(1) of the Finance Act, 1994 read with Section 66B and Section 68 of the erstwhile Finance Act, 1994 (as it existed upto 30/06/2017) read with Rule 6 of the Service Tax Rules, 1994 read with Section 174 of the Central Goods and Service Tax Act, 2017.

(iii) Interest as applicable on the amount of service tax liability of **Rs.11,64,15,918/-** (inclusive of Cess) should not be recovered from them for not making payment in time, under Section 75 of the Finance Act, 1994.

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

(v) Penalty should not be imposed upon them under the provision of section 76 and/or 78 of the erstwhile Finance Act for willful misstatement, suppressing the facts and contravention of statutory provisions with intent to evade payment of service tax demanded hereinabove.

II. Reply:

1) The description of service provided by the company:

1.1 The company provide Research & Development and Analysis Services to the client. The Company has attached a detailed note on the services provided by them to the client as **Annexure-5**.The brief of the same is as follows:

(a) **Preliminary discussion:**

The client and the Company undertake preliminary discussion to agree on certain criteria like the name of API, reference drug for development of formulation, dosage form, dose strength, target market etc. This is required to understand the scope of the work of the Company. Based on these discussions, the Project Manager is assigned to co-ordinate the project.

(b) **Project Initiation Activities:**

The Company draws up a detailed strategy for the formulation development. This enables the Company to understand the time required for completion of the services. The details of the strategy and timelines are shared with the client.Based on the skill set required for the project the Company allots dedicated resource to the project.

(c) **API and RLD characterization:**

The API is the active ingredient which is used to develop the formulation. Generally, the client provides a reference of the existing drug to enable the Company to understand the characteristics required from formulation which is to be developed by them. This drug is called "Reference Drug" (RLD). The Company undertakes characterization of API and RLD. They study the following characteristics of both of them:

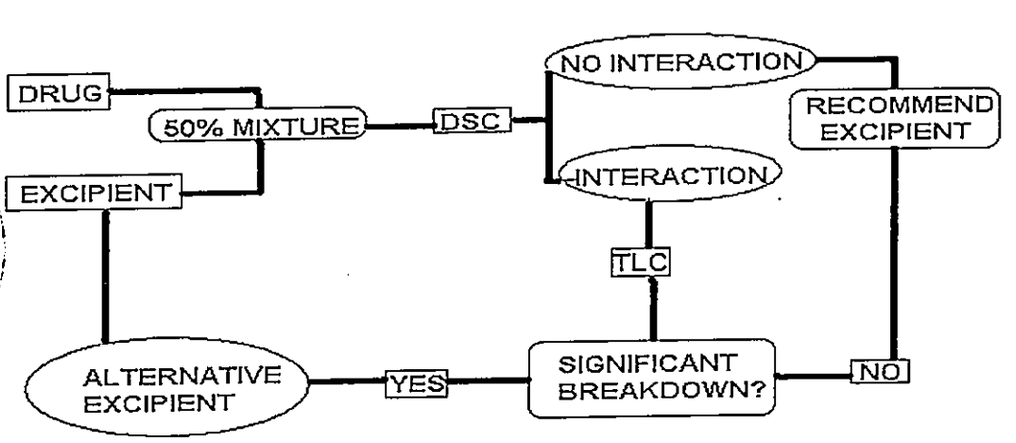
- API evaluation:
  - flow properties,
  - particle size,
  - density profile,
  - compressibility
  - solubility studies

- RLD evaluation:
  - Appearance
  - Average weight of the tablets
  - Content Uniformity
  - Disintegration Time
  - Dissolution Profile, Multimedia and multipoint
  - Assay and Content Uniformity
  - Related Substances

The Company also undertakes stress study on API to understand its nature and impact under severe conditions.

(d) **API Excipient compatibility study:**

The excipient is an inactive substance that serves a physical carrier or media for drugs, molecules, API or other inactive substances. The excipient should be compatible with the API to develop formulation. Hence, the Company selects ten to twelve excipients to conduct compatibility study. The mixture of API and excipient are tested for compatibility as follows:



The samples which are compatible with the API will be further evaluated for impurity profile and visual observation. They are packed in glass vials for stability study.

(e) **Prototypebatch manufacturing and stability study:**
The scientist initiates the prototype development on the basis of the results of excipient compatibility study. They shortlist the expedient to develop the formulation of various strength and composition. This helps them to understand the amount of expedient to be used in each formulation and its impact on API. The samples are tested for various characteristics like:

- Assay (% of drug present in product)
- Content uniformity (amount of API present in each individual capsule)
- Related substances (impurities generated)
- Dissolution (% of API that is expected to be dissolved in various dissolution media)

Apart from the above, these samples are tested for stability. Based on the results, the scientists finalize the most suitable composition for the formulation. They further optimize the process in order to access the critical parameters like blending time, effect of lubrication and compression i.e. turret speed and hardness profiling for manufacturing the formulation. They also undertake to optimize the composition of formulation. In order to undertake this process, they select few critical variables of the formulation and evaluate the impact of the change on the characteristics of the final product.

Based on the above Research and Development, the formulation is developed by the Company.

(f) **Development of analytical method:**
The method to be used for analysis of each step undertaken for formulation development is decided by the Company. The method is decided based on the characteristics of the API, RLD and the literature available on them. The Good Manufacturing Practices (GMP) norms of the target market are studied to ensure that the analytical method for cleaning the machine is proper so that no particles of API or excipient are left in the machinery.

(g) **Analytical method validation:**
The analytical methods developed will be challenged and validated to ensure that the methods are able to provide accurate, reproductible and specific results.

(h) **Confirmatory Batch Manufacturing and stability study:**
The composition of the formulation is finalized in the prototype batch manufacturing process. In this process, the equipment's similar to prototype batch are used to manufacture a scale of batch of the prototype. All the parameters to manufacture the scale of batch are same as prototype batch to undertake the stimulation between the two process.

The Company undertakes testing of the formulation and the process of the scale up batch in order to identify specifications of the same. They also undertake stability study of the batch to mainly evaluate the following:

i. Appearance
ii. Assay
iii. Related substances
iv. Dissolution profile
v. Water content

The stability study is undertaken for defined time period like one month, three months, six months, one year and so on.

(i) **Clinical Batch Manufacturing:**
In this process the Company manufactures the batch size of the formulation to replicate manufacturing conditions of the factory. This batch is generally manufactured under GMP conditions. A part of the batch is shipped to the client outside India. The remaining part is maintained with the Company to undertake stability study.

(j) **Technology Transfer Documentation:**

Based on the confirmatory batch and clinical batch, the documents for following details will be prepared and provided to the client in order to initiate the technology transfer of the formula and process:

- Master manufacturing document
- In-Process and Finished product specifications
- Raw Material specifications
- Tooling drawings
- Analytical Method transfer protocol

(k) **Product Development Report:**
The entire summary of the outcome in all the steps involved in the product development will be summarized along with the results in the product development report. This will help the regulatory agencies to understand the rational for each of the steps of the development.

The company undertakes the above activities to provide Contract Research and Development Services to the customer.

1.2 The company enters into Master Service Agreement with each customer for supply of service. The agreement is for 3 to 5 years. During this period, the company will develop various oral formulations (formulation taken through mouth) for client. The scope of work for each formulation development is decided through proposal, work order etc. The agreement entered with M/s. Tolero Pharmaceutical Inc. dated 17/07/2015 was attached as **Annexure-6.** The scope of service of the company has been stated in clause 2 of the agreement. As per clause 2 the details of services of the company will be stated in Project Proposal.The company had sent proposal to M/s Toleroto lay down the scope of service, their consideration, responsibilities of both parties for each formulation development. The project proposal dated 23/6/2015was attached as Exhibit-I to the agreement. The project scope is stated in Point No. 2 of Exhibit-I. The same is reproduced below:

> **"2.** ***Project Scope:***
> - *Scope of the project involves formulation development and clinical manufacturing of TP=0903 capsules of 1mg, 4mg and 16mg for Phase-I study.*
> - *Direct blending has been considered as the preferred manufacturing process. In case direct blending process doesn't work well, dry granulation or wet granulation processes shall be employed for the manufacturing.*
> - *Formulations will be developed as dose proportionate keeping final capsule weight constant.*
> - *Clinical batches will be manufactured for 1mg, 4mg and 16mg strength.*
> - *Clinical packaging will be done using HDPE bottle."*

The product development plan has been stated in 2.1 to 2.10 of the proposal. The details of consideration has been stated in para 10.1 of the proposal. The company has raised invoice on Tolero on completion of each of the mentioned activity. The statement showing details of invoice raised by the company was attached as **annexure-7.**The description of work done for each of the invoice raised on Tolero is as follows:

i. **Project initiation and resource allocation (Invoice No. 3319001060 dated 21/08/2015):**
The Company drew a detailed plan of strategy for formulation, development and the time required for completion of the project. Based on the work required to be undertaken, the Company allocated eight staff members to the project. The Company had to submit an application for NOC to manufacture the new drug formulation to Directorate General of Health Services, Ministry of Health and Family Welfare. The approval for this project was received vide Reference No. 27/1/2015-F29/3540 dated 25/8/2015. The copy of the approval was attached as **annexure-8.** The list of the staff members, their qualifications and experience have been stated in the approval letter. The invoice was raised to initiate the project and allocate the resource to the project. The copy of invoice no. 3319001060 was attached as **annexure-9.**

ii. **Analytical Method Development (Invoice No. 3319001090 dated 27/10/2015):**
The Company had developed cleaning method of the machines to ensure that no API or excipient materials are left in the machinery and contaminate next product. This method was developed in accordance with Globally acceptable norms ofUSA.The copy of invoice no. 3319001090 was attached as **annexure-10.**

iii. **API characterization and drug excipient capability (invoice No. 3319001091 dated 28/10/2015:**

The Company had characterized API-TP0903 to understand its physical properties like appearance, density, particle size and solubility through various techniques. This process is important to understand the ingredients, its potential impact and the modifications required for formulation of the product.

Based on the characteristics of API, itscompatibility with various excipient is also evaluated. In this case, the Company had evaluated the following excipient:

- Microcrystalline Cellulose USP/NF
- Lactose Monohydrate USP/NF
- Corn Starch USP/NF
- Crospovidone USP/NF
- Talc USP/NF
- Coloidal silicon dioxide USP/NF
- Magnesium Stearate USP/NF

The invoice no. 3319001091 to undertake this activity was attached as **annexure-11.**

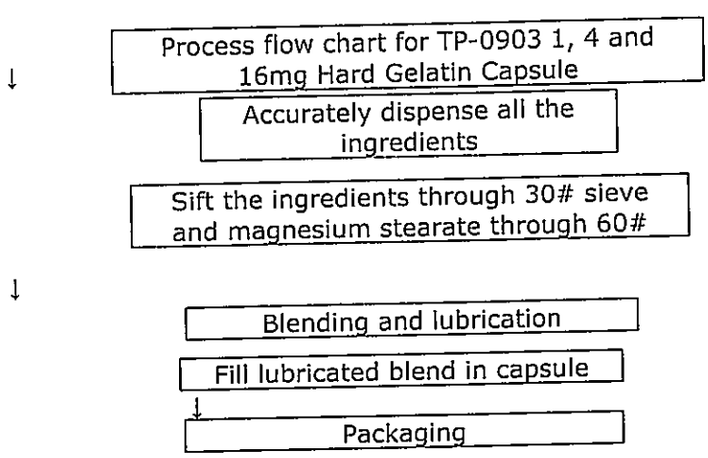
iv. **API Characterization (Invoice No. 3319001103 dated 26/11/2015):**

The client had changed the project scope to includePSD method, development and verification for API-TP-0903. The PSD is a process to check the particle size and distribution of API. This is a part of API characterization. The client specifically asked for this detail. Since this was not part of proposal, the company had executed change order no. 1 dated 10-08-2015. The copy of same was attached as **annexure-12.** Hence the Company had raised a separate invoice for the same. The copy of invoice no. 3319001103 dated 26/11/2015 was attached as **annexure-13.**

v. **Prototype formulation development and one monthly stability study (invoice No. 339001132 dated 31/12/2015):**

In this step, the scientists evaluate the impact of various excipient/s and process on manufacture of different prototype batches which are tested for physical and chemical testing to predict the behavior of the product. The batch with most promising physical and chemical stability will be identified as lead prototype to be taken to the next step of development. These batches are analyzed for various parameters mentioned above in para II(1)(e) of the reply.

Based on the result, the Company optimizes the manufacturing processes so as to ensure reproducible and predictable results during the manufacturing of the clinical batches. The optimized batch is verified for its characteristics and tested on above parameters.In instant case, the prototype manufacturing was undertaken of 500 capsules of strength 1mg, 4mg and 16mg. They had finalized the following manufacturing process:



This prototype batch was packaged and studied for stability. The Company has to study the stability at various time intervals. In this case, the stability was tested for one-month period. The invoice was raised to undertake these activities. The copy of invoice no. 3319001132 was attached as **annexure-14.**

vi. **Analytical method for verification (invoice No. 3319001152 dated 22/06/2016:**

The Company had challenged and validated the analytical method developed to formulate the formulation to ensure that they are able to provide accurate, reproducible and specific results. The copy of invoice no. 3319001152 was attached as **annexure-15.**

vii. **Certificate of analysis for clinical batch (invoice no. 3319001161 dated 29-02-2016):** The company had manufactured the clinical batch of TP 0903 4 mg hard gelatin capsules and TP 0903 16 mg hard gelatin capsules and performed the analysis to check if the product meets the customer prescribed quality limits. The copy of invoice no. 3319001161 dated 29/2/2016 was attached as **annexure-16.**

viii. **Prototype batch stability (invoice No. 3319001162 dated 29/02/2016):** The Company undertook further three months stability studyfor prototype batch manufactured by them. The invoice no. 3319001162 has been raised for the same. The copy of invoice no. 3319001162 was attached as **annexure-17.**

ix. **Product development report submission (Invoice No. 3319001190 dated 31/03/2016):** The Company has to prepare summary of outcome for all steps involved in the project development along with the results. This report is prepared for regulating agencies to understand the rational for each of the steps of the development. The Company had prepared the same and sent it to the client. The copy of invoice no. 3319001190 raised for same was attached as **annexure-18.**

x. **3 M stability data for clinical batch (invoice no. 3319001229 dated 28-06-2016:** The clinical batch manufactured above in the step vii.was put for stability study for 36 months. At the end of 3 months, drug was tested for at various time intervals at different temperature and humidity conditions to assign the shelf life/Expiry date/use by of the product. The result of this testing was shared with the customer. The copy of invoice no. 1229 dated 28/6/2016 was attached as **annexure-19.**

xi. **Product initiation (invoice No. 3319001358dated 12-01-2017):**

The client has changed the project scope vide change Order No. 1 dated 16/12/2016 for manufacture and stability study of clinical batches of TP0903 capsules 4mg and 16mg. The invoice no. 3319001358was raised to initiate this part of project. The copy of invoice was attached as **annexure-20.**

xii. **API Method evaluation, verification and release (Invoice no. 3319001359 dated 24-01-2017):** The API (TP 0903) was characterized again prior to use in clinical batch to ensure that the API used is of predefined quality standards and suitable for use in clinical batch. The client had supplied analytical results of the API which were used by company to ascertain the quality of the API. The copy of invoice no. 3319001359 dated 24/1/2017 was attached as **annexure-21.**

xiii. **Analytical Method verification (Invoice no. 3319001368dated 06-02-2017):**

The formulation was packed in hard gelatin capsules shells. However, these capsule shells used for the clinical batches were changed by the client. Hence the analytical methods were required to be re-verified to ensure that change in capsule shell had no impact on the analytical methods. The copy of invoice no. 3319001368 dated 06-02-2017 was attached as **annexure-22.**

xiv. **Project initiation (change order)-Invoice no. 3319001369:** The client had issued change Order No. 2 dated 12/01/2017 for manufacture of clinical batch to TP0903 capsule 1mg. The copy of change order and invoice no. 3319001369 raised to undertake this activity was attached as **annexure-23.**

xv. **Clinical batch manufacturing (Invoice No. 3319001370 dated 17/02/2017):**

This invoice was raised for clinical batch manufacturing for 16 mg and 4mg. In this process, the batch size is changed to 7000 capsules of each strength to test the formulation and process to manufacture the same on a commercial level. The Company exported 5000 capsules to the customers. The ShippingBill was attached as **Annexure-24.** The balance 2000 capsules are with the Company for stability study. The copy of invoice no. 3319001370 was attached as **annexure-25.**

xvi. **Clinical batch manufacturing (Invoice No. 3319001383dated 15/03/2017):** The client had issued change Order No. 2 dated 12/01/2017 for manufacture of clinical batch to TP0903 capsule 1mg. The copy of change order no. 2 was attached

as **annexure-26.** The invoice no. 3319001383 has been raised for the same. The copy of change order and invoice was attached as **annexure-27**.

xvii. **Stability Study (Invoice No. 3319001442 dated 20/06/2017):**
The Company had undertaken stability study for TP0903 capsules of 16mg and 4mg strength. The invoice no. 3319001442 has been raised for the same. The copy of invoice was attached as **annexure-28.**

xviii. **Stability Study (Invoice No. 3319001445 dated 22/06/2017):**

The client had modified the project by change of Order No. 3 dated 14/03/2017. The copy of the change order was attached as **annexure-29**. The stability study for clinical batch of TP0903 capsules of 1mg was included. The invoice has been raised for this activity. The invoice no. 3319001445 was attached as **annexure-30**. Therefore, it will be evident from above that the that company had provided development of formulation services to its client M/s Tolero.

1.3 The Work Order 25 of M/s. Theracos Holding Ltd. dated 23/09/2015 and agreement of M/s. Key Pharmaceuticals dated 10/09/2015 was attached as **Annexure-31 and annexure-32** respectively to substantiate the nature of service. The date of Key Pharmaecetuials agreement have been wrongly stated as 21/5/2015 in the show cause notice.

It will be evident from above, that the invoices and the agreements are for development of the formulation. The Company does not undertake mere testing and analysis on API alone. The company only undertakes characterization of API which is a part of the activity undertaken by the Company to enable them to develop the formulation. The API is consumed in the process of formulation development.

2) **The interpretation of Rule 4(a) of the Place of Provision of Service Rules, 2012:**

The Place of Provision of Service Rules, 2012 has been notified to determine the place of provision of every 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 madeavailableby 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 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".*

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 be 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.

3) <u>The API is consumed in development of formulation-Hence, the services of the company cannot be covered under Rule 4(a) of said rules:</u>

The showcause notice in para 6.6 and 9 has stated that essential characteristic of a service to be covered under Rule 4 is that the goods should temporarily come in physical possession or control of the service provider. This allegation has been made based on the Guidance Note issued by the CBEC which is reproduced above.

The CBEC in Education Guide has clarified that *'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'.* It has been clarified that the goods should temporarily come into physical possession of the provider of service. It implies that goods which are physically provided by the service receiver to the provider of service for rendering the services should be returned to the service receiver. The same can also be evidenced from the example given in the said guidance note which is reproduced as follows:

> *"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"*

Further all other examples given in the said education guide imply that goods should be returned in the same form in which it was provided by the service receiver for e.g. storage and warehouse services, repairs service etc. Further education guide also specify that goods used in the manufacture will not be covered under the said rules, which also implies that goods should be return in the same form.

In the present case, the API get consumed in the development of formulation and thus loose it's existence.It is evident from the submission made above that the API received by company is combined with expedient and a series of process are undertaken to develop formulation. These formulations along with the report for technical transfer is sent to the customer. The original material gets consumed and can never be sent back to the customer.

This fact will be evident from the Certificate of Analysis of the API and the formulation. They are explained as follows:

(a) The Certificate of Analysis of raw material i.e. API TP-0903 Tartate bearing no. COA/159/2015 was attached herewith as **annexure-33**. It will be evident that API is off-white colored solid substance. It is stored in tightly closed container at 25°C ±2°C temperature.
(b) The Certificate of Analysis of Finished Product i.e. TP-0903 Capsules, 1 mg bearing no. COA/049/2016 was attached herewith as **annexure-34**. It will be evident that:
   (i) the finished product is white opague size "3" hard gelatin capsules containing white powder. The API was in solid state whereas the capsules contain powder.
   (ii) It is to be stored at 20 °C - 25 °C. This temperature differs from storage temperature of API.

(iii) The identification test for the API and capsules also vary.

Hence, it will be evident that the existence of TP-0903 is lost in process of development of formulation contained in the hard gelatin capsules. The API cannot be separated from capsules and sent to the customer. 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. ....."*

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.

4) The nature of service provided by company has not been stated correctly in the showcause notice:

4.1 The DGGI has explained the nature of services provided by the Company in **para 1.1., Para 5** and **Para 17** of the Show Cause Notice. The services as explained, is reproduced below:

1.1 *"M/s. Piramal Enterprises Limited (hereinafter referred to as 'M/s. PEL for sake of brevity') is situated in SEZ area and they are performing the clinical tests, analysis for foreign clients and classified these services under the category of "Scientific and Technical Consultancy Service" as defined under Section 65(105)(za) of the Finance Act, 1994.*

4.1 *Whereas, on scrutiny of the agreement dated 21/05/2016 [RUD-R-1] entered into between M/s. Key Pharmaceuticals Ltd., Galan House, 83 High ST, Someraham, Cambridgeshire and M/s. PEL, it was noticed that active substances were required to be sent/made available by M/s. Key Pharmaceuticals Ltd. for further development of the formulation of the product by way of Testing and Analysis.*

5. *Scrutiny of the above terms of agreements revealed that M/s. Piramal Enterprise Limited, were providing the Scientific & Technical Consultancy Service to their foreign based clients who were sending or making available goods such as "Active Substances or Molecule/API" to M/s. PEL located in the taxable territory. It was observed that the M/s. PEL were acting as Testing & Analysis Agency. They conducted prescribed tests and analysis on the drugs/molecules so received from the foreign clients.*

17. *Since M/s. PEL carried out 'service' regarding technical scientific & technical consultancy for the purpose of chemical testing of active substances and formulations in India."*

It will be evident from above that the DGGI has stated that the Company is engaged in performing clinical tests and analysis on drugs/molecules received from foreign clients.

The Company had submitted various agreements to the DGGI to explain the nature of services provided by them. The DGGI had examined 4 agreements which have been listed in **para 4** of the Show Cause Notice. While explaining the agreement, the DGGI has stated that the Company had used active substances for further development of formulation. However, it has been concluded inpara 5 that as per the agreement, the Company is acting as testing and analysis agency as they do test on drugs and molecules.

It is submitted that the extract of the agreement which provide for the scope of services are reproduced below:

(i) Extract of agreement dated 10/9/2015 with Key Pharmaceuticals

"2. Project Scope

Following Considerations have been taken into account for the drug product development:

- *Scope involves **generic development of Mebeverine HCl MR capsules 200 mg considering "Colofac MR Capsules 200mg" by Abbott Healthcare UK as a reference product** for Europe (UK and Ireland) market.*
- *Extrusion/spheronization followed by Wurster coating has been considered as the preferred manufacturing process.*
- *The Capsule does strengths targeted for development is 200 mg*
- *200 mg capsule dissolution will be compared against the Innovator capsule formulation from Europe market provided by Key Pharma; a comparative dissolution results and summary will be shared with Key Pharma.*
- *Scale-up and Pilot BE batch will be manufactured for 200 mg strength."*

Further, para 2.1 to 4 of the agreement list down the break-up of nature of service which is the same as explained in para II(1).

(ii) Extract of agreement dated 23/9/2015 with M/s Theracos Holding Limited:

"1.Purpose:

THL requires a proposal for Bexagliflozin (EGT0001442) SR Tablets, 20 mg, to confirm the robustness of the existing process and product. Hereinafter major emphasis would be given on identifying the factors to prevent laminating tendency of tablets during compression. In order to achieve this Piramal would execute the project as per the steps mentioned in Figure 1.

API Name	*Bexagliflozin (EGT0001442)*
Dosage Form Type, Release, Duration	*SR Tablets*

Possible Dose Strength (s)	*20 mg and optionally at 10 mg*
Active Batches	***Screening trial*** *– To evaluate the impact of Poloxamer, Lactose and MCC grades* ***Formula Optimization Trials*** *– To optimize the polymer concentration* ***Process Optimization Trials*** *– To optimize process parameters (blending, milling and compression)* ***Scale Up Batch (optional)*** *– Confirmation of formula and process parameters at larger scale.*
Stability Study	***Scale up batch*** *25°C/60%RH-up to 12M* *40°C/75%RH-up to 6M* *30°C/75%RH -up to 12M*
Alcohol Dose Dumping Study	*Evaluate the in-vitro performance of final composition at different Ethanol concentration*
Analytical Method requirements	*Existing validated methods to be used"*

It is evident from above that the agreement clearly provides that the Company will develop the formulation. They will undertake characterization of the API and reference products, develop test batches, undertake testing of these batches and prepare report for transfer of technical and formulation to manufacture the formulation in the factory of the client. This very nature of service was also explained by Smt. Manali Butala in her statement dated 03/07/2019. The Question No. 3 of the statement contains details of activities undertaken by the Company. This part of statement has been reproduced in para 5.1 of the Show Cause Notice.

Hence, it is abundantly evident that the Company had explained the nature of the services provided by them to the DGGI. The DGGI noted these facts in the Show Cause Notice itself also. However, they conveniently ignored these facts to state that the Company undertakes testing and analysis on drugs and molecules. They undertake chemical testing of active substances and formulation in India. It is submitted the DGGI has not made any attempt to understand the nature of service of the company. The showcause notice is factually incorrect. Hence, the demand should be dropped.

5) <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 DGGI. The DGGI has noted the nature of services provided by the Company in para 4 and para 5.1 of the Show Cause Notice. However, they have alleged that the Company provides the following two types of services:

a) Clinical tests, analysis for foreign clients which are classified under the category of scientific and technical consultancy services.
b) Conducting chemical testing and analysis on active substances and formulation in India.

It is submitted that the clinical testing entails manufacture of a product and testing it for human consumption whereas the chemical testing on active substances is a very broad nature of service which can include host of services like stability testing, stress testing, testing for compatibility of excipient, etc. The DGGI 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 is a testing and analysis agency which performs prescribed test and analysis on active substances and the services are classified under 'Scientific and Technical Consultant 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 notice 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 causenotice is the foundation on which the department has to build up its case. **<u>If the allegations</u>***

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.

6) <u>The testing undertaken by company is incidental to service of development of formulation:</u>

It will evident that nature of service is not Technical Testing and Analysis service. It is development of formulation. The company has to test the compatibility of expedient with the API. They also have to test the developed formulation to ensure that they are of the requisite chemical formula, quality, and purity. This testing is incidental to the process of development of formulation. 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, ***<u>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</u>.***"

Hence, it is submitted that the testing is incidental to process of development of formulation. The services of the company cannot be considered as Technical Testing and Analysis.

7) <u>The onus to prove that the allegation has not been discharged by the revenue:</u>

It is evident from submission in above paragraphs that DGGI has alleged that the company has provided testing service on active substances. It has also been stated that company performs clinical test for foreign clients. We request you to please let us know the basis of such allegation. The agreements submitted by company and the statement of Smt. Manali Butala does not state provision of any such service. Furthermore, there is no evidence placed on record to substantiate as to how the DGGI arrived at the conclusion that the Company provides these services. There is no reference placed on any agreements, work orders, invoices of the Company or statement of Smt Manali Butala.

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. 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. 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.

8) The category of service is not relevant in instant case:

The DGGI has stated in para 1.1, 5 and 17 of the showcause notice has stated that the company has provided Scientific & Technical Consultancy service. It is submitted that the period under dispute in showcause notice is April 2014 to June 2017. The tax was leviable under negative list regime w.e.f. 1/7/2012. The charging section 66 was replaced by Section 66B. This charging section did not provide for category of services, as specified in different clauses of section 65 of erstwhile Finance Act. The charging section 66B provided levy of tax on all services other than services specified in Negative List. The taxpayer had to pay tax under specific accounting code and file return category of service wise for statistical analysis purpose. This has been clarified by Government vide Circular No. 165/16/2012-S.T., dated 20-11-2012.Therefore, the category of service after 01-07-2012 was only mentioned in the documents for statistical purpose and not for levy of Service Tax. Hence, it is not relevant for determination of Place of Provision of Service and levy of tax.

9) Without prejudice to above, the submissions on allegation made in the showcause notice:

The Show Cause Notice in para 9 and para 17 has alleged that it is essential that:

(i) The goods temporarily come in the physical possession or control of the Company and;

(ii) Without this happening, the services cannot be rendered;

It is submitted that it is evident from the submissions made above that the API is consumed in the process of development of formulation. Therefore, it does not come in temporary possession or control of the Company. Once consumed it losses its identity. Hence, the condition that the goods should come in temporary possession is not fulfilled in this case.

It is submitted that both of the conditions stated above have to be fulfilled to be covered under Rule 4 of the Place of Provision of Service Rules, 2012. The term 'and' has been used for these conditions. The term ***"and"*** is a conjunction used to join two phrases to show the continuity in the meaning. It has been interpreted in the case of M/s. AmritlalChemaux Ltd. reported in 2004 (172) ELT 475 (Tri-Mumbai). The relevant extract of the same is reproduced below:

"10. The learned Departmental Representative, while referring to Chapter Notes 11 to 29, contended that the word 'and' contained therein shall be read as 'or' and for this purpose, he rely upon AIR 1968 SC 1450. The word 'and' has been judicially interpreted in plethora of judgments to ***mean in the context to include or along with or in addition something thereto****....."*

The above case has been upheld by Hon'ble Supreme Court as reported in 2015 (321) E.L.T. 5 (S.C.)

Further, it has been defined as follows in Words & Phrases of Excise, Customs & Service Tax (4th Edition) as follows:

"It is a conjunction used to join two phrases or clauses or sentences to show the continuity in the meaning."

Therefore, it is submitted that both conditions have to be fulfilled to consider the service under Rule 4 of the Place of Provision of Service Rules, 2012. In this case, the API does not come in temporary possession of the Company. Therefore, one condition is not fulfilled. Hence, the services cannot be classified under Rule 4 of the said rules.Therefore, the place of provision of service cannot be in India.

10) The reliance in the case of M/s. Steps Therapeutics Ltd., Hyderabad (Ruling No. AAR/44/ST-1/27/2016 dated 12/07/2016 is misplaced:

The DGGI in para 12 of the Show Cause Notice has relied in the case of M/s. Steps Therapeutics Ltd (supra)., Hyderabad Advance Ruling. In this case the applicant proposes to conduct clinical trial of drug provided by the customer located outside India. It has been held in this case that the services proposed to be provided in respect of goods received from service receiver will be covered under Rule 4 of the Place of Provision of Service Rules, 2012.

It is submitted that the facts of this case are not the same in instant case. In this case, the Company is engaged in development of formulation and optimizing them to transfer the technology to the client to manufacture them. The Company does not merely test the drugs provided to them. Therefore, it is submitted that this case will not apply to instant case. Hence the reliance of DGGI is misplaced.

11) The case of M/s. Sai Life Sciences Ltd. reported in 2019 (9) TMI 572 – CESTAT Mumbai is not applicable to instant facts of the case:

(a) In this case the Hon. Mumbai CESTAT has held that DMPK studies in respect of formulation provided by overseas client is covered under Rule 4 of the Place of Provision of Service Rules, 2012. Therefore, the place of provision of service is in India and hence the said services cannot be considered as 'export of service'. It is evident from para 5.2 and para 5.7 of the judgment that the appellants undertook research study to understand the effect of drug composition in the body over the course of time. These Compounds/New Chemical Entity (NCE) were provided to the appellants for Drug Metabolism and Pharmacokinetics (DMPK) study by the overseas client. The research involved the following four stages:

- Dosing formulation development
- Animal studies
- Bioanalytical method developments and bioanalysis
- Pharmacokinetic analysis and reporting

The Tribunal in para 5.7 has reproduced the various extract of the Order passed by the Commissioner. The Commissioner has stated that the appellants undertook DMPK services in two ways i.e. in-vitro and in-vivo. The in-vitro studies involve uses of enzyme, proteins, plasma, etc. in solution whereas the in-vivo study involves the use of the smaller animals like mice and cats.

In both the above cases, the role involved understanding the solubility and distribution, materials to conduct the study. The appellants provided the stand alone DMPK services in which the compounds were supplied by the clients to carryout the study. The demand has been raised for providing the stand-alone services only.

Hence, it is evident that in this case the appellants did not manufacture the compounds to undertake any research. The compounds were provided by the overseas client. They only undertook the research for the clients. However, in instant case, the Company manufactures the formulation. Hence, the provision of the service of the Company is not the same as the provision of the service of the appellants. Therefore, the above case is not applicable to the case of the Company.

(b) The Tribunal in para 5.10 has held that the in the case of Principal Commissioner of Central Excise, Pune-I versus Advinus Therapeutics Ltd. reported in 2017 (51) S.T.R. 298 (Tri. - Mumbai), the decision has been based on the principle that taxes should not be exported. However, the taxes are determined as per the taxing statue and the scope cannot be expanded. Hence, the services of the appellants fall within the scheme of Rule 4 of the Place of Provision of Service Rules, 2012. Therefore, the same cannot be considered as 'export of service'.

It is submitted that the Tribunal in this case has not interpreted Rule 4(a) of the Place of Provision of Service Rules, 2012 in any manner. The Tribunal has merely stated that the case of M/s. Advinus Therapeutics Ltd cannot be followed by them as these cases have provided judgments based on the principle that the taxes should not be exported.

It is submitted that this observation in no way states that the Rule 4(a) of the Place of Provision of Service Rules, 2012 is applicable to all testing services. The Tribunal has provided their observation which is limited to the facts of case. This observation does not distinguish the case of M/s. Advinus Therapeutics Ltd.

12) The services are classifiable under Rule 3 of Place of Provision of Service Rules, 2012:

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 **location of the recipient of service**:*
>
> *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 will be evident from the Place of Provision of Service Rules, 2012 that if the services are not classified under any of the rules that is Rule 4 to Rule 12, the place of supply will be determined by Rule 3 of the Place of Provision of Service Rules, 2012. The DGGI has in para 2 of the Show Cause Notice alleged that the Company is providing technical testing and analysis services. The client send or make available their own goods for provision of service. It will be evident from the above submissions as per letter dated 12/12/2017 that the services of the Company cannot be classified under the category of 'Technical Testing and Analysis Services'. The services are basically research and development of formulation.

The period involved in the current Show Cause Notice is for the period April, 2014 to June-2017. The definition of various services as given in Section 65 and various sub-sections are not relevant for the purpose of levy of tax under any category. However, the Company had classified the services under the category of 'scientific and technical consultancy services' as defined in Section 65(105)(za) of the Finance Act, 1994. The same is also indicated in the invoice.

The Show Cause Notice has without assigning any reason and without analysis of the nature of services performed by the Company as in para 2 made a statement that the services are classified under 'Technical Testing and Analysis services'. It is already explained in the above para that these services are not classifiable under the said category.

The Rule 4 to Rule 12 of the Place of Provision of Service Rules, 2012 does not provide for determination of the place of supply of provision of service when the services are in the nature of scientific or technical consultancy services (R & D services). Therefore, it is submitted that the place of supply will be determined by Rule 3 and not by Rule 4 as alleged in the showcause notice.

13) The conditions specified under Rule 6A of the Service Tax Rules, 1994 has been fulfilled and hence services are export of service:

The showcause notice in para 11 has stated that the company has not fulfilled the conditions specified in sub-clause (d) of Rule 6A of the said rules. The Rule 6A has been reproduced in point 9 of the statement of facts. It will be evident from above that clause (d) prescribes that the place of provision of the service should be outside India. It is evident from submissions made above that the rule 4(a) of the POPS Rules is not applicable to the service of the company. In instant case, the place of provision must be determined as rule 3 of the said rules. As per this rule the place of provision of service is location of service recipient. It is not in dispute that the service recipients of the company are located outside India. Therefore, it is submitted that the place of provision of service is outside India. The company has fulfilled the condition stated in clause (d) of Rule 6A of said rules. Hence, the provision of service of the company should be considered as export of service. In view of above, it is submitted that the company is not liable to pay tax on services provided by them. They have correctly disclosed the service as export of service in ST-3 return.

14) Without prejudice to 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. They carry out Research, Development and Analysis for them and provide test report for transfer of technology to them. 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 versusUNION 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.

It has been stated in para 6.4 of the showcause notice that present case pertains to applicability of chapter V of Finance Act, 1994 for levy of tax on services provided in SEZ. The chapter V is applicable to whole of India except the state of Jammu and Kashmir. Therefore, there is no inconsistency between section 51 of SEZ Act and provisions of Finance Act. It is submitted that the DGGI has presupposed that the matter pertains to chapter V of Finance Act. They have ignored the definition of export under SEZ Act and that services of the company are considered as export under this definition. Therefore, there is inconsistency between provisions of Finance Act and SEZ Act. Hence, section 51 is invokable in instant case. The allegation of DGGI is not sustainable in instant case.

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

In instant case, the DGGI 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. 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."

The company also relies on the judgment of COMMISSIONER OF C. EX., BANGALOREVersusBIOCON 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.

16) Time Barring:

The extended period under the proviso of section 73(1) of Finance Act 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. The said judgments are reproduced below:

i. **Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay 1995 (75) ELT 721 (SC).** The court held that 'intent to evade duty must be proved for invoking proviso to section 11A(1) of the Central Excise Act, 1944' which deals with the provisions for extended period of limitation. In this case, it was held that mis-statement or suppression of fact in the SSI declaration cannot be called wilful, unless it is proved that it was done willfully with an intent to evade duty, for the purpose of invoking the extended period of limitation.

The Supreme Court has observed in the above case that –
-intent to evade duty is built in to the expressions 'fraud' and 'collusion'
-'mis-statement' and 'suppression' have been qualified by immediately preceding words 'wilful'
-'contravention of any of the provisions of this Act or rules' has been qualified by the immediately following words 'with intent to evade payment of duty'.
Thus, to invoke the proviso to the section and the extended period of limitation it should be proved that the assessee made a misstatement or suppression which is 'wilful' or has acted with 'intent to evade payment of duty'.

ii. **In CCE Vs. Chemphar Drug and Liniments 1989(40) ELT 276 (SC),** the court held that something positive, rather than mere inaction or failure on the part of manufacturer, has to be proved before invoking the extended period of limitation as per proviso under section 11A(1). Also it has been held that where department has full knowledge about the facts and the manufacturer's action or inaction was based on the belief that they were required or not required to carry out such action or inaction, the extended period cannot be made applicable.

iii. **In Pushpam Pharmaceuticals company VS. CCE Bombay 1995 (78) ELT 401 (SC)** is important in construing the meaning of the words 'suppression of facts' as used in the proviso to section 11A(1) of the Act. The gist of the judgment is as follows:-
- the expression 'suppression of facts' has been used in the company of strong words such as fraud, collusion or wilful default. In fact, it is the mildest expression used in the proviso. Yet in the surroundings in which it has been used, it has to be construed strictly. It does not mean any omission. The act must be deliberate. It taxation, it can have only one meaning and that is 'that the correct information was not disclosed deliberately to escape from payment of duty'.
- the assessee cannot be held guilty on the mere 'suppression of facts' when the law itself is not clear or there are conflicting judgments or when the position is not settled in law, unless it can be proved that the intention of the assessee was to evade payment of duty.

iv. **Tamil Nadu Housing Board 1994 (74) ELT 9 (SC)**
When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more. stringent by use of the word `intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.

In terms of the provision, the extended period of five years can only be invoked where there is suppression of facts. It is submitted that it is a settled position that suppression occurs when facts which an assessee knew he had to disclose were consciously not disclosed to evade the payment of tax.

v. **Continental Foundation Jt. Venture, 2007 (216) ELT 177 (SC)**
The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

vi. In this regard, it is submitted that the proviso to Section 73 of the Finance Act is in parimateria to Section 11A of the Central Excise Act, 1944. Reference in this regard, is made to the decision of the Hon'ble Tribunal in **Mahakoshal Beverages Pvt. Ltd. v. Commissioner of Central Excise, Belgaum[2007 (6) STR 148]**, wherein it has inter alia been held that:

"The proviso to Section 73 of the Act was promulgated by Finance Act 2004 but adding proviso to Section 73 of the Central Excise Act, which is parimateria to Section 11A of Central Excise Act."

vii. Reference in this regard is made to the decision of the Hon'ble Supreme Court in **Pahwa Chemicals Private Limited vs. Commissioner of C. Ex., Delhi [2005 (189) E.L.T. 257 (S.C.)]**, wherein it has been inter alia held that
"It is settled law that mere failure to declare does not amount to willful mis-declaration or willful suppression. There must be some positive act on the part of the party to establish either willful mis-declaration or willful suppression.

viii. We also refer to the judgment of the Hon'ble Supreme Court, in **AnandNishiKawa Co. Ltd. vs. Commissioner of Central Excise Appeal, Meerut [2005 (188) E.L.T. 149 (SC)]** wherein it was held that 'Suppression of facts' can have only one meaning that correct information was not deliberately disclosed to evade payment of duty, when facts were known to both the parties, omission by one to do what he might have done not that he must have done would not render it suppression. Mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression."

It has been consistently held in the above judgments that the extended period of limitation as provided under section 11A can be invoked only when the service provider has mala fide intention for non-payment of service tax. In the instance case, the company does not have any mala fide intention which will be evidentfrom the following:

(a) It is admitted position in the showcause notice that the company has disclosed the value of service in the ST-3 return. It has been admitted in para 5.2 of the notice that the company had disclosed the export of service in return. It is submitted that the suppression of facts cannot be alleged for information disclosed in the ST-3 return. The ST-3 return for the period April-2016 to September-2016 was attached as **annexure-35** to substantiate this fact. The extended period has been invoked on allegation that the company had not disclosed the place of provision of service in the return. It is submitted that the return does not provide for disclosure of these facts. The suppression cannot be alleged on such allegation. The company relies on following judgement:
    (i) COMMISSIONER OF CENTRAL EXCISE, KOLKATA-VI Versus ITC LTD. 2013 (291) E.L.T. 377 (Tri. - Kolkata)
    (ii) MEDICAPS LTD.COMMISSIONER OF CENTRAL EXCISE, INDOREVersus2011 (24) S.T.R. 572 (Tri. - Del.)
    (iii) SPECIALITY COATINGS & LAMINATIONS LTD. Versus COMMR. OF C. EX., GURGAON 2007 (209) E.L.T. 477 (Tri. - Del.)
    (iv) M/s SUZICA COLOR LABORATORYVsCOMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX 2020-TIOL-1176-CESTAT-KOL.

(b) The Company has disclosed the amount on which the tax is demanded as export of service in the ST-3 return. The Company has filed the return on 22nd October 2016. There is no dispute about declaring the services as export during this period. The department or DGGI has not made any inquiry on nature of service prior to the Show Cause Notice for wrong declaration in

the return. In view of this, it is submitted that there was a bonafide belief that the services are 'export of service'

(c) The company had explained the nature of service at the hearing held on 1/12/2017. They also submitted letter dated 1/12/2017 to explain the nature of service and stages of development process in this letter. The company had also submitted agreements vide letter dated 3/3/2016; 3/3/2018 and 1/5/2018.

(d) The services were provided in the SEZ unit. The services of the company were considered as export as per the SEZ Act. They were granted Letter of Permission to operate inside SEZ for provision of these services. The copy of the LOP was attached as **annexure-36.**Therefore, the company was under bonafide belief that the services provided by them is export of service.

In view of above, it is submitted that the extended period cannot be invoked in this case. The showcause notice was issued on 17/10/2019. The normal period of demand is 30 months from the date of filing of return. Hence, the demand for the period April 2014 to March, 2017 is barred by limitation.

17) 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 2014 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"*

It is evident that the person cannot be subjected to penalty greater than that which might have been inflicted under the law in force at the time of commission of offence. The said principle has been applied by Hon. Supreme Court in the case of Md. Abdul SufanLaskar&Ors. Vs State of Assam reported in 2008-(009)-SCC-0333-SC wherein it was observed that certain offence may be commuted at the time when it was committed but due to amendment in law, provisions' relating to commutation of the offence was omitted. However, the court held that at the time of committing the offence provision of commutation existed. Therefore, the offence can be commuted. Applying the ratio of the said judgment, it is submitted that the Central Excise Officer still has the power to waive penalty under section 80 as it existed during the period of demand. The mere fact that section 80 has been omitted w.e.f. 14-5-2015 does not mean that power to remit penalty has been completely withdrawn. Otherwise, it will mean that the penalty levied is higher than the penalty leviable on the person at the time when the offence is committed which will be contrary to the provisions of article 20(1) of the Constitution of India.

In instant case, it was plead that the company had reasonable cause for to consider service as export. They had disclosed the credit in the ST-3 return also. Hence the penalty should be waived off.

(b) Section 78:

The showcause notice has stated that the penalty should be imposed under section 78 and/or section 76 of the Finance Act. The penalty under section 78 is levied where the demand for service tax arises on account of fraud, collusion, willful 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 wordings used in section 78 are identical to the wording used in first proviso to section 11A of Central Excise Act. 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 section 78. The company relies 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 the company had bonafide belief that they have fulfilled all the conditions stated in Rule 6A of the Service Tax Rules, 1994. Hence, the service provided by them will be considered as export of service. Therefore, no penalty under section 78 shall be levied.

(c) <u>Penalty cannot be imposed under section 78 and 76 simultaneously:</u>

The showcause notice has stated that the penalty under section 78 and/or section 76 should be levied. The section 78 was amended on 10th May 2008 wherein it is specifically provided that in case the penalty is levied under section 78, the provisions of section 76 will not apply. The same is reproduced below:

"Provided further that if the penalty is payable under this section, the provision of section 76 shall not apply"

In view of this, it is submitted that the penalty either can be sustained under section 76 or section 78 but cannot be levied under both the sections.

(d) <u>Section 77(1)(b):</u>

The section 77(1)(b) provides for imposition of penalty for failing to maintain books of accounts and other documents. The said section is reproduced below:

"Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, —
(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to ten thousand rupees;"

It is submitted that there is no allegation on any kind of documents that was not maintained by the company. There is no allegation for non-maintenance of records. Hence, penalty cannot be imposed under this section on the company.

(e) <u>Interpretation of statute:</u>

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 relies 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

23. <u>PERSONAL HEARING:</u>

Personal hearing in the matter was held on 29.06.2021, 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:

24. 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.

25. From the records of the case and the defence reply, I find that the assessee is engaged in the following activities.

(a) They are engaged in provision of development and technology transfer of solid oral formulations.
(b) They evaluate and study the API, reference drug, excipient to develop formulations of various strengths and composition.
(c) These formulations are evaluated to analysis its properties, stability, feasibility, shelf life etc.
(d) Based on above research and analysis the formulation and the manner to manufacture it is optimized by the assessee.
(e) Further test and analysis are carried out for scaling up batches, microbiol study, pilot batch run etc.
(f) The above research and analysis are documented in a report. The primary intent to prepare the report is to transfer the technology used by the assessee to develop the formulation and manufacture the same to the client.

26. The assessee had received consideration in foreign convertible currency. The Assessee has considered this service as 'export of service' and disclosed the same in the ST-3 Returns.It has been alleged in the Show Cause Notice that the assessee had performed Technical Test and Analysis on drugs/molecules received from their clients located outside India and then they conducted prescribed tests on molecules and subsequently sent the test report to their clients.

27. The gist of the statement of Smt. Manali Butala – Chief Manager Finance of the assessee is as follows:

(a) The Assessee undertook Contract Research & Development services which were classified under 'Scientific and Technical Testing Services'. It included various activities which have been listed at point 3 of the statement. They provided Product Development Report to client. They may have to visit client's site transfer of technology for product formulation method.

(b) They maintained laboratory notebooks containing development activities of both Research & Development and analytical services.

(c) They procured the materials directly or indirectly through third party vendors. The cost of the material may or may not be reimbursed separately by the clients.

(d) The Assessee is exempt from obtaining test license/import license as they are a SEZ unit.

28. On scrutiny of the contracts of various clients of the assessee, it was concluded that the API was agreed to be provided by clients to the assessee for further development of the formulation of the product by way of Testing and Analysis. The department relied on the following clauses of the contract to state that API was supplied by clients:

(a) Clause 8 of Sr.No. 1 of Section 12 of the terms and conditions of the agreement dated 21/05/2015 with M/s. Key Pharmaceuticals Ltd. and M/s. Cambridgeshire.

(b) Clause 12 of Sr. No. 1 of Section 12 of the terms and conditions of the agreement dated 23/06/2015 with M/s. Tolero Pharmaceuticals ING.

(c) Clause 2.12 of Sr.No. 1 of Section 12 of the terms and conditions of the agreement dated 08/02/2016 with M/s. Helm AG, Germany.

(d) Clause 12 of Sr.No. 1 of Section 12 of the terms and conditions of the agreement dated 23/09/2015 with M/s. Theracos Holdings Ltd.

29. It has been alleged in the show cause notice that the place of provision of services of the assessee will be determined under Rule 4 of Place of Provision of Service Rules, 2012. As per this rule, the place of provision of service is the place where services are actually performed by the assessee. In instant case, the services have been performed in India. Hence, the services which were performed on the goods cannot be considered as 'export of service'. These allegations have been made based on following grounds:

(i) The API/Molecule/Active Substance temporarily came into the physical possession or control of the assessee. The testing of Active Substances cannot be done in absence of physical or control of the service provider.

(ii) The services cannot be considered to be performed outside India merely because the assessee had sent reports to clients outside India.

30. Therefore, the conditions prescribed in Rule 6A(d) of the said rules had not been fulfilled and the assessee is liable to pay tax on the services declared as 'export of service' in the ST-3 return.

31. I have gone through the defence replies submitted by the assessee, wherein, the assessee has elaborately described the activities undertaken by them. I hereby reproduce some of the vital aspects of their contention as under:

(I) **API and RLD characterization:**

The API is the active ingredient which is used to develop the formulation. Generally, the client provides a reference of the existing drug to enable the Assessee to understand the characteristics required from formulation which is to be developed by them. This drug is called "Reference Drug" (RLD). The Assessee undertakes characterization of API and RLD. They study the following characteristics of both of them:

- API evaluation:
  - flow properties,
  - particle size,
  - density profile,
  - compressibility
  - solubility studies

- RLD evaluation:
  - Appearance
  - Average weight of the tablets
  - Content Uniformity
  - Disintegration Time
  - Dissolution Profile, Multimedia and multipoint
  - Assay and Content Uniformity
  - Related Substances

32. The assessee had undertaken stress study on API to understand its nature and impact under severe conditions.

i. **API Excipient compatibility study:**

The excipient is an inactive substance that serves a physical carrier or media for drugs, molecules, API or other inactive substances. The excipient should be compatible with the API to develop formulation. Hence, the assessee selects ten to twelve excipients to conduct compatibility study. The mixture of API and excipient are tested for compatibility

ii. **Project initiation and resource allocation (Invoice No. 3319001060 dated 21/08/2015):**

The assessee had drawn a detailed plan of strategy for formulation, development and the time required for completion of the project. The invoice was raised to initiate the project and allocate the resource to the project.

iii. **Analytical Method Development (Invoice No. 3319001090 dated 27/10/2015):**
The Assessee had developed cleaning method of the machines to ensure that no API or excipient materials are left in the machinery and contaminate next product. This method was developed in accordance with Globally acceptable norms of USA.

iv. **API characterization and drug excipient capability (invoice No. 3319001091 dated 28/10/2015:**
The Assessee had characterized API-TP0903 to understand its physical properties like appearance, density, particle size and solubility through various techniques. This process was important to understand the ingredients, its potential impact and the modifications required for formulation of the product.Based on the characteristics of API, its compatibility with various excipients is also evaluated.

v. **API Characterization (Invoice No. 3319001103 dated 26/11/2015):**
The client had changed the project scope to include PSD method, development and verification for API-TP-0903. The PSD is a process to check the particle size and distribution of API. This was a part of API characterization. The client specifically asked for this detail. Since this was not part of proposal, the assessee had executed change order no. 1 dated 10-08-2015.

vi. **Prototype formulation development and one monthly stability study (invoice No. 339001132 dated 31/12/2015):**
In this step, the scientists evaluate the impact of various excipient/s and process on manufacture of different prototype batches which are tested for physical and chemical testing to predict the behavior of the product. The batch with most promising physical and chemical stability will be identified as lead prototype to be taken to the next step of development. These batches are analyzed for various parameters mentioned above in para II(1)(e) of the reply.

Based on the result, the Assessee optimized the manufacturing processes so as to ensure reproducible and predictable results during the manufacturing of the clinical batches. The optimized batch is verified for its characteristics and tested on above parameters.In instant case, the prototype manufacturing was undertaken of 500 capsules of strength 1mg, 4mg and 16mg.

vii. **Analytical method for verification (invoice No. 3319001152 dated 22/06/2016:**
The Assessee had challenged and validated the analytical method developed to formulate the formulation to ensure that they are able to provide accurate, reproducible and specific results.

viii. **Certificate of analysis for clinical batch (invoice no. 3319001161 dated 29-02-2016):** The assessee had manufactured the clinical batch of TP 0903 4 mg hard gelatin capsules and TP 0903 16 mg hard gelatin capsules and performed the analysis to check if the product meets the customer prescribed quality limits.

ix. **Prototype batch stability (invoice No. 3319001162 dated 29/02/2016):**
The Assessee had undertaken further three months stability study for prototype batch manufactured by them.

x. **Product development report submission (Invoice No. 3319001190 dated 31/03/2016):**
The Assessee had to prepare summary of outcome for all steps involved in the project development along with the results. This report was prepared for regulating agencies to understand the rational for each of the steps of the development. The Assessee had prepared the same and sent it to the client

xi. **3 M stability data for clinical batch (invoice no. 3319001229 dated 28-06-2016:**
The clinical batch manufactured above in the step vii.was put for stability study for 36 months. The result of this testing was shared with the customer.

xii. **Product initiation (invoice No. 3319001358dated 12-01-2017):**

The client has changed the project scope vide change Order No. 1 dated 16/12/2016 for manufacture and stability study of clinical batches of TP0903 capsules 4mg and 16mg.

xiii. **API Method evaluation, verification and release (Invoice no. 3319001359 dated 24-01-2017)**:
The API (TP 0903) was characterized again prior to use in clinical batch to ensure that the API used is of predefined quality standards and suitable for use in clinical batch. The client had supplied analytical results of the API which were used by assessee to ascertain the quality of the API.

xiv. **Analytical Method verification (Invoice no. 3319001368dated 06-02-2017):**

The formulation was packed in hard gelatin capsules shells. However, these capsule shells used for the clinical batches were changed by the client. Hence the analytical methods were required to be re-verified to ensure that change in capsule shell had no impact on the analytical methods.

xv. **Project initiation (change order)-Invoice no. 3319001369:**
The client had issued change Order No. 2 dated 12/01/2017 for manufacture of clinical batch to TP0903 capsule 1mg.

xvi. **Clinical batch manufacturing (Invoice No. 3319001370 dated 17/02/2017):**

This invoice was raised for clinical batch manufacturing for 16 mg and 4mg. In this process, the batch size is changed to 7000 capsules of each strength to test the formulation and process to manufacture the same on a commercial level.

xvii. **Clinical batch manufacturing (Invoice No. 3319001383dated 15/03/2017):**
The client had issued change Order No. 2 dated 12/01/2017 for manufacture of clinical batch to TP0903 capsule 1mg.

xviii. **Stability Study (Invoice No. 3319001442 dated 20/06/2017):**
The Assessee had undertaken stability study for TP0903 capsules of 16mg and 4mg strength.

xix. **Stability Study (Invoice No. 3319001445 dated 22/06/2017):**

The client had modified the project by change of Order No. 3 dated 14/03/2017.

32.1 Thus from the above it appeared that the assessee had provided development of formulation services to its client M/s Tolero.

33. The Work Order 25 of M/s. Theracos Holding Ltd. dated 23/09/2015 and agreement of M/s. Key Pharmaceuticals dated 10/09/2015 also substantiate the nature of service from which is evident that the invoices and the agreements were for development of the formulation. The Assessee had not undertaken mere testing and analysis on API on standalone basis. The assessee had undertaken characterization of API which is a part of the activity undertaken by the assessee to enable them to develop the formulation. The API is eventually consumed in the process of formulation development.

34. The extract of the agreement which provide for the scope of services is reproduced below:

(i) Extract of agreement dated 10/9/2015 with Key Pharmaceuticals

*"2.**Project Scope***

Following Considerations have been taken into account for the drug product development:

- *Scope involves **generic development of Mebeverine HCl MR capsules 200 mg considering "Colofac MR Capsules 200mg" by Abbott Healthcare UK as a reference product** for Europe (UK and Ireland) market.*
- *Extrusion/spheronization followed by Wurster coating has been considered as the preferred manufacturing process.*
- *The Capsule does strengths targeted for development is 200 mg*
- *200 mg capsule dissolution will be compared against the Innovator capsule formulation from Europe market provided by Key Pharma; a comparative dissolution results and summary will be shared with Key Pharma.*
- *Scale-up and Pilot BE batch will be manufactured for 200 mg strength."*

Further, para 2.1 to 4 of the agreement list down the break-up of nature of service which is the same as explained in para II(1).

(ii) Extract of agreement dated 23/9/2015 with M/s Theracos Holding Limited:

"1.Purpose:

THL requires a proposal for Bexagliflozin (EGT0001442) SR Tablets, 20 mg, to confirm the robustness of the existing process and product. Hereinafter major emphasis would be given on identifying the factors to prevent laminating tendency of tablets during compression. In order to achieve this Piramal would execute the project as per the steps mentioned in Figure 1.

API Name	*Bexagliflozin (EGT0001442)*
Dosage Form Type, Release, Duration	*SR Tablets*
Possible Dose Strength (s)	*20 mg and optionally at 10 mg*
Active Batches	***Screening trial** – To evaluate the impact of Poloxamer, Lactose and MCC grades* ***Formula Optimization Trials** – To optimize the polymer concentration* ***Process Optimization Trials** – To optimize process parameters (blending, milling and compression)* ***Scale Up Batch (optional)** – Confirmation of formula and process parameters at larger scale.*
Stability Study	***Scale up batch*** *25°C/60%RH-up to 12M* *40°C/75%RH-up to 6M* *30°C/75%RH -up to 12M*
Alcohol Dose Dumping Study	*Evaluate the in-vitro performance of final composition at different Ethanol concentration*
Analytical Method requirements	*Existing validated methods to be used"*

35. It is evident from above that the agreement clearly provided that the Assessee will develop the formulation,they will undertake characterization of the API and reference products, develop test batches, undertake testing of these batches and prepare report for transfer of technical and formulation to manufacture the formulation in the factory of the client. This very nature of service was also explained by Smt. Manali Butala in her statement dated 03/07/2019, wherein the Question No. 3 of the statement contained details of activities undertaken by the Assessee.

36. I agree with the contention of the assessee that clinical testing entails manufacture of a product and testing it for human consumption whereas the chemical testing on active substances is a very broad nature of service which can include host of services like stability testing, stress testing, testing for compatibility of excipient, etc. It has been alleged in the Show Cause Notice that the Assessee is a testing and analysis agency which performs prescribed test and analysis on active substances, however, the exact nature of services provided by the assessee has not been mentioned or elaborated in the Show Cause Notice to substantiate the facts.

37. From the submission of the assessee and on scrutiny of the invoices and agreements related to this case, it is evident that nature of service provided by the assessee is not Technical Testing and Analysis service but it is development of formulation. The assessee had to test the compatibility of expedient with the API. They also had to test the developed formulation to ensure that they are of the requisite chemical formula, quality, and purity. This testing is incidental to the process of development of formulation. The assessee 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**."*

38. Hence, from the above, it is apparent that since the testing of API is incidental to process of development of formulation. The services of the assessee cannot be considered as Technical Testing and Analysis.

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, 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.

(ii) 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):

46.1 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.

46.2 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.

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

47.1 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.

47.2 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."*

47.3. 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. ....."

47..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

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

48. 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.

49. 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.

50. 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."

51. 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.

52. I also find that according to Rule 14 of POPS Rules, 2012 where the provision of a service is, *prima facie*, determinable in terms of more than one Rules, it shall be determined in accordance with the Rule that occurs later among the Rules that merit equal consideration. As per Para 5.14.1 of the Education Guide, this Rule covers situations where the nature of a service, or the business activities of the service provider, may be such that two or more rules may appear *equally applicable*. It is the case of the department that the present matter is falling under Rule 4(a) of POPS Rules, hence by applying the ratio of Rule 14, the provisions of Rule 4 which come later in the rules will prevail over Rule 3 *ibid*. I am not convinced with this inference in the light of the aforesaid discussions which revealed that Rule 4 is not at all applicable in the present case, as the service is not rendered "*in respect of any specific goods*" provided by the foreign clients, besides the service is not something which cannot be carried out by the assessee without any such goods provided by the clients. Since two different Rules from the POPS Rules are not '*equally applicable*' in this case, Rule 3 which is the main rule or default rule will prevail, and accordingly the place of provision of the service shall be the location of the recipient of service. Consequently, I find that there is no violation of condition (d) of Rule 6A of Service Tax Rules, 1994 as made out in the SCN and therefore, the services rendered by the assessee to their foreign clients would qualify as '*Export of Services*' as specified in the said Rule 6A ibid.

53. 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.***

54. 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.***

55. 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.

56. Further, in the case of *Advinus Therapeutics Ltd. cited in 217 (51) STR 298 (Tri. Mum)*, Hon'ble Tribunal, as reproduced above, has examined almost of all the aspects as covered in the instant case. I find that the ratio of this decision is squarely applicable in the present case. The respondent, in this case also was a 100% EOU and rendering 'scientific or technical consultancy service', by entering into agreements with their foreign clients for generation of candidate compounds for pharmaceutical products on certain drug targets through research and drug development by using information supplied by their client. The following part of the decision settles the issue under contention in the instant Show Cause Notice.

> *"12. .....The 'negative list' regime was not intended to be either detrimental or beneficial to existing assessees except where such intent was specifically sanctioned by legislation. The respondent, prior to 1st July, 2012, was eligible for all benefits as the service rendered by them were treated as export with the recipient of the service being outside the country. The corresponding provision in Place of Provision of Services Rules, 2012 is Rule 3 which brings the service within the ambit of export of service in Rule 6A of Service Tax Rules, 1994. Revenue has not made any submission of legislative intent to deprive a provider of 'scientific or technical consultancy service' in the erstwhile regime of its status as exporter of service owing to change in the regime.*
>
> *13. In the context of a catena of judgments and decisions that exports are not taxable and, with the most palpable manifestation of export of invisibles being the receipt of convertible foreign*

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

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

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

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

.....

.....

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

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

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

17. The goods supplied to the respondent, minor though the proportion may be, are subject to alteration in the course of research. It is not asserted anywhere that these goods, in its altered

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

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

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

57. 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....."

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

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

"The 'deliverables' by the Appellants are neither supplied or owned by the service receiver nor the Appellants are providing any service in respect of the deliverables. Synthesis of a new compound using various chemicals, solvents, reagents, compounds cannot be called as service in respect of the said chemicals, solvents, compounds. Further, the Appellants are formulating the process of the manufacture of the new compounds and the process is being sent to their clients/service receiver. It is seen from the detail service agreement that the Appellants are engaged into converting compound 120 into compound 129."

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

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

> *"8. The view taken by the Central Board of Excise and Customs vide Circular No. 66/2005-S.T., is that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/99-S.T., dated 9-4-1999. The Board was examining the effect of withdrawal of Notification No. 6/99-S.T. This Notification exempted the taxable service specified in Section 65(48) of the Finance Act, 1994 provided to any person, in respect of which payment was received in India in convertible foreign exchange, from payment of service tax. The Notification, in a proviso, laid down that nothing contained in the Notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered was repatriated from or sent outside India. It was this Notification which was rescinded by Central Government by issuing Notification No. 2/2003-S.T., dated 1-3-2003. The Board was called upon to consider representations received from service sector, wherein an apprehension was raised that export of service would be affected adversely in the international market on account of withdrawal of Notification No. 6/99-S.T. The Board dispelled this apprehension by clarifying that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/99-S.T. This clarification is certainly binding on the Revenue. Consequently, it has to be held that the reinstatement of the above exemption through Notification No. 21/2003-S.T., dated 20-11-2003 cannot detract from the correct legal position clarified by the Board. For this reason, we hold that there can be no demand of service tax on the appellant on the ground that exemption Notification No. 6/99-S.T. was withdrawn in March, 2003 and identical exemption was reintroduced in November, 2003. As a matter of fact, none of the notifications referred to 'export of services'. Again, as a matter of fact, the Central Board of Excise & Customs held 'export of services' to be tax-free notwithstanding the notifications. The law which categorically exempted export of services from payment of service tax was brought into force for the first time through the Export of Services Rules, 2005. Undoubtedly, the period of demand, in the present case, is prior to 2005.*
>
> *9. The view taken hereinbefore is supported by the judgment of the Hon'ble Supreme Court in All India Federation of Tax Practitioners' case (supra), wherein it was held that service tax was a destination-based consumption tax in the sense that it was on commercial activities and was not a charge on the business but on the consumer. The emphasis is on consumption of service. In the instant case, the services rendered by the appellant were consumed abroad where the appellant's clients used the service of inspection/test/analysis to decide whether the goods intended to be imported by them from India conformed to the requisite specifications and standards. In other words, the benefit of the service accrued to the foreign clients outside the Indian territory. By no stretch of imagination can it be said that there was no export of service. The services, in question, were exported. Export of service has ever been tax-free as observed by the CBEC. This exemption has never been affected by Notification No. 6/99-S.T. or its rescission. Ultimately, therefore, we hold that no service tax was leviable from the appellant."*

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

59. 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.

60. 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;"

60.1 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 considers 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.)].

60.2 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."

61. 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.

62. 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."

63. 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.

64. 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).

65. 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.DGGI/AZU/Gr.'E'/36-94/2019-20 dated 17/10/2019 issued by the Addl. Director General, DGCEI(Now DGGI),Ahmedabad Zonal Unit, Ahmedabad.

(AMARJEET SINGH)
COMMISSIONER
CGST & CEX,
AHMEDABAD NORTH

F No.STC/15-63/OA/2019 Date: .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:

(1) The Chief Commissioner, CGST Ahmedabad Zone, Ahmedabad
(2) The Addl Director General, DGGI, Ahmedabad Zonal Unit, Ahmedabad
(3) The Deputy/Assistant Commissioner,CGST, Division-IV, Ahmedabad
(4) The Superintendent of CGST, Range-III, Division-IV,Ahmedabad North
(5) Guard File.