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

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निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/15-58/OA/2018 DIN 20210864WT0000999CE3

आदेश की तारीख / Date of Order : 02.08.2021

जारी करने की तारीख / Date of Issue : 02.08.2021

द्वारा पारित/Passed by -

अमरजीत सिंह / AMARJEET SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–23/2021-22

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

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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. VI/1(b)CTA/Tech-32/SCN/Oxygen/2018-19 dated 22.10.2018 issued to M/s Oxygen Bio Research Pvt. Ltd., 18, Pharmaceutical Special Economic Zone, Village Matoda, Taluka Sanand, District Ahmedabad- 382213

BRIEF FACTS OF THE CASE

1. The facts of the case, in brief, are that M/s Oxygen Bio Research Pvt. Ltd., 18, Pharmaceutical Special Economic Zone, Village Matoda, Taluka Sanand, District Ahmedabad-382213 [*here-in-after referred to as 'said assessee' for the sake of brevity*] was holding Service Tax registration number AAACO8803ESD001 and engaged in providing of Business Auxiliary service, Courier agency service, and Technical Testing & Analysis Service. The said assessee has subsequently changed their name as M/s Piramal Enterprises Ltd. with revised Service Tax Registration No AAACN4538PSD017.

2. During the course of audit conducted at the premises of the said assessee, following observations were made: -

Wrong availment of benefit of export of service

3. On scrutiny of the ST-3 returns filed by the assessee for the period April, 2013 to May, 2015, it was noticed that the assessee has provided Technical Testing & Analysis Services and not paid service tax on the premise that they were export of services.

4. It was noticed that the assessee has entered into a Master Service Agreement [MSA] with various companies situated outside India for providing Technical Testing & Analysis Service. It was noticed that the service recipient located abroad was required to make available the samples to the service provider. Alternatively, it was mentioned in the work orders issued by the recipient of service that the assessee will be reimbursed the cost of the samples procured on their behalf. It appeared that the invoices submitted by the said assessee also reflect that they have billed their service recipient for reimbursement of cost of starting material i.e. samples.

5. Rule 6A(1) of the Service Tax Rules, 1994 (STR, for brevity) governing export of services reads as under: -

> *"(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-*
>
> *(a) the provider of service is located in the taxable territory,*
> *(b) the recipient of service is located outside India,*
> *(c) the service is not a service specified in the section 66D of the Act,*
> *(d) the place of provision of the service is outside India,*
> *(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and*
> *(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act."*

6. It appears that though the recipient of the service is located outside India and the provider of service is located in the taxable territory, the place of provision of the service is not outside India. The place of provision of service is within India. The samples have to be made physically available to the assessee in the taxable territory. The technical testing and analysis of the sample is then carried out in the taxable territory and therefore, the provision of service is carried out in the taxable territory. As can be seen from the provisions of Rule 6A of the said STR, 1994, a service can be considered as export of service only if all the conditions of the rule are satisfied. All the provisions from (a) to (f) of Rule 6A(1) of STR must be satisfied in order to avail the status of export of service. In the present case, condition (d) to Rule 6A of STR is not satisfied as the place of provision of the service is not outside India and is in the taxable territory. Accordingly, it appears that the assessee cannot get the benefit for not paying service tax as the services provided by them are not export of services. As the provision of service is in a taxable territory, service tax at the appropriate rate is required to be paid by the assessee under Section 66B of the Finance Act, 1994.

7. The relevant text to Section 65B(44) of the said Finance Act defining *'service'* reads as under: -

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

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

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

8. Section 66B of the Act reads as under: -

"SECTION [66B.Charge of service tax on and after Finance Act, 2012.—There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]".

9. 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"

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

11. It appears from the agreements that samples are required to be made physically available by the recipient of the service to the provider of service, in order to provide the

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

12. On scrutiny of the ST 3 returns filed for the period from April, 2013 to May, 2015 under the category of Technical, Testing & Analysis Service, the month-wise details and service tax payable are detailed as under:

MONTH	NATURE OF THE SERVICE	TAXABLE AMOUNT	S.TAX RATE	Edu. Cess H.Edu. Cess	S.TAX	Edu. Cess / H.Edu. Cess	TOTAL S.TAX
April'13	TECHNICAL TESTING & ANALYSIS SERVICE [P]	44598921	12	0.36	5351871	160556	5512427
May'13		44502388	12	0.36	5340287	160209	5500495
June'13		48834685	12	0.36	5860162	175805	6035967
July'13		47978120	12	0.36	5757374	172721	5930096
August'13		56533283	12	0.36	6783994	203520	6987514
Sept'13		59895147	12	0.36	7187418	215623	7403040
TOTAL		302342544			36281105	1088433	37369538
Oct'13	TECHNICAL TESTING & ANALYSIS SERVICE [P]	56498633	12	0.36	6779836	203395	6983231
Nov'13		57398357	12	0.36	6887803	206634	7094437
Dec'13		59073530	12	0.36	7088824	212665	7301488
Jan'14		56079363	12	0.36	6729524	201886	6931409
Feb'14		50170571	12	0.36	6020469	180614	6201083
Mar'14		52755668	12	0.36	6330680	189920	6520601
TOTAL		331976122			39837135	1195114	41032249
TOTAL - OCT-TO MAR		331976122			39837135	1195114	41032249
TOTAL 2013-14		**634318666**			**76118240**	**2283547**	**78401787**

MONTH	NATURE OF THE SERVICE	TAXABLE AMOUNT	S.TAX RATE	Edu. Cess H.Edu. Cess	S.TAX	Edu. Cess / H.Edu. Cess	TOTAL S.TAX
April'14	TECHNICAL TESTING & ANALYSIS SERVICE [P]	55646811	12	0.36	6677617	200329	6877946
May'14		52226269	14	0	7311678	0	7311678
June'14		59398741	14	0	8315824	0	8315824
July'14		55675690	14	0	7794597	0	7794597
August'14		54610816	14	0	7645514	0	7645514
Sept'14		58024409	14	0	8123417	0	8123417
TOTAL		335582736			45868647	200329	46068975
Oct'14	TECHNICAL TESTING & ANALYSIS SERVICE [P]	51601569	14	0	7224220	0	7224220
Nov'14		56383958	14	0.5	7893754	281920	8175674
Dec'14		58171094	14	0.5	8143953	290855	8434809
Jan'15		47941950	14	0.5	6711873	239710	6951583
Feb'15		43159838	14	0.5	6042377	215799	6258177
Mar'15		45300899	14	0.5	6342126	226504	6568630
TOTAL		302559308			42358303	1254789	43613092
TOTAL - OCT-TO MAR		302559308			42358303	1254789	43613092
TOTAL 2014-15		**638142044**			**88226950**	**1455117**	**89682067**

Apr'15	TECHNICAL TESTING & ANALYSIS SERVICE [P]	55706176	14	0.5	7798865	278531	8077396
May'15		50003228	14	0.5	7000452	250016	7250468
June'15 to Sep'15		0	14	0.5	0	0	0
Total		**105709404**			**14799317**	**528547**	**15327864**

13. It appears from the above table that the assessee has not paid service tax to the tune of Rs 18,34,11,718/- (Rs 7,84,01,787/- for the period from April 2013-March 2014, Rs 8,96,82,067/- for the period from April 2014 to March 2015 and Rs 1,53,27,864/- for the period from April 2015 to May 2015).

Non-payment of service tax on import of service

During the course of audit, it was noticed that the assessee has received the services namely Business Support Service from M/s. Oxygen Bioresearch & Reaction Biology Corp of the United Kingdom and Business Auxiliary Services from M/s. Piramal Enterprises, also of United Kingdom. It was seen that they had not paid the service tax on these services.

15. It appears that services received by a Unit located in a Special Economic Zone ('SEZ') are exempted from payment of duty subject to certain conditions which needs to be fulfilled, as envisaged under Not. No 40/2012-ST dated 20.6.2012, as amended by Not. No 12/2003-ST dated 1.7.2013. The relevant text of Not. No 40/2012-ST reads as under:

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) read with sub-section 3 of section 95 of Finance (No.2), Act, 2004 (23 of 2004) and sub-section 3 of section 140 of the Finance Act, 2007(22 of 2007) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 17/2011-Service Tax, dated the 1st March, 2011, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R.174(E), dated the 1st March, 2011, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the services on which service tax is leviable under section 66B of the said Act, received by a unit located in a Special Economic Zone (hereinafter referred to as SEZ) or Developer of SEZ and used for the authorized operations, from the whole of the service tax, education cess and secondary and higher education cess leviable thereon.

2. The exemption contained in this notification shall be subject to the following conditions, namely:-

(a) the exemption shall be provided by way of refund of service tax paid on the specified services received by a unit located in a SEZ or the developer of SEZ and used for the authorised operations:

Provided that where the specified services received in SEZ and used for the authorised operations are wholly consumed within the SEZ, the person liable to pay service tax has the option not to pay the service tax ab initio instead of the SEZ unit or the developer claiming exemption by way of refund in terms of this notification.

Explanation.- For the purposes of this notification, the expression "wholly consumed" refers to such specified services received by the unit of a SEZ or the developer and used for the authorised operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012(hereinafter referred as the POP Rules) is as under:-

(i) in respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ ; or

(d) for the purpose of claiming ab initio exemption, the unit of a SEZ or developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, in addition to the list specified under condition (c); the unit of a SEZ or developer who does not own or carry on any business other than the operations in SEZ, shall declare to that effect in Form A-1;

(e) the unit of a SEZ or developer claiming the exemption shall declare that the specified services on which exemption and/ or refund is claimed, have been used for the authorised operations;

(i) exemption or refund of service tax paid on the specified services other than wholly consumed services used for the authorised operations in a SEZ shall not be claimed except under this notification;

3 The following procedure should be adopted for claiming the benefit of the exemption contained in this notification, namely:-

(a) the unit of a SEZ or developer, who has paid the service tax leviable under section 66B of the said Act shall avail the exemption by filling a claim for refund of service tax paid on specified services used for the authorised operations;

(b) the unit of a SEZ or developer who is registered as an assessee under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, or the said Act or the rules made thereunder, shall file the claim for refund to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the SEZ or registered office or the head office of the SEZ unit or developer, as the case may be, in Form A-2; (g) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after verifying that,-

(i) the refund claim is complete in all respects;

(ii) the information furnished in Form A-2 and in supporting documents correctly indicate the service tax involved in the specified services used for the authorised operations in the SEZ, which is claimed as refund, and has been actually paid to the service provider,
shall refund the service tax paid on the specified services;

(h) a service provider shall provide the specified services falling under wholly consumed category, under ab initio exemption granted by this notification, to a unit of a SEZ or developer, for authorised operations, subject to the submission of list specified in condition (c) under paragraph 2 and a declaration in Form A-1"

16. The relevant text of the amended Not. No 12/2013-ST dated 1.7.2013 reads as under: -

"2. The exemption shall be provided by way of refund of service tax paid on the specified services received by the SEZ Unit or the Developer and used for the authorised operations:

Provided that where the specified services received by the SEZ Unit or the Developer are used exclusively for the authorised operations, the person liable to pay service tax has the option not to pay the service tax ab initio, subject to the conditions and procedure as stated below.

3. This exemption shall be given effect to in the following manner:

(I) The SEZ Unit or the Developer shall get an approval by the Approval Committee of the list of the services as are required for the authorised operations (referred to as the 'specified services' elsewhere in the notification) on which the SEZ Unit or Developer wish to claim exemption from service tax.

(II) The ab-initio exemption on the specified services received by the SEZ Unit or the Developer and used exclusively for the authorised operation shall be allowed subject to the following procedure and conditions, namely:-

(a) the SEZ Unit or the Developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, along with the list of specified services in terms of condition (I);

(b) on the basis of declaration made in Form A-1, an authorisation shall be issued by the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be to the SEZ Unit or the Developer, in Form A-2"

(c) the SEZ Unit or the Developer shall provide a copy of said authorisation to the provider of specified services. On the basis of the said authorisation, the service provider shall provide the specified services to the SEZ Unit or the Developer without payment of service tax"

17. It appears that the assesse has not provided any declaration in Form A-1 to the Assistant/Deputy Commissioner of the SEZ in which it is located. It has not produced any

authorization in Form A-2 from the Assistant/Deputy Commissioner of the SEZ. The assessee has to first pay the service tax leviable and then claim exemption by way of claiming a refund. It has to follow the entire procedure envisaged in the Not. No 40/2012-ST, as amended by Not. No 12/2013-ST by filing information in Form A-1 and getting an authorization in Form A-2. It appears that the assessee has not paid any service tax leviable on the services received from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises, both of United Kingdom. It, therefore, appears that they are liable to pay the service tax, as envisaged under Section 68(2) of the Act.

18. Not. No 30/2012-ST dated 20.6.2012 reads as under: -

"In exercise of the powers conferred by sub-section (2) of section 68 of the Finance Act, 1994 (32 of 1994), and in supersession of (i) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 15/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i),vide number G.S.R 213(E), dated the 17th March, 2012, and (ii) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 36/2004-Service Tax, dated the 31st December, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 849 (E), dated the 31st December, 2004, except as respects things done or omitted to be done before such supersession, the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely:-

I. The taxable services, -

(B) provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory; [other than non-assessee online recipient];

Table

Sr No	*Description of a service*	*Percentage of service tax payable by the person providing service*	*Percentage of service tax payable by any person liable for paying service Tax*
10	*in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory*	*Nil*	*100%*

19. The relevant rules of the Place of Provisions Rules, 2012 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 :

20. The above Rule of the POPR means that where the provider of a service is located outside the taxable territory, the person liable to pay service tax is the receiver of the service. The person who is legally entitled to receive a service and, therefore, obliged to make payment, is the receiver of a service.

21. In the present case, the place of provision of service is the location of the recipient of the service and therefore, they are liable to pay service tax on the services received by them from the overseas service providers on reverse charge basis. It appears that the assessee is liable to pay service tax @ 100% in respect of the taxable services received by them from persons located in the non-taxable territory.

22. The year wise details of services received by the assessee and the quantum of service tax not paid by them is as under:

F. Y.	Name of S. Provider	Taxable Amount	Service Tax payable @ 12.36 % /
2013-14	Piramal Healthcare UK Ltd	50359158	6224392
2013-14	Oxygen Healthcare –UK	11189974	1383081
2013-14	Reaction Biology Corp.	6900029	852844
	Total – A	68449161	8460316
2014-15	Piramal Healthcare UK Ltd	252438558	31201406
2014-15	Oxygen Healthcare –UK	45848549	5666881
2014-15	Reaction Biology Corp.	8096784	1000763
	Total – B	306383891	37869050
Upto May'15	Piramal Healthcare UK Ltd	3408344	421271
	Total – C	3408344	421271
	G.Total [A+B+C]	**378241396**	**46750637**

23. From the above table, it is seen that the assessee have received taxable services valued at Rs 37,82,41,396/- on which the service tax liability comes to Rs 4,67,50,637/-, covering the period from 2013-14 to May 2015.

Wrong availment of the benefit of Notfn No 40/2012-ST dated 20.6.2012 and Notfn No 12/2013-ST

24. During the course of audit, it was noticed that the assessee had wrongly availed the benefit of Notification No 40/2012-ST dated 20.6.2012 grating *ab initio exemption* on services received in SEZ. It was seen that the assessee had availed the services of renting of motor vehicle. The said Notification granting *ab initio exemption is* subject to the condition that the services are wholly consumed in SEZ and are exclusively used in SEZ. As per the explanation of the wholly consumed in SEZ given in the notification, if the place of provision of the service is SEZ, than it shall be considered as wholly consumed in SEZ. Similarly, as provided in Notification 12/2003-ST, if the services used only for furtherance of authorized operation in SEZ, then the service can be considered as exclusively used in SEZ. The service is used for picking up and dropping of passengers outside the SEZ. Since, it appeared that the place of provision of the services are outside the SEZ, the same cannot be considered as wholly consumed in SEZ or exclusively used in SEZ.

25. It appears that the assesse has not provided any declaration in Form A-1 to the Assistant/Deputy Commissioner of the SEZ in which it is located. It has not produced any authorization in Form A-2 from the Assistant/Deputy Commissioner of the SEZ. The assessee has to first pay the service tax leviable and then claim exemption by way of claiming a refund. It has to follow the entire procedure envisaged in the Not. No 40/2012-ST, as amended by Not. No 12/2013-ST by filing information in Form A-1 and getting an authorization in Form A-2. It appears that the assessee has not paid any service tax leviable on the services received from the rent-a-cab operator. It, therefore, appears that they are liable to pay the service tax, as envisaged under Section 68(2) of the Act.

26. The relevant text of Not. No 30/2012-ST dated 20.6.2012 is as under:

I. The taxable services, -

(A) (i) .....

(v) provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers to any person who is not in the similar line of business or ..... to a to a business entity"

Table

Sr No	*Description of a service*	*Percentage of service tax payable by the person providing service*	*Percentage of service tax payable by any person liable for paying service Tax*
7(b)	*in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on non-abated value to any person who is not engaged in the similar line of business*	*60%* *50% from 11.7.2014 (under Not. No 10/2014-ST)*	*40%* *50% from 11.7.2014 (under Not. No 10/2014-ST)*

27. In the present case, the place of provision of service is the location of the recipient of the service and therefore, they are liable to pay service tax on the services received by them from the rent-a-cab operator on reverse charge basis. It appears that the assessee is liable to pay service tax @ 40%/50% in respect of the taxable services received by them from the rent-a-cab operator located in the taxable territory.

28. Therefore, it appeared that the benefit of the exemption under the said notifications availed by the assessee was not proper. Therefore, as per Sr No 7(b) of the Notification No 30/2012-ST dated 20.06.2012, the service recipient is liable to pay Service Tax under the reverse charge mechanism, as indicated above.

The assessee vide their letter dated 6.10.2018 have provided the details of Rent-a cab services availed by them for the years 2013-14 & 2014-15, detailed as under: -

Sr. No.	Vendor	Clring Doc.	Text	Pstng Date	Amount in local curr.
1	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Jan-13	31.01.13	177600

2	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Jan-13	31.01.13	58608
3	313506	Rushabh Travels	Staff Bus Expenses for Jan-13	31.01.13	90000
4	313506	Rushabh Travels	Staff Bus Expenses for Jan-13	31.01.13	87500
5	313506	Rushabh Travels	Staff Bus Expenses for Jan-13	31.01.13	3510
6	313506	Rushabh Travels	Staff Bus Expenses for Jan-13	31.01.13	2850
7	313506	Rushabh Travels	Staff Bus Expenses for Jan-13	31.01.13	2025
8	313506	Rushabh Travels	Staff Bus Expenses for Jan-13	31.01.13	94281
9	313506	Rushabh Travels	Staff Bus Expenses for Feb-13	28.02.13	5550
10	313506	Rushabh Travels	Staff Bus Expenses for Feb-13	28.02.13	20410
11	313506	Rushabh Travels	Staff Bus Expenses for Feb-13	28.02.13	7500
12	313506	Rushabh Travels	Staff Bus Expenses for Feb-13	28.02.13	79200
13	313506	Rushabh Travels	Staff Bus Expenses for Feb-13	28.02.13	75000
14	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Feb-13	28.02.13	159800
15	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Feb-13	28.02.13	48600
16	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Mar-13	26.03.13	170200
17	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Mar-13	26.03.13	48691
18	313506	Rushabh Travels	Staff Bus Expenses for Mar-13	31.03.13	80500
19	313506	Rushabh Travels	Staff Bus Expenses for Mar-13	31.03.13	82800
20	313506	Rushabh Travels	Staff Bus Expenses for Mar-13	31.03.13	14060
21	313506	Rushabh Travels	Staff Bus Expenses for Mar-13	31.03.13	1750
22	313503	Shree Jay Ambey Travels	Staff Bus Expenses for April-13	29.04.13	72631
23	313503	Shree Jay Ambey Travels	Staff Bus Expenses for April-13	29.04.13	177600
24	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	86520
25	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	84000
26	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2160
	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2760

28	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2800
29	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2810
30	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2100
31	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	8400
32	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	5600
33	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2960
34	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	11200
35	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2800
36	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2800
37	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2800
38	313506	Rushabh Travels	Staff Bus Expenses for April-13	30.04.13	2800
39	313503	Shree Jay Ambey Travels	Staff Bus Expenses for May-13	31.05.13	185000
40	313503	Shree Jay Ambey Travels	Staff Bus Expenses for May-13	31.05.13	7922
41	313506	Rushabh Travels	Staff Bus Expenses for May-13	31.05.13	90100
42	313506	Rushabh Travels	Staff Bus Expenses for May-13	31.05.13	87500
43	313506	Rushabh Travels	Staff Bus Expenses for May-13	31.05.13	87500
44	313506	Rushabh Travels	Staff Bus Expenses for May-13	31.05.13	87000
45	313503	Shree Jay Ambey Travels	Staff Bus Expenses for May-13	31.05.13	45090
46	313503	Shree Jay Ambey Travels	Staff Bus Expenses for June-13	28.06.13	42278
47	313503	Shree Jay Ambey Travels	Staff Bus Expenses for June-13	29.06.13	170200
48	313506	Rushabh Travels	Staff Bus Expenses for June-13	30.06.13	82900
49	313506	Rushabh Travels	Staff Bus Expenses for June-13	30.06.13	80500
50	313506	Rushabh Travels	Staff Bus Expenses for July-13	31.07.13	90000
51	313506	Rushabh Travels	Staff Bus Expenses for July-13	31.07.13	87500
52	313506	Rushabh Travels	Staff Bus Expenses for July-13	31.07.13	114400
53	313503	Shree Jay Ambey Travels	Staff Bus Expenses for July-13	31.07.13	47588

54	313503	Shree Jay Ambey Travels	Staff Bus Expenses for July-13	31.07.13	185000
55	313506	Rushabh Travels	Staff Bus Expenses for Aug-13	31.08.13	86400
56	313506	Rushabh Travels	Staff Bus Expenses for Aug-13	31.08.13	82250
57	313506	Rushabh Travels	Staff Bus Expenses for Aug-13	31.08.13	1900
58	313506	Rushabh Travels	Staff Bus Expenses for Aug-13	31.08.13	86400
59	313506	Rushabh Travels	Staff Bus Expenses for Aug-13	31.08.13	86110
60	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Aug-13	31.08.13	169800
61	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Aug-13	31.08.13	36500
62	313506	Rushabh Travels	Staff Bus Expenses for Sept-13	30.09.13	80500
63	313506	Rushabh Travels	Staff Bus Expenses for Sept-13	30.09.13	4800
64	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Sept-13	30.09.13	255300
65	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Sept-13	30.09.13	43230
66	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Oct-13	30.10.13	288600
67	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Oct-13	30.10.13	53873
68	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	91000
69	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	150840
70	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	2928
71	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	2400
72	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	2100
73	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	1770
74	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	1608
75	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	1750
76	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	150840
77	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	150840
78	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	2100
79	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	2125

80	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	1608
81	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	1446
82	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	1750
83	313506	Rushabh Travels	Staff Bus Expenses for Oct-13	30.10.13	1134
84	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Nov-13	30.11.13	210900
85	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Nov-13	30.11.13	37021
86	313506	Rushabh Travels	Staff Bus Expenses for Nov-13	30.11.13	63000
87	313506	Rushabh Travels	Staff Bus Expenses for Nov-13	30.11.13	21020
88	313506	Rushabh Travels	Staff Bus Expenses for Nov-13	30.11.13	2100
89	313506	Rushabh Travels	Staff Bus Expenses for Nov-13	30.11.13	1862
90	313503	Shree Jay Ambey Travels	Staff Bus Charges Extra Trip 2/12 & 3/12	26.12.13	11600
91	313503	Shree Jay Ambey Travels	Bus Charges for Orsang Visist	26.12.13	64880
92	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Dec-13	31.12.13	266400
93	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Dec-13	31.12.13	45847
94	313506	Rushabh Travels	Staff Bus Expenses for Dec-13	31.12.13	84000
95	313506	Rushabh Travels	Travelling Exp. Extra from 05.12 - 06.12.13	31.12.13	13200
96	313506	Rushabh Travels	Travelling Exp. Extra from 05.12 - 06.12.13	31.12.13	13200
97	313506	Rushabh Travels	Travelling Exp. Extra from 05.12 - 06.12.13	31.12.13	9600
98	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Dec-13	31.12.13	45847
99	313503	Shree Jay Ambey Travels	Staff Bus Expenses for Dec-13	31.12.13	45550
100	313506	Rushabh Travels	Transportation Charges for Jan-14	31.01.14	93600
101	313506	Rushabh Travels	Transportation Charges for Jan-14 Tata Marco Rep	31.01.14	18000
102	313503	Shree Jay Ambey Travels	Transportation Charges for Jan-14	31.01.14	295200

103	313503	Shree Jay Ambey Travels	Transportation Charges for Jan-14 mahindr repai	31.01.14	6000
104	313503	Shree Jay Ambey Travels	Transportation Charges for Jan-14 Bolero	31.01.14	52108
105	313506	Rushabh Travels	Transportation Charges for Feb-14	28.02.14	85800
106	313506	Rushabh Travels	Transportation Charges for Feb-14 mahindr break	28.02.14	34562
107	313503	Shree Jay Ambey Travels	Staff Bus Transportation Charges Feb-14	03.03.14	270600
108	313503	Shree Jay Ambey Travels	Staff Bus Transportation Charges March-14	31.03.14	282900
109	313506	Rushabh Travels	Transportation Charges for Mar-14	31.03.14	85800
110	313506	Rushabh Travels	Transportation Charges for Mar-14 rep	31.03.14	6900
111	313506	Rushabh Travels	Transportation Charges for Mar-14 EHS Audit	31.03.14	2185
	Total Value				**7285238**
	As per Not. 30/12-ST Sr No 7(b) taxability on Service provider			**60%**	**4371143**
	As per Not. 30/12-ST Sr No 7(b) taxability on Service receiver			**40%**	**2914095**
	Total Service Tax Payable			**@ 12.36%**	**360182**

Sr. No.	Vendor	Clring Doc.	Text	Pstng Date	Amount in local curr.
1	313506	Rushabh Travels	Transportation Charges for Apr-14	30.04.14	89700
2	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Apr-14	30.04.14	282900
3	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for May-14	30.05.14	395019
4	313506	Rushabh Travels	Transportation Charges for Apr-29 to June 19-2014	23.06.14	274413
5	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for June-14	30.06.14	377200
6	313506	Rushabh Travels	Transportation Charges for 07.07 to 10.07.2014	28.07.14	38410

7	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for July-14	02.08.14	410000
8	313506	Rushabh Travels	Transportation Charges for 30.07 to 02.08.2014	07.08.14	38009
9	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Aug-14	11.09.14	378466
10	109899	Parth Travels	Transportation Charges for Employee	17.09.14	6988
11	109899	Parth Travels	Transportation Charges for Employee	17.09.14	9103
12	109899	Parth Travels	Transportation Charges for Employee	17.09.14	7528
13	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Aug-14	26.09.14	6534
14	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Sep-14	30.09.14	435100
			Total value		2749370
			As per Notfn No 30/2012-ST (Sr No 7(b)) – taxable on service provider	60%	1649622
			As per Notfn No 30/2012-ST (Sr No 7(b)) – taxable on service receiver	40%	1099748
			Total service tax payable	@ 12.36%	135929
15	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Sep-14	01.10.14	435100
16	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Sep-14	01.10.14	417500
17	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Oct-14	06.11.14	114800
18	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Oct-14	06.11.14	200400
19	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Nov-14	08.12.14	360800

20	313506	Rushabh Travels	Bus Service due to Break Down	01.01.15	28060
21	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Dec-14	02.01.15	402500
22	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Jan-15	29.01.15	354200
23	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Feb-15	05.03.15	331800
24	313506	Rushabh Travels	Bus Service due to Break Down	09.03.15	8360
25	316752	Eagle Corp. P Ltd	Staff Bus Transportation Charges for Mar-15	24.03.15	396800
	Total Value				**30,50,320**
	As per Not. 30/12-ST Sr No 7(b) taxability on Service provider			**50%**	**1525160**
	As per Not. 30/12-ST Sr No 7(b) taxability on Service receiver			**50%**	**1525160**
	Total Service Tax Payable			**@ 12.36%**	**188510**

30. From the above table, assessee had availed Services of Rent-a-Cab amounting to Rs 1,30,84,928/- for the period 2013-14 & 2014-15 on which the service tax not paid works out to Rs 6,84,621/-.

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

- Section 66B of the Act as they have failed to pay the service tax leviable on the taxable service as a service provider in case of technical testing and analysis service and as a service recipient on the services received from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises and from the rent-a-cab operator;

- Section 68 of the Act read with Rule 6 of the Rules as they have failed to pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed as a service provider in case of technical testing and analysis service and as a service recipient on the services received from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises and from the rent-a-cab operator;

- Section 70 of the Act read with Rule 7 of the Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed as a service provider in case of technical testing and analysis service and as a service recipient on the services received from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises and from the rent-a-cab operator.

32. The Government has from the very beginning placed full trust on the manufacturers/ service providers and accordingly measures like self-assessments etc., based on mutual trust and confidence are in place. Further, a manufacturer/service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder, as considerable amount of trust is placed on them and private records maintained by them, for normal business purposes are accepted, practically for all the purposes. All these operate on the basis of honesty of the said assessee; therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. From the evidences, it appears that the said assessee has willfully mis-declared the nature of the taxable services provided by them and suppressed the material facts by wrongly availing the benefit of export services and did not pay service tax as a recipient with intent to evade payment of service tax. The deliberate non-payment of duty/ tax & willful mis-declaration of service provided by them and suppression of material facts from the revenue is in utter disregard to the requirements of law and breach of trust deposed on them, and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime.

33. It also appears that the said assessee has not made payment of service tax. Moreover in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the said assessee to the department and consequently the department would come to know about such transgression only during audit or preventive/other checks.

34. Moreover, in this case there is no dispute as regards the taxability of service tax on Technical, testing & Analysis Service and services received from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises & from the rent-a-cab operator and the said assessee has not paid service tax on these services during the relevant period. However the quantum of income received on provisions of these services has been suppressed/ concealed from the department, deliberately, consciously and purposefully to evade payment of tax. In the case of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 (23) STT 275, in case of Lalit Enterprises v CST Chennai, it is held that extended period can be invoked when department comes to know of service charges received by appellant on verification of his accounts. Therefore, in this case all essential ingredients exist to invoke the extended period under proviso to Section 73 of the Finance Act, 1994 to demand the service tax not paid.

35. Further, it appears that the said assessee has rendered themselves liable to penalty in terms of the provisions of Section 78 of the Finance Act, 1994, for the above said contravention and suppression of material facts from the department with intent to evade payment of tax. Interest is also liable to be charged and recovered from them under the provisions of Section 75 of the Finance Act, 1994.

36. Whereas, in view of above, it appears that the said assessee has not paid service tax of Rs. 18,34,11,718/- for the F.Y. 2013-14 & 2014-15 under the category of Technical, Testing & Analysis Service, Rs.4,67,50,637/- for the F.Y. 2013-14, 2014-15 & 2015-16 [Upto May'15] on services received from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises and Rent-A-Cab services amounting to Rs 6,84,621/- for 2013-14 to 2014-15, totally amounting to Rs. 23,08,46,976/- and is liable for recovery under proviso to Section 73 of Finance Act, 1994 along with interest under Section 75 of Finance Act, 1994.

37. It also appears that the said assessee have rendered themselves for the penal action under the provisions of Section 78 of the Finance Act, 1994 for their acts of contravention of the provisions of the Finance Act, 1994 in as much as they have committed these acts with an intent to evade payment of service tax by reason of suppression and misstatement of the facts, as discussed supra.

38. As per Board's Instruction No 1080/09/DLA/MISC/15 dated 21.12.2015 and Instruction No 1080/11/DLA/CC Conference/2016 dated 8.7.2016, pre consultation with the adjudicating authority has been made mandatory before issuance of a show cause notice involving an amount of over Rs 50 lacs. Based on these instructions, a communication was made to the assessee fixing the date for pre-consultation discussion on 22.10.2018. Ms Manali Butala appeared on behalf of the assessee for the pre-consultation was held on 23.10.2018 and disagreed with the objections. A submission was made by her under an E-mail dated 23.10.2018. It was stated that the chemicals on which research is carried out and the resultant compounds are not the same. Also, there is no one-to-one quantitative co-relation between chemicals used and samples of compounds synthesized and generated by the Company. Since the raw material used in the research and the resultant compound supplied, if any, to the customers of the company are different, it cannot be said that the service was provided 'in respect of particular goods' as required under Rule 4 of the POPR and accordingly, the service provided by the Company in the instant case does not fall under the said Rule 4 of the POPR. Therefore, the services provided by the company are export of service. On the issue of import services received from M/s Oxygen Bio Research and M/s Piramal Health, it was stated that the services were provided for authorized operations of the company and therefore, the demand of service tax could not be made. Regarding the issue of rent-a-cab service, it was argued that the bus service for transportation of employees also qualify as service for authorized operations in SEZ as the Place of Provision of Service Rule is only to determine the place of provision of service and not for determination of consumption of service. Hence, they were entitled to the benefit of exemption. A Final Order No A/11534-11535/2018 dated 17.7.2018 passed by the CESTAT, Ahmedabad in their case was enclosed to support their claim that cenvat credit was

admissible to them on the amount of service tax paid under VCES Scheme in relation to services received from abroad under the provisions of Section 66A of the Finance Act, 1994.

39 It appears that the arguments made by the assessee for non payment of service tax are not acceptable and tenable in light of the above discussions. Further, the Tribunal has merely allowed the cenvat credit of service tax paid under VCES scheme. The ruling nowhere talks about non payment of service tax. The ruling, in fact, has allowed the cenvat credit as the service tax was paid by the assessee on the services received from abroad under Section 66A of the Act. In the present case, no service tax has been paid by the assessee on the services received from overseas providers and therefore, it appears that the judgement cannot be made applicable to the facts of the instant case.

40 Therefore, a show-cause-notice F.No. VI/1(b)CTA/Tech-32/SCN/Oxygen/2018-19 dated 22.10.2018 was issued by the Commissioner, CGST, Audit Commissionerate, Ahmedabad to the said M/s Oxygen Bio-Research Pvt Ltd, 18, Pharmaceutical Special Economic Zone, Village: Matoda, Taluka: Sanand, District: Ahmedabad 382213 (*Now known as M/s Piramal Enterprises Ltd*) were called upon to show cause before the Commissioner of Central Goods & Service Tax, Ahmedabad North, having his office situated at 1st Floor, Custom House, Nr All India Radio, Navrangpura, Ahmedabad as to why: -

i. The total Service Tax of **Rs. 23,08,46,976/-** should not be demanded and recovered from them under the category of Technical, Testing & Analysis Service, services received from services received from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises and Rent-A-Cab services, as envisaged in the proviso to Section 73 of Finance Act, 1994 by invoking extended period of five years;

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

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

DEFENCE REPLY

41. The said assessee, vide their letter dated 18.01.2019 submitted a defence reply on all the three issues involved in the show-cause-notice. As regards Technical Testing and Analysis Service, they stated that the main allegation of the department is that the service provided by the company is covered under rule 4(a) of POPS Rules 2012 as the service is in relation to the goods supplied by the customer to the company and hence, the place of provision of service will be in India; that before discussing the reasons for non-applicability of Rule 4(a), the relevant rule 4(a) and its clarification by the CBEC vide Education guide is reproduced:

> *"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 of the place of provision shall be the location where goods are situated at the time of provision of service:*
> ***Provided further** that this sub-rule shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs, reconditioning or re-engineering for re-export, subject to conditions as may be specified in this regard".*

42. 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".*

43. The reasons for non-applicability of Rule 4(a) are discussed below:

a) Services that are related to goods and service receiver is required to make such goods physically available to the service provider so that the service can be rendered, are only covered under Rule 4(a): Commissioner, in para 4 of showcase notice has observed that the customer of company is required to make available samples to them without which the service cannot be provided by them. Alternatively, the company can procure the material on behalf of client and recover the cost from customer. Hence, the service has been provided in relation to goods and therefore will fall under rule 4(a) of POPS Rules 2012. It is evident from the wordings of rule 4(a) that services must be provided in respect of goods that are required to be physically made available by the recipient of the services to the provider of service. These services can be provided only after the recipient has made the goods available to the provider of services. Without this, provider of services is not in a position to provide the services. The use of words 'required to be' in rule 4(a) makes it clear that without goods being made available by the service recipient, the services cannot be provided. The examples of services covered under rule 4(a) are repairs & maintenance, storage and warehousing, technical testing and analysis, etc. It is not possible for the service provider to provide services without receiving material from the service receiver, e.g. the service of repairs cannot be provided unless goods are received from receiver of services. From para 5.4.1 of the Service Tax Education Guide, the scope of services covered under this rule has been clarified. Services such as repair services, storage and warehousing, courier services, cargo handling, etc. have been clarified to be covered under this rule. It can be seen from the above examples that these are such services where the goods are provided by the recipient of service so that the provider of service can provide the service. Also, after the provision of service, the goods are either returned to the service recipient or to any other person on his behalf. In the present case, Service provider does not receive any material from the service receiver. Also, it can be seen from the agreement that there is no compulsion on the service recipient to provide materials to the Company. The Master Service Agreement entered with Bind Therapeutics dated 30/5/2013 was attached as Annexure-1. It will be evident that para 1.02 of the agreement provide that 'customer-supplied

material' shall mean material that has been supplied by or on behalf of Bind to company to facilitate the provision of service, including any material identified in the work order. Hence, there is provision in agreement for customer to supply material or the company to procure material on behalf of customer. The term 'work order' has been defined in para 1.07 of the agreement to mean a written plan appended as exhibit A to the agreement or purchase order describing services, laboratory results to be provided for particular project, payment terms, other conditions etc. Therefore, the work order lays down the services to be provided, material required and payment terms. In this case, there is no material identified which should be supplied by customer in the agreement. They attached Appendix 1 to Exhibit A (Work Order No. 1) along with agreement in annexure-2 on specimen basis. It will be evident that the there is no identified material in the work order. Hence, the customer has not provided any such material to the company. They further submitted that the company has not purchased any material on behalf of Bind. The Invoice 3498500991 dated 31.12.2014 raised on Bind is attached as annexure-3. It will be evident that the invoice contains a list of material which were ordered for provision of service of the customer. The purchase order for raw material DBCO-PEG4-NHS-Ester raised on Click Chemistry Tools, LLC, USA has been attached as annexure-4. It will be evident that the company has placed order to procure the material on principal to principal basis. This order has not been placed on behalf of Bind. The company has themselves made the payment for the same. The payment voucher for the invoice is attached as annexure-5. Therefore, it is submitted that the company has not procured the material on behalf of the customer. The ownership of the material is with the company. The department has alleged that the material has been procured on behalf of the customer merely on the basis that company has recovered the amount of material from the customers. It is submitted that this amount is recovered in terms of the agreement with the Bind. The condition of consideration has been stated in para 'costs' of Exhibit A of the agreement. As per this para, the company will offer services at a cost of $65000 per FTE/per annum. This para clearly provides that the consideration will include the value of staring material at actual cost. The estimated cost of starting material has also been mentioned in the agreement. Therefore, it is submitted that the cost of material forms part of the consideration for the provision of service of the company.

Hence, all the materials required by the company has be procured by them. This material has not been procured on behalf of customer of company. As submitted above, under rule 4(a) mentions the wording 'goods required' for providing services must be provided by the service recipient. Thus, it is evident that the goods are not required to be provided by the service recipient. Hence it is submitted that provisions of rule 4(a) will not be applicable in the present case for determining POPS.

b) The goods which are received from the service receiver should be the material returned to the receiver of services in the same form after completion of services: 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, Service provider does not receive any material from the service receiver. However, even if it is assumed that the material were purchased on behalf of the customer even then the goods gets consumed in the making of various compounds and thus said goods lose it's existence. For eg: the company manufactured 17 compound in ml scale through coupling reaction from 1 gram of DBCO-PEG4-NHS-Ester order by the

company. These compound along with the analysis report is sent to the customer. It will be evident that the original material gets consumed and can never be sent back 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 LTD. 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 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. ....."*

They also placed reliance on the following judgments and submitted that Rule 4(a) will not apply to instant case:

(i) COMMISSIONER OF CENTRAL EXCISE, PUNE-I Versus SAI LIFE SCIENCES LTD. 2016 (42) S.T.R. 882 (Tri. - Mumbai)
(ii) M/s Fertin Pharma Research & Development India Pvt Ltd 2018 (10) TMI 1373-CESTAT Mumbai.
(iii) M/s Fertin Pharma Research & Development India Pvt Ltd 2017 (7) TMI 1238-CESTAT Mumbai.
(iv) Midas Care Pharmaceuticals Pvt Ltd 2014-TIOL-1484-CESTAT-MUM

c) Rule 4(a) includes only such services which cannot be provided without receiving the goods from the service receiver: The use of words **'required to be'** in rule 4(a) makes it clear that without goods being made available by the service recipient, the services cannot be provided. In para 5.4.1 of the Service Tax Education Guide, it has been clarified that Rule 4(a) of the Place of Provision of Service Rules, 2012 will not cover services where the supply of goods by the receiver is not material to the rendering of service. 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. If for providing any service goods are not necessarily require to be received from the service recipient than same will not be covered under the aforesaid rule for e.g. service provider can purchase it from market and provide the service on the same. The Education Guide has clarified that such a service will not be covered under rule 4(a) as the goods provided by the service recipient are not material to rendering of the marketing service. In the present case also, the services performed by the company are not in respect of any goods provided by the recipient of service. Thus, it is submitted that service will not be covered under Rule 4(a) of the Place of Provision of Service Rules, 2012.

2) They also stated that 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."*

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

3) Without prejudice to above, they also submitted that the unit is located in SEZ; that the services provided by them are considered as export as per SEZ Act, 2005; and hence, as per section 51 the provisions of service tax cannot apply in instant case. They 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;"*

Therefore, 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 customers of the company are located outside India. They carry out research and testing for them and provide test report along with the compound 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 under this Act to set up unit in SEZ. 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."*

Accordingly, the said assessee submitted that the provision of service of company is considered as export under SEZ Act. Hence, even if 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.

4) The department has considered the value of material as reimbursement for cost of starting material. They submitted that even if the amount is considered as reimbursement it is out of preview of tax. Para 11 of the showcase notice alleged that invoices submitted by company reflect the reimbursement of cost of starting material. It is submitted that the company has already submitted above that the cost of material form part of consideration for the company. However, assuming without admitting that the amount recovery for cost of material is reimbursement for company for cost incurred by them on behalf of customer, it is submitted that the reimbursements were not leviable to tax prior to 14.05.2015. The section 67 provides that the value of service shall be gross amount charged from such service by service provider. This section 67 had explanation to it to explain meaning of various terms. The term 'consideration' was defined as follows:

> *(a) 'consideration' includes any amount that is payable for the taxable services provided or to be provided.*

Government amended the definition of consideration w.e.f. 14.05.2015 to as follows to bring reimbursable expenditure under ambit of service tax:

> *Explanation. — For the purposes of this section, —*
>
> *(a) "consideration" includes —*
>
> *(i) any amount that is payable for the taxable services provided or to be provided;*

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.'

They submitted that service tax was leviable on the reimbursable expenditure only from 14.05.2015. There was no tax prior to this date. The Hon'ble Supreme Court in the case of UNION OF INDIA versus INTERCONTINENTAL CONSULTANTS AND TECHNOCRATS PVT. LTD. as reported in 2018 (10) G.S.T.L. 401 (S.C.) has held that it is a substantive change and hence is retrospective in nature. The relevant extract of the judgment is reproduced below:

"29. In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature……."

Therefore, it is submitted that the amount of reimbursements can be considered as value of service only from 14.05.2015. Prior to this date the amount of reimbursement is out of preview of tax. Hence, tax cannot be collected on alleged amount of reimbursement till 14.05.2015. The demand is liable to be recomputed on this basis.

44. As regards services received from outside India in SEZ Unit, they stated that the services have been used for authorised operation of the company. The Company has received services from M/s. Piramal Health Care, M/s. Oxygen Health Care Research Pvt. Ltd. and M/s. Reaction Biology Corp. M/s. Piramal Health Care and M/s. Oxygen Health Care Research Pvt. Ltd. had provided the services of promotion of the business of the Company and Reaction Biology has provided testing services. The agreement with M/s. Piramal Health Care has been

attached as Annexure-6. It will be evident that it is a marketing service agreement wherein M/s. Piramal Health Care will market and sell the Company's product, liaison the Company to potential customers, assist the company in preparation of proposal and provide monthly inventory of prospective customers for marketing opportunities. The agreement has been entered to carry these activities in six countries. Hence, it is evident that M/s. Piramal Health Care is engaged in promotion of business of the Company in various countries outside India. Secondly, the company has entered into agreement with M/s. Oxygen Health Care to provide logistical, management, operational, administrative support required to focus on bio-technology services of the company. The Company will also assist in client inquiry. The copy of the agreement has been attached as Annexure-7. Therefore, it is evident that Oxygen HealthCare provides the support required by the company for smooth functioning of the business with the customers located outside India. M/s. Reaction Biology Corp provides services of testing to the Company. The various compounds manufactured by the Company are tested at their laboratory. They provide a report of the chemical composition of the compounds. Therefore, it is submitted that all the service providers had provided services in relation to the testing services of the company and promotion of the business to enable the Company to earn foreign exchange. Therefore, these services have been used for authorized operation of the Company. They referred to para 14 of the showcase notice which stated that M/s Oxygen Bioresearch, UK & M/s Reaction Biology Corp, USA, had provided to Business Support Service to company and M/s Piramal Enterprise, UK provided Business Auxiliary Service. The department has also not disputed the provision of service nor the fact that the services were for authorised operation of SEZ unit.

45. They stated that the exemption has been correctly availed in terms of the provisions of SEZ Act since such provisions have overriding effect over Finance Act, 1994. The section 26 of the Special Economic Zones Act 2005 provides for exemption from service tax under Chapter V of the Finance Act, 1994 to the taxable services provided to a Developer or Unit to carry the authorised operations in a Special Economic Zone. As per the above section, there is an exemption on the services which are provided to SEZ unit to carry on the authorised

operations in a Special Economic Zone. The exemption under the said section is subject to the conditions that are required to be specified by the Central Government. Under the provision of section 55(x) of the SEZ Act, 2005 the Central Government has been given the power to make rules for the manner in which and the terms and the conditions subject to which the exemptions, concessions, draw back or other benefits shall be granted to every Developer and entrepreneur under sub-section (2) of section 26. In pursuance of the said power the Central Government has notified the Special Economic Zone Rules, 2006 w.e.f 10.02.2006. Rule 31 of the Special Economic Zone Rules, 2006 provides for the exemption from payment of service tax on taxable services under section 65 of the Finance Act, 1994 rendered to a developer or a unit including a unit under construction by any service provider for the authorised operation of such SEZ unit or the developer. Thus, rule 31 of the SEZ rules 2006 makes specific provisions for exemption from payment of service tax on all the services rendered to a SEZ unit for its authorised operation. There is no other condition attached or required to be fulfilled for obtaining the exemption under the said rule. It is evident from above that the services have been used for authorised operation. Section 51 of the Special Economic Zone Act, 2005 provides that the provisions of this Act shall have an overriding 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 other law other than this Act. Thus, it is evident from the provisions of section 51 that the provisions contained in Special Economic Zone Act 2005 and the rules made there under have overriding effect on the provisions contained in any other act including Chapter V of the Finance Act 1994. Since all taxable services rendered to a SEZ unit has been exempted under the provisions of SEZ Act, 2005 read with SEZ Rules, 2006, the services rendered by these companies are also exempt from payment of service tax.

46. They stated that Hon'ble Tribunal has consistently held that the provisions of the SEZ Act, 2006 will override the provision of Finance Act, 1994 for the purpose of claiming exemption, and relied on the following decisions:

(i) Reliance Ports and Terminals Ltd. v/s Commr. Of. C.E. & S.T., Rajkot 2015 (40) S T R 200 (Tri. - Ahmd.)

"7. From the provisions contained in Section 26(1)(e) of the SEZ Act, read with Rule 30(10) of the SEZ Rules, 2006, it can be seen that no Service Tax is payable on the services provided by a service provider to a SEZ unit. Further, Sec. 51 of the SEZ Act also makes an over-riding provision that SEZ Act shall have effect even if there is anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any other law. It is accordingly held that Notification No. 9/2009-S.T. and amended Notification No. 15/2009-S.T. have been only issued to operationalize the exemption/immunity available to SEZ unit under Sec. 26(1)(e) of the SEZ Act, 2005"

(ii) EON KHARADI INFRASTRUCTURE PVT. LTD. - 2015 (39) S.T.R. 267 (Tri. - Mumbai).

Refund - SEZ unit - Assessee claiming benefit of exemption Notification No. 9/2009-S.T. exempting taxable services provided to developer or units of SEZ - Notification No. 15/2009-S.T. amended Notification No. 9/2009-S.T. to effect that refund only admissible to services not wholly consumed within SEZ - *HELD :* Impugned condition cannot nullify overriding provisions of Section 51 of Special Economic Zones Act, 2005 - If service provider pays Service Tax on service provided and wholly consumed within SEZ unit, recipient bound to get refund unless assessment at end of service provider re-opened and refund given to service providers.

(iii) **INTAS PHARMA LTD. - 2013 (32) S.T.R. 543 (Tri. - Ahmd.)**

Refund claim - SEZ Unit - Recipient of Architect service, Interior Decorator service and Consulting Engineer service to SEZ - Adjudicating authority and Commissioner (Appeals) order rejecting claim, holding Notification No. 15/2009-S.T. inapplicable as services wholly consumed in SEZ - HELD : Under Sections 7 and 26 of Special Economic Zone Act, 2005 taxable service provided to developer or unit to carry authorized operation in SEZ exempted from Service Tax - In view of legislated exemption and provision of 2005 Act provided overriding effect vide Section 51 and absence of provision in Act eclipsing overarching trajectory of 2005 Act, immunity legislatively enjoined - Neither Notification No. 9/2009-S.T. nor Notification No. 15/2009-S.T. disentitle immunity enjoined by SEZ Act - Impugned notification merely contours process by which exemption/immunity benefit operationalised - Substituted provision of clause 'c' of Notification No. 15/2009-S.T. not to be inferred as imposing disability on recipient of service -

(iv) The Hon'ble Gujarat High Court in the case of ESSAR STEEL LIMITED Versus UNION OF INDIA. 2010 (249) E.L.T. 3 (Guj.) has with respect to the non-obstante clause under section 51 of the SEZ Act 2005 has observed as follows: -

"41.3.3 Section 51 of the SEZ Act, 2005 providing that the Act would have overriding effect does not justify adoption of a different definition in the Act for the purposes of another statute. A non-obstante clause only enables the provisions of the Act containing it to prevail over the provisions of another enactment in case of any conflict in the operation of the Act containing the non-obstante clause. In other words, if the provision/s of both the enactments applies in a given case and there is a conflict, the provisions of the Act containing the non-obstante clause would ordinarily prevail. In the present case, the movement of goods from the Domestic Tariff Area into the Special Economic Zone is treated as an export under the SEZ Act, 2005, which does not contain any provision for levy of export duty on the same. On the other hand, export duty is

levied under the Customs Act, 1962 on export of goods from India to a place outside India and the said Act does not contemplate levy of duty on movement of goods from the Domestic Tariff Area to the Special Economic Zone. Therefore, there is no conflict in applying the respective definitions of export in the two enactments for the purposes of both the Acts and therefore, the non-obstante clause cannot be applied or invoked at all."

The above judgement has been maintained by the Supreme Court as reported in *2010 (255) E.L.T. A115 (S.C.).*

(v) The company also relies on the judgment of ADANI POWER LIMITED Versus UNION OF INDIA 2015 (330) E.L.T. 883 (Guj.) as approved by Hon'ble High Court as reported in 2016 (331) E.L.T. A129 (S.C.).

47. They also stated that various Circulars issued in the context of Central Excise viz. Circular No. 29/2006-Cus., dated 27-12-2006 as amended by Circular No. 6/2010-Cus., dated 19-3-2010) in the context of Central Excise provisions have stated that the provisions of SEZ have overriding effect. The said circular clearly states that in order give effect to the SEZ provisions, the clearance of goods from DTA are allowed to be removed without payment and have to be treated as export goods under central excise. Thus, it is evident that the provisions of SEZ Act will prevail over the provisions of service tax and therefore the exemption is eligible for services provided by these companies under the Act.

48. Reference to service tax notifications is not made in the SEZ Rules and thus exemption is not subject to the said notifications. The SEZ Act or the rules do not prescribe that exemption under service tax is subject to notifications issued under service tax. The Rule 30(1) of SEZ Rules, 2006 grants a similar benefit of duty exemption to procurement of goods from DTA by a SEZ unit or developer. The said rule reads as follows:

RULE 30. Procedure for procurements from the Domestic Tariff Area. — (1) The Domestic Tariff Area supplier supplying goods to a Unit or Developer shall clear the goods, as in the case of exports, either under bond or as duty paid goods under claim of rebate on the cover of ARE-I referred to in [notification number 42/2001-Central Excise (NT)] dated the 26th June, 2001 in quintuplicate bearing running serial number beginning from the first day of the financial year.

49. It is evident from the said rule, that the SEZ act and SEZ rules itself have provided for the conditions and manner for availing the credit by reference to the relevant notification in the central excise act. CBEC vide circular no 1001/8/2015-CX.8, dated 28-4-

2015 has also clarified that provisions mentioned in SEZ Act and Rule will prevail over the provisions in other acts. However, Rule 31 of the SEZ rules or the SEZ Act contain no reference to the service tax notifications for grant of exemption to the services to SEZ. Hence, it is submitted that the exemption available under SEZ Act is not subject to exemption notification issued under Service tax provisions.

50. The said assessee also claimed that the demand is not sustainable, even if it assumed (without admitting) that the company was required to be follow the procedure under the service tax notifications, as not obtaining form A-2 on time is merely procedural lapse. The dispute is for the period April, 2013 to May, 2015. The department in para 17 of the showcase notice has stated that company has not produced any declaration in form A-1 or authorisation in form A-2 for services provided by these companies to company. Therefore, the company is liable to pay tax. It is submitted that the declaration in form A-1 was required in notification 40/2012. However, for disputed period notification 12/2013-ST was applicable. The notification 12/2013 provides exemption on basis of form A-2. Hence, it is submitted that the entire dispute is only on not availability of form A-2 under notification 12/2013. It is submitted that this allegation is incorrect. The company had obtained form A-2 under this notification for these companies. The copy for same is attached herewith as annexure-8. The form A-2 were obtained in May and June 2016 for Oxygen Healthcare and Piramal Healthcare & Reaction Biology respectively. It is submitted that the company had obtained Form A-2 for all the service providers in 2013-2014. The copy of the same is attached as annexure-9. However, they did not add the name of above-mentioned companies because the tax was payable under reverse charge by the company. Hence, the legal team of company did not add their name in the form A-2. However, company was merged with M/s Piramal Enterprises Limited via High Court order dated December 2014. They decided to add the name of the company in form A-2 and hence the form was obtained in 2016. They also stated that the notification 12/2013 provides exemption to services provided to SEZ unit. The point 3 provides the manner in which the exemption should be given effect. The point 3 (II) of the notification provides conditions and procedure to grant ab-initio exemption. The said para is reproduced below:

"(II) The ab initio exemption on the specified services received by the SEZ Unit or the Developer and used exclusively for the authorised operation shall be allowed subject to the following procedure and conditions, namely:-

(a) the SEZ Unit or the Developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, along with the list of specified services in terms of condition (I);

(b) on the basis of declaration made in Form A-1, an authorisation shall be issued by the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be to the SEZ Unit or the Developer, in Form A-2;

(c) the SEZ Unit or the Developer shall provide a copy of said authorisation to the provider of specified services. On the basis of the said authorisation, the service provider shall provide the specified services to the SEZ Unit or the Developer without payment of service tax;

(d) the SEZ Unit or the Developer shall furnish to the jurisdictional Superintendent of Central Excise a quarterly statement, in Form A-3, furnishing the details of specified services received by it without payment of service tax;

(e) the SEZ Unit or the Developer shall furnish an undertaking, in Form A-1, that in case the specified services on which exemption has been claimed are not exclusively used for authorised operation or were found not to have been used exclusively for authorised operation, it shall pay to the government an amount that is claimed by way of exemption from service tax and cesses along with interest as applicable on delayed payment of service tax under the provisions of the said Act read with the rules made thereunder."

51. It will be evident from above, that the entire paragraph only provides one condition in point (c), which is that the exemption will be available to service provider based on the authorisation given by SEZ unit. Apart from this the entire para provides the procedure to obtain the exemption i.e. to submit form A-1 and obtain form A-2. Hence, the process to obtain A-2 for service covered under reverse charge is a procedural condition. Therefore, it is submitted that not obtaining form A-2 on time for the services covered under reverse charge was a procedural lapse for the company. The exemption cannot be denied for delay in fulfilment of procedural condition. It is submitted that substantive benefit should not be denied to the company on such procedural lapse. The substantive condition for the grant of exemption under the SEZ provisions is the use of the services by the SEZ unit for the authorized operations of the SEZ and obtaining the list of approved services. All the other conditions like, obtaining of Form A2 are required to be considered as procedural conditions for the grant of exemption to the company, in order to comply with the said exemption. The company submits that it is a settled law that the benefit of substantive conditions cannot be denied on the ground of violation of procedural conditions. It is submitted that the interpretation of the exemption notification is required to be done in accordance with the law laid down by Hon'ble Supreme

Court in the case of MANGALORE CHEMICALS & FERTILIZERS LTD. 1991 (55) E.L.T. 437 (S.C.). In this judgment it was held that it is erroneous to attach equal importance to non-observance of substantive and procedural conditions. The substantive conditions are mandatory in nature and are required to be fulfilled. Non-observance of substantive conditions can lead to denial in exemption conditions. However, the same is not true for non-observance of procedural conditions. Thus, delay in obtaining of Form A2 is only a procedural lapse and therefore the substantive benefit should not be denied to the company.

52. Without prejudice to any other submissions, company submits that the objective of any notification under service tax will be to grant exemption from levy of service tax to services consumed in relation to authorised operation of SEZ developers/units and thus grant of exemption from service tax will promote objective of scheme. It is an undisputed fact that the services are rendered to unit SEZ for authorised operation. The basic objective behind the service tax notifications is that the developer or unit holder in SEZ is able to obtain the service without payment of service tax. The said objective is achieved when the service tax exemption is given to the service provider of the SEZ developer. The Gujarat High Court in the case of Essar Steel Ltd., 2010 (249) ELT 3 (Guj) has observed as follows:

> *"41.2.4 The Statement of Objects and Reasons of the SEZ Act, 2005 indicates that the policy for setting up of Special Economic Zones had been adopted by the Government of India with a view to provide an internationally competitive environment for export. The objectives of the Special Economic Zones include making available (to the Unit) goods and services free of taxes and duties for export production, supported by integrated infrastructure.*
>
> *41.2.5 In line with the aforesaid objective of providing goods and services free of taxes and duties to the Unit in the Special Economic Zone or to a Developer for the purpose of establishing an integrated infrastructure for export production, provisions have been made in the SEZ Act, 2005 granting exemption from taxes and duties, which would otherwise have been leviable in the absence of any provision for exemption from such duties."*

53 Further in case of SHYAMARAJU & CO. (INDIA) PVT. LTD. *Versus* UNION OF INDIA 2010 (256) E.L.T. 193 (Kar.) it has been observed that intention of government was to made available goods and services available duty free to SEZ developer/unit. The relevant extract is reproduced below:

> *".....Such provision exempts goods brought in by the SEZ unit from all levies and duties and since the duty is leviable on the goods, it is not rational to contend that the export*

leviable on the goods, it is not rational to contend that the export from the DTA to the SEZ should be taxed while the inward movement of the goods from the DTA to the SEZ would be exempt. It is thus clear from the Statement of objects to the SEZ Act that the intention of the Legislature was to make available goods and services to the developer or unit, within the SEZ free of taxes and duties. Hence, the levy of export duty is neither expressly nor impliedly contemplated under the Act……."

54. Notification should be interpreted so as to advance the object and purpose of such exemption and not to defeat the same. The SEZ exemption notifications have to be interpreted in the light of the intention and object of issue of such exemption. The interpretation which defeats the object of the introduction of particular provisions cannot be adopted. Thus, it is submitted that the interpretation of the service tax notifications has to be in line with the intention of the government to exempt services provided to SEZ unit and therefore the exemption has been rightly availed by company. It is further submitted that the exemption notification has to be interpreted in the light of the object and the purpose for which it has been enacted and therefore the benefit of exemption has been rightly availed by the company. The company submits that while interpreting the exemption notification due regard has to be given to the object and the purpose for providing such exemption notification. They relied on the following case laws for the said contention.

a. The Hon'ble Supreme court in case of GOVERNMENT OF INDIA *versus INDIAN* TOBACCO ASSOCIATION 2005 (187) E.L.T. 162 held that Exemption notification must be construed with regard to object and purpose which it seeks to achieve.

b. The Hon'ble Supreme court in case of COMMISSIONER OF CUS. (PRV.), AMRITSAR *Versus* MALWA INDUSTRIES LTD. reposted in 2009 (235) E.L.T. (214) held that Notification like statute must be construed having regard to purpose and object it seeks to achieved and that the exemption benefit should not to be deprived by taking recourse to doctrine of narrow interpretation simplicitor.

c. Hon'ble Supreme court in case of OBLUM ELECTRICAL INDUSTRIES PVT. LTD. *versus* COLLR. OF CUS. BOMBAY reported in 1999 (108) E.L.T. 9 held that Wordings in the notification have to be construed keeping in view the object and purpose of the exemption.

Hon'ble Supreme court in case of COLLECTOR OF CENTRAL EXCISE *Versus* NEOLI SUGAR FACTORY reported in 1993 (65) E.L.T. 145 held that exemption notifications to be given their due effect keeping in view the purpose underlying.

The Hon'ble Bombay High court in case of GELDHOF AUTO AND GAS INDUSTRIES LTD. Versus UNION OF INDIA reported in 2011 (263) E.L.T.

528 held that an interpretation which helps to achieve object sought to be achieved, by the provisions ha to be adopted. It is further held that Interpretation rendering application of notification totally arbitrary, discriminatory, untenable and unworkable can never be sustained on touchstone of Article 14 of Constitution of India, and can never be the intention of Government.

55. In view of the same it is submitted that the intention of SEZ exemption notifications was to promote the set-up of SEZ and the object was to make exports of SEZ units tax-free. Thus, the notification has to be interpreted keeping in mind the said purpose. It is further submitted that the exemption notification is required to be interpreted in a beneficial and liberal manner as the said notification is a beneficial notification. Thus, if the demand is confirmed, then the same would be against the policy of the Government. Therefore, the showcase notice should be dropped.

56. As regards the demand of tax on Pick up and drop services received by SEZ unit, they stated that ab-initio exemption is available under notification 40/2012 and notification 12/2013. The Company has received pickup and drop service for employee to-and-from office for the period Jan-2013 to Mar-2015. The company has availed the benefit of notification 40/2012-ST for the period Jan to March, 2013 and notification 12/2013 for the period April, 2013 to March, 2015 to claim ab-initio exemption from service tax for these services. The Show Cause Notice in para 24 has stated that the ab-initio exemption is subject to the condition that: (i) the service has been wholly consumed in SEZ for notification 40/2012; and (ii) used exclusively for authorised operation for SEZ for notification 12/2013. The department has alleged that the place of provision of this service is outside the SEZ. Hence, the same cannot be considered to be 'wholly consumed' in SEZ or used exclusively in SEZ. Notification No. 40/2012–ST provided for ab-initio exemption for services wholly consumed in SEZ. The term 'wholly consumed' has been explained in the explanation to para 2(a) of the notification. As per the explanation, the term 'wholly consumed' means as follows:

"Explanation.- For the purposes of this notification, the expression "wholly consumed" refers to such specified services received by the unit of a SEZ or the developer and used for the authorised operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012(hereinafter referred as the POP Rules) is as under:-

(i) in respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ ; or

(ii) in respect of services specified in rule 5 of the POP Rules, the place where the property is located or intended to be located is within the SEZ; or

(iii) in respect of services other than those falling under clauses (i) and (ii), the recipient does not own or carry on any business other than the operations in SEZ;"

57. Hence, it is evident that for the services specified in Rule 5 of the Place of Provision of Service Rules, 2012 is the place of provision of service is where the property is located. The Rule 5 of the Place of Provision of Service Rules, 2012 reads as follows:

"RULE 5. Place of provision of services relating to immovable property. — The place of provision of services provided directly in relation to an immovable property, including services provided in this regard by experts and estate agents, provision of hotel accommodation by a hotel, inn, guest house, club or campsite, by whatever, name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including architects or interior decorators, shall be the place where the immovable property is located or intended to be located."

58. It will be evident that any services directly related to immovable property including the services of Architects, Interior Decorators, etc. shall be the place where the immovable property is located. In instant case, the pickup and drop service is provided to the office of the Company located in SEZ area. Therefore, the services are directly related to the office of the Company which is an immovable property. Hence, it is submitted that the place of provision of service is the SEZ area. Therefore, the allegation of the department is that the services are not wholly consumed in SEZ, is incorrect. This notification was superseded by Notification No. 12/2013- ST. As per this notification, ab-initio exemption was available to services used exclusively for SEZ. The Notification No. 12/2013 – ST provides that the services should be exclusively used for authorized operation. The explanation added to para 2 of the notification explains the meaning of term as follows:

"Explanation. – For the purposes of this notification, a service shall be treated as used exclusively for the authorised operations if the service is received by the SEZ Unit or the Developer under an invoice in the name of such Unit or the Developer and the service is used only for furtherance of authorised operations in the SEZ.";

59. Hence, it will be evident that the services shall be treated as used exclusively for authorized operation, if it is only for furtherance of authorized operation. In instant case, the pickup and drop services is required so that all the employees reach the office on time. The SEZ is located in Sanand District in Ahmedabad. This area is 29 kilo mtrs. away from the main city. Therefore, the arrangement of transport for the employees to reach on time is highly essential. Without this arrangement, the employees will find it very difficult and expensive to commute to office on daily basis. Hence, it is submitted that this service enables the Company to transport employees on daily basis. Since, the company is engaged in service industry, the employee are highly essential to provide the service of the company. Hence, it is submitted that this service is highly essential for the authorized operation of the Company. Therefore, it is submitted that this service is used for authorized operation of the company. Hence, these services are eligible for ab-initio exemption of the company. The allegation of the department does not survive.

60. The notification 30/2012-ST provides that the service of hire of vehicle for carrying passenger is covered under reverse charge mechanism. The service provider is required to pay 40%/50% of the service tax. The demand has been raised based on this notification under reverse charge mechanism. The department has alleged in para 25 and 27 of showcase notice that the company is liable to pay tax as they have not produced form A-1 and A-2. Therefore, the company should pay tax and claim refund. It is submitted that the substantive conditions of the notification have been complied with in this case. The company has substantiated in above submission that the services have been wholly consumed in SEZ and used exclusively for authorised operation of SEZ. Hence, this allegation does not survive. Further, it is submitted that the demand cannot be raised merely on the ground that the form A-1/A-2 does not state the name of the company for hire of vehicle services under reverse charge mechanism. The denial of exemption on this procedural lapse is incorrect in law. It is submitted that the submissions made in point (B) are equally applicable to instant case. Therefore, the exemption should be granted to the company.

61. The said assessee further contended that the demand is time barred for the period April 13 to September 14. The extended period under the proviso of section 73(1) of Finance Act read has been invoked to upheld the demand for reversal of credit arising on account of fraud, collusion, wilful misstatement, suppression of facts etc. The wordings in this rule is similar to the wordings used in proviso to section 11A which provides for serving of show cause notice within a period of five years from the relevant time. The Hon. Supreme Court has consistently held that provision of section 11A applies only when the manufacturer had malafide intention in non payment of duty. It is submitted that the ratio of these judgments apply with equal force to the provisions contained in proviso to section 73(1) also. They relied on following judgment:

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

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.

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 wilful 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 pari materia 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 pari materia 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 wilful mis-declaration or wilful suppression. There must be some positive act on the part of the party to establish either wilful mis-declaration or wilful suppression.

viii. We also refer to the judgment of the Hon'ble Supreme Court, in Anand NishiKawa 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 wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression."

62. Accordingly, they submitted that they did not have any malafide intention to pay service tax, and stated that the company had disclosed the entire amount claimed at export in the ST-3 return. The department, in para 12 of the showcase notice has stated that the month-wise details of the amount was obtained on scrutiny of ST-3 return. It is submitted that

suppression with intent to evade duty cannot be alleged for services which have been disclosed in the ST-3 return. The company had disclosed the transactions with service provider for whom tax has been recovered under reverse charge in books of accounts. It is settled position in law that suppression cannot be alleged for transactions which have been recorded in books of accounts. The company relies on the judgments: (i) Ace Computer Education Versus COMMISSIONER OF C. EX., JAIPUR-II 2007 (6) STR 361 (Tri-Del); and (ii) CCE v. Target Institution of Competition 2008 (11) STR 152 (Tri-Del). Therefore, it is submitted that the company did not have any malafide intention to evade duty. The showcase notice was issued on 22/10/2018 to raise demand for the period April 13 to September 15. The normal period to raise demand is 30 months. Therefore, it is submitted that the demand for the period April 13 to September 14 is barred by limitation. Hence, the demand for this period should be dropped.

63. They further stated that 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: *"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 – Azadi Bachao Andolan v. Union of India 2001 (116) Taxman249 /252 ITR 471."* The demand in the present show cause notice is for a period April 2011 to March 2012. 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: *"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 Sufan Laskar & 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 not pay tax. They had disclosed the value of export of service in the ST-3 return also. Hence it is submitted that the penalty should be waived off.

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

(a) Cosmic Dye Chemicals Vs Collector of Central Excise, Bombay, 1995 (75) ELT 721 (SC)

(b) CCE Vs Chemphar Drugs & Liniments, 1989 (40) ELT 276 (SC)
(c) Pushpam Pharmaceuticals Co Vs CCE, Bombay, 1995 (78) ELT 401 (SC)

65. Thereafter, the said assessee vide letter dated 26.02.2020 furnished an additional submission wherein they inter alia, stated that the show cause notice is vague in nature as para 4 alleges that the company has provided the services of Technical Testing and Analysis without discussing the nature of services and the nature of technical testing and analysis carried out by the company. It is submitted that the company does not carry out the activity of technical testing and analysis on the samples provided by recipient as alleged in show cause notice. The client does not provide any sample. Hence, the question of testing does not rise. They also stated that the demand of tax cannot be confirmed on the basis of classification adopted by company; that the company by mistake filed ST-3 return under the category of Technical Testing and Analysis service; and that the demand is for the period April 2013 to September 2015. After July 2012, the category of service is abolished. As per section 66B, tax was levied on all services except the services mentioned in negative list (section 66D). The taxpayer had to pay tax under specific accounting code and file return category of service wise for statistical analysis purpose. This fact has been clarified by Government vide Circular No. 165/16/2012-S.T., dated 20-11-2012. Therefore, mentioning of category in the return does not have any impact on the nature of services. It is submitted that the classification of service should be determined on the basis of activity carried out by the company and not on the basis on category under which the return has been filed by the company. The company relied upon the following judgment: -

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

66. They further stated that, it has been alleged in para 11 of the notice that the samples are made available physically to service provider at the taxable territory and technical testing is done on the samples. The said statement in para 11 is totally erroneous and not based

on any facts. The company has not received any samples from the recipient of service. The company procures the starting material and carries out the activity which are specified in the work order. Therefore, the allegation that the testing is carried out on the samples is totally erroneous. The entire basis on this part of show cause notice is based on such erroneous facts.

67. As regards the demand of tax on export of service, they stated that they provide synthetic medicinal chemistry, project management and customized synthetic chemistry services to support client's medicinal chemistry discovery efforts. Therefore, the company provides service of discovery of new pharmaceutical drugs and other allied services to support the client's discovery efforts. The activity of drug discovery means that the company synthesizes various chemical substances (starting material) to create a compound. The activity of combining the chemical substances/simple compound (starting materials) to form a complex compound which is a unified entity of all the elements is called synthesis. The chemical structure of the compound is sent by the client. The client also provides the details of the chemical substances/simple compound (starting material) from which the compound should be prepared by the Company. The starting material are recognized by Chemical Abstract Substance (CAS) number worldwide. The CAS number is a unique numerical identifier assigned by the Chemical Abstracts Service to every chemical substance. These starting materials are procured by the Company based on the CAS number. The Company develops a chemical route of the synthesis to create a compound. The chemical route is a step by step bifurcation of the process that the Company will undertake on the starting materials to create compound out of it. The Company has attached the Master Service Agreement of M/s. BIND Therapeutics Inc. As per this agreement, the services required to be undertaken by the Company shall be specified in the Work Order stated in Exhibit-A to the agreement. The project scope in Exhibit A clearly provide that the company will the following services:

> ***"Project Scope:***
> *The Scope of work involves supporting Bind's compound synthesis efforts. PDS will provide services including a) synthetic chemistry support from mg to multi-gram scale, b) synthetic route scouting and validation, c) focused chemical library generation via high-throughput synthesis & purification.*
> *PDS understand that the initial requirements are:*

A. Synthesis of 6 Sialoside Ligands @ 100 mg each.
B. Folate Derivative Synthesis: Pteroic acid protection at N10 and 2-NH2 positions with Alloc group and deliver 1-2 grams. This could be followed by literature synthesis reproduction of a 6-bromomethy pterin and deliver 2-3 grams.
C. Synthesis of 9 CD-38 Binding molecules incorporating alkyne functional group @ 100 mg each. "

68. Hence, in this agreement the company provides services of synthesis of chemical substance i.e. scouting of chemical route of synthesis and validation of route by development of compound. In addition to this they have agreed to provide allied service of scale-up the batch of compound from mili gram to multi gram and creation of multiple compounds. It is evident that all the services are related to synthesis for compound. In this case the chemical route has been stated in the Point-A of para 'Manpower/Chemical route/Rational' of Exhibit-A. This para provides the chemical route of synthesis of starting material i.e. 'Sialoside Molecules' to create compound 1 to 6. The equation on page 18 is the chemical route for creation of compound 5. In order to do this, the Company has to create Intermediate-A, Intermediate-B, Intermediate-7 and Intermediate-7A. The chemical route for synthesis is explained as follows: -

i. The structure with title SM is the starting material. The diagram resembles the chemical structure of the chemical substance.
ii. The equation besides the structure states the process that the Company will undertake to alter the chemical structure of the starting material. 4/Methoxyphenol is the reactor and BF3 and Et2o are the catalysts. The reactor and the catalysts are added to the starting material. This mixture is mixed in solvent i.e. CH2CL2. This solution is heated at 24°C for thirty minutes. The Company requires 75% yield from the solution to complete this step-1.
iii. The diagram above point no. 1 shows the manner in which chemical structure of the starting material is altered on completion of Step-1.
iv. Similarly, the Company will carry out Step-2 in which Dimethoxytoluene is the reactor, PTSA is the catalyst and CH3CN is the solvent. This solution is maintained for certain period of time to alter the chemical structure of the starting material. The chemical structure of altered starting material is stated in diagram no. 2.
v. Similarly, the Company will undertake Step No. 3 to further alter the structure of the starting material. In this step the company will require 89% yield of solution to complete this step.
vi. The 80% solution of Step No. 3 is mixed with solvent AoOH and heated at 60°C to create Intermediate-A. The diagram above Intermediate-A is the manner in which chemical structure of the starting material has changed after this step i.e. Step-4.
vii. The second line of the chemical route describes the steps required to be taken to create Intermediate-B.
viii. The third line of the chemical route describes the steps required to be taken to create compound 5. The company has mixed the Intermediate-A and Intermediate-B in a fixed proportion and carried out process to create

Intermediate- 7. The intermediate 7 is converted to Intermediate-7A. The process carried out on intermediate 7A leads to creation of the compound-5.

ix. Similarly, the chemical route for Compound 1, Compound 2, Compound 3, Compound 4 and Compound 6 have been mentioned on page no. 19 & 20 of the agreement.

69. The limited testing undertaken by company is of analysis of Intermediate and compounds. The analysis of intermediate is undertaken to verify that the chemical route of synthesis is altering the chemical structure of starting material in desired manner. Similarly, the analysis of compounds is undertaken to verify its structure and purity. On satisfactory results of analysis, the compound is shipped to the client. The client undertakes the following testing on the compound:

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

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

(c) The company has also attached the following documents to substantiate the nature of service:

(i) The Master Service Agreement of Stiftelsen Alzecure dated 15/9/2014 is attached herewith as Annexure-1. It will be evident from the agreement para 2 of the agreement that the service of the company will be stated in project brief based on requirement of the client. The project brief dated 5/9/2015 is attached to the agreement. It is evident that it clearly stated that the company will devise the chemical route, synthesis compound based on chemical structure provided by client. The client has also stated the required purity level of the compound.

(ii) The form of order issued by UCB Pharma SA dated 5/12/2014 along with the quotation herewith as Annexure-2. It will be evident from the quotation that the company has to undertake synthesis of compound name PLX3397. The chemical structure of the compound, characteristic, purity requirement has been stated in the quotation. These details are provided by the UCB to enable the company to provide the quotation. On approval of quotation, the company will prepare the chemical route and undertake synthesis.

70. They further stated that the Rule 4(a) of the Place of Provision of Service Rules, 2012 is not applicable in instant case. The detailed nature of service provided by company has been stated in above para. It is evident that the company provides services of synthesis on starting material. The starting material changes its structure in synthesis process. It can never be sent to the client in *"as is"* form. The rule 4(a) of Place of Provision of Service Rules, prescribes that services provided in respect of goods that are required to be made available by

the quotation. The copy of form of order and quotation is attached as Annexure-2. As per the contract the invoice was to be raised on UCB Celltech. Hence, the invoice bearing no. 3498501021 dated 31.01.2015 was raised by the company. The quotation number has been stated in the invoice. The copy invoice is attached as Annexure-8. Therefore, it is submitted that it is abundantly clear that the Company receives the cost of starting material as a part of the consideration of the services provided by them. The do not receive starting material from the client. Therefore, the provisions of rule 4(a) are not applicable in instant case.

73. The amount of starting material is received as consideration and not as reimbursement. The Department has alleged that the company recovers the cost of starting material as reimbursable expenditure. It is submitted that this allegation is not correct. The submission for same are as follows:

(i) FTE projects: In case of FTE projects, the company has already submitted above that the order of starting material is placed on principal to principal basis and the amount is recovered as part of consideration. Therefore, such an amount cannot be considered as reimbursement.

(ii) FPP project: In these projects the Company charges a fixed price to provide the service. They do not recover the cost of starting material separately. In fact, the agreement itself provides that the cost of starting material is included in the consideration. The proposal of synthesis of intermediate 12 and compound 20 dated 22/5/2014 was sent to Institut de Rescherche Pierre Fabre. The copy of same is attached as Annexure-9. The para B of this proposal contains terms of cost estimate and timelines. The company has provided total fee of $ 29,900 (19750+10150). This fee includes the cost of all chemicals, starting material, shipping cost etc. Both the parties had signed the statement of work on 14/7/2014 for this amount. The copy of statement of work is attached as annexure-10. The company has raised invoice no. 3498501035 dated 28/2/2015 for this amount. The copy of invoice is attached as annexure-11. Therefore, it is evident that the cost of starting material is included in the fees of the company for FPP projects. There is no condition for client to provide the material or pay for it on actual basis. Therefore, it is submitted that the allegations made in the Show Cause Notice is not applicable for FPP projects. Hence, the demand for these projects should be dropped. The demand for FPP project is Rs. 91,43,057/-. The invoice wise break-up of this project will be submitted within a week. It is submitted that the said demand is liable to be dropped.

Therefore, in view of above, they submitted that the place of provision of service of the company cannot be determined under Rule 4(a) of Place of Provision of Service Rules, 2012. The place of provision should be determined under Rule 3 of the Place of Provision of

Services, Rules, 2012. As per this rule, the place of provision of service is the place of service recipient. The service recipient in this case, is located outside India. Hence, the place of provision of service is outside India. Therefore, the company has correctly considered the service as export of service. The demand is not payable by them.

75. As regards the demand of tax under reverse charge mechanism for denial of exemption, they submitted that the services received from outside India is provided by M/s. Piramal Enterprises, UK, M/s. Oxygen Bio Research, UK, M/s. Reaction Biology Corporation, USA (import of service), and the rent-a-cab services are received for pickup and drop of employees from various vendors. The period of dispute for the above services are as follows:

Sr	Nature of Service	Period of Demand
1.	Services received from outside India	July-2013 to May-2015
2.	Rent-a-cab services	Jan-2013 to Mar-2015

76. The Company has taken exemption from payment of tax for the above services under following notifications:

Sr	Notification No. & Date	Period of Exemption
1.	40/2012 – ST Dt.: 20/06/2012	Jan-2013 to June-2013
2.	12/2013 – ST Dt.: 01/07/2013	July-2013 to May-2015

77. The department has disputed the eligibility of exemption on the basis of two allegations made in para 17 and 25 of the show cause notice. For import of service, the Company has not provided any declaration in Form-A1 and Form-A2. Hence, the Company has to first pay the tax and then claim exemption by way of refund. For rent-a-cab service, the place of provision of service for pickup and drop of passengers is outside SEZ. Hence, the services cannot be considered as wholly consumed or exclusively used in SEZ. The Company has not provided Form-A1 and Form-A2 which were documents specified in the above-mentioned notification to claim exemption. Hence, the exemption is not available to the Company. It is submitted that the above-mentioned allegations are not tenable. The services of rent-a-cab were wholly consumed in SEZ unit. The Notification No. 40/2012-ST exempted service tax for the services used for authorized operations which were received by SEZ unit/developer. The exemption was available by way of refund. However, the ab-initio

exemption was provided to services used for authorized operation which were wholly consumed within the SEZ. The term 'wholly consumed' was explained in the explanation to para 2(a) of the notification. The said explanation is reproduced below:

> *"Provided that where the specified services received in SEZ and used for the authorised operations are wholly consumed within the SEZ, the person liable to pay service tax has the option not to pay the service tax ab initio instead of the SEZ unit or the developer claiming exemption by way of refund in terms of this notification.*
>
> *Explanation.—For the purposes of this notification, the expression "wholly consumed" refers to such specified services received by the unit of a SEZ or the developer and used for the authorised operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012 (hereinafter referred as the POP Rules) is as under:—*
>
> *(i) in respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ ; or*
>
> *(ii) in respect of services specified in rule 5 of the POP Rules, the place where the property is located or intended to be located is within the SEZ; or*
>
> *(iii) in respect of services other than those falling under clauses (i) and (ii), the recipient does not own or carry on any business other than the operations in SEZ;"*
>
> *It will be evident from the above that any services are considered to be wholly consumed on fulfillment of the following conditions:*
>
> *(a) Services should be received by SEZ unit/developer;*
>
> *(b) Services should be used for authorized operation;*
>
> *(c) The place of provision of service should be within SEZ as per in Rule 4 & Rule 5 of the Place of Provision of Service Rules, 2012;*
>
> *(d) For services other than those covered in Rule 4 & Rule 5 of the said rules- The SEZ unit should not own or carryout any business other than the operations in SEZ;*

78. The place of provision for rent-a-cab service is not covered under Rule 4 or Rule 5 of the Place of Provision of Service Rules, 2012. Our reply to this extent stands modified. Therefore, the services are covered under the residual category. For this category, a service is wholly consumed if the SEZ unit does not own or carryout any business other than the operations in SEZ. In instant case, this notification was effective till June-2013. Till June, 2013 the Company was named M/s. Oxygen Bio-Research Pvt. Ltd. The Company did not have any operation apart from the services provided in SEZ unit. There was no other service in the DTA area of the Company. Therefore, it is submitted that the company did not own or carry any business other than the operation in SEZ. Hence, for the period Jan-2013 to June-2013, the rent-a-cab services was covered residual category and hence considered as wholly consumed under the explanation of wholly consumed SEZ. Therefore, the rent-a-cab service was also wholly consumed within the SEZ unit. The place of provision for the said service is not

relevant to determine whether it has been wholly consumed in SEZ or not. Hence, the allegation of the department is not tenable in law.

79. The condition to obtain Form A1 is procedural in nature. It is submitted that the Company did not have any operation outside of SEZ. Hence, all the services used by them were for SEZ operation. The exemption has been denied merely on the ground that the Company have not submit Form A1. It is submitted that the Company has made elaborate submissions in para B(5) of the reply to the Show Cause Notice to state that the condition to obtain Form A1 is procedural in nature. The exemption cannot be denied merely on the ground of non-submission of Form A1. The exemption is available under SEZ Act and rules made thereunder. The company has made elaborate submission in para B of the reply to show cause notice to submit that exemption from service tax is available under SEZ Act and rules made thereunder. The Section 7 and Section 26(e) of the SEZ Act, 2005 read with Rule 31 of the SEZ Rules, 2006 clearly provides that the service tax is exempt for services received by SEZ unit. The Hon. Tribunal in the case of Reliance Ports and Terminals Ltd. v/s Commr. Of. C.E. & S.T., Rajkot 2015 (40) S T R 200 (Tri. - Ahmd.) has held that the notification under service tax merely operationalize the exemption from service tax available in the Act. Notwithstanding anything containing in the exemption notification, the exemption will be available to the SEZ unit. The relevant extract of the judgment is reproduced below:

> *"7. From the provisions contained in Section 26(1)(e) of the SEZ Act, read with Rule 30(10) of the SEZ Rules, 2006, it can be seen that no Service Tax is payable on the services provided by a service provider to a SEZ unit. Further, Sec. 51 of the SEZ Act also makes an over-riding provision that SEZ Act shall have effect even if there is anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any other law. It is accordingly held that Notification No. 9/2009-S.T. and amended Notification No. 15/2009-S.T. have been only issued to operationalize the exemption/immunity available to SEZ unit under Sec. 26(1)(e) of the SEZ Act, 2005"*

80. The Hon. Andhra Pradesh High Court in the case of M/s. General MRO Aerospace Inc. (GMA) reported in GMR AEROSPACE ENGINEERING LTD. versus UNION OF INDIA 2019 (31) G.S.T.L. 596 (A.P.) has also upheld the above view. The relevant extract of the judgment is reproduced below:

83. Further, the invoice raised on M/s Principia Biopharma is attached at page 69 of additional submission submitted on 17/3/2020. It will be evident that starting material has been billed for USD 5,416.56. The purchase order wise breakup of material consumed is given in page number 70. One of the purchase orders i.e. PO no. 4500245147 raised on M/s Thermo Fisher Scientific India Private Limited is attached on page number 71. This material has been supplied by M/s Johnson Matthey Chemicals India Pvt. Ltd parent company of the supplier. Hence, it is substantiated that materials are purchased by the company. The material is not supplied by the client. Hence, it is submitted that para 4 of the Place of Provision of Service does not apply. The provisions of Rule 4 of Place of Provision of Service Rules, 2012 (POPS) do not apply to ADME services. The nature of services provided under this category is explained in para 9 of the submission made on 17-03-2020. As submitted therein the compound developed by the company is used for further providing the services of ADME. The company does not receive any material from clients. Therefore, it is submitted that the provisions of Rule 4 of POPS Rule do not apply to ADME services. The place of supply will be determined as per Rule 3 of the POPS Rules. Since the recipient of service is located outside India, the services shall be considered as export of service. The mere mention of category of service as Technical Resting and Analysis Service in invoice/ Return (TTA) is not sufficient to classify the services under this category. As explained above, the para-4 of the Show Cause Notice has alleged that the company has provided services of TTA. This appears to be based on the nature of services mentioned in the invoice and category of services mentioned in the return. The period of Show Cause Notice is April-13 to May-15. The charging Section 66 was replaced by Section 66B with effect from 01-07-2012. The 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. 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.

84. Without prejudice to the above, they submitted that it has been consistently held by tribunal that merely because the company has obtained registration under any particular category of services, the services cannot be classified under that category. The observation of tribunal in para 6 in case of RADIOWANI VERSUS COMMISSIONER OF SERVICE TAX, MUMBAI-I 2019 (21) G.S.T.L. 157 (TRI. – MUMBAI) as reported in 2019 (21) G.S.T.L. 157 (TRI. – Mumbai) is reproduced below:

> *"6. It is seen from the records that the appellant had registered themselves under Service Tax Rules, 1994 as provider of sound recording service. However, that by itself is not sufficient to operate as a conclusive ground of taxability. Levy under Finance Act, 1994 is not on the persona but on the activity; neither registration nor wherewithal for rendering the service can substitute for classifying the activity within the definition of the service. Learned Chartered Accountant has placed reliance on the decisions of the Hon'ble Supreme Court in Dunlop India Ltd. and Madras Rubber Factory Ltd. v. Union of India [1983 (13) E.L.T. 1566 (S.C.)] and of the Hon'ble High Court of Calcutta in Dalhousie Institute v. Assistant Commissioner, Service Tax Cell [2006 (3) S.T.R. 311 (Cal.)] as well as the decision of the Tribunal in Commissioner of Central Excise, Bhopal v. Mahakoshal Potteries [2005 (183) E.L.T. 289 (Tri.-Del.)]. This then is a settled law. The tax collector must not only propose the classification as a pre-requisite for demand but also test the fitment of the activity within the definition itself. The discharge of tax liability on a former occasion or a claim entered will not suffice to impose the burden on the assessee for all time to come. Hence mere registration or even the operation of sound recording studio does not, by itself, bring the appellant within the fold of taxation."*

85. They also relied upon the decisions in LOTUS SHIPPING LTD. VERSUS COMMISSIONER OF C.EX., CUS. & S. TAX, COCHIN 2015(38) S.T.R. 1148 (TRI. – BANG.) and SSPL DEVELOPERS (P) LTD. VERSUS COMMISSIONER OF S.T., BANGALORE 2015 (39) S.T.R. 455 (TRI. – BANG) and stated that the classification of service under TTA is incorrect.

86. The assessee further submitted that the Tribunal in case of Reliance Ports and Terminals Ltd. V/s Commr. Of C.E. & S.T., Rajkot 2015(40) S.T.R. 543 (TRI. – AHMD.) has held that by virtue of section 26(1)(e) of Special Economic Zone Act,2005 read with Rule 31 of Special Economic Zone Rule, 2006 the exemption is provided to the services received by SEZ. It has overriding effect over the provisions of Service Tax. Hence, exemption from payment of duty is available to the company. The Andhra Pradesh High Court in the case of GMR Aerospace Engineering Ltd. Versus Union of India 2019 (31) G.S.T.L. 596 (A.P.) has also held

that non-filing of form A-1 and A-2 are not relevant for providing exemption from payment of Service Tax. The court has observed in para 32 to 34 as follows and finally held that tax is not payable by the supplier of service or recipient of service:

> *32. A combined reading of Sections 7, 26 and 50 of the SEZ Act, 2005, would show that SEZ Act, 2005 speaks of three different types of exemptions. They are, -*
>
> *1) exemption from payment of taxes under the enactments specified in the First Schedule, in respect of goods and services exported out of, or imported into or procured from a DTA by a unit in a Special Economic Zone or a Developer under Section 7,*
>
> *2) exemption from payment of duties under the Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1994, Central Excise Tariff Act, 1985, Finance Act, 1994, Finance (No. 2) Act, 2004 and Central Sales Tax Act, 1956, covered by Section 26 (1); and*
>
> *3) exemption from payment of state taxes, levies and duties covered by Section 50, provided there is a state enactment to the said effect.*
>
> *33. The word "prescribe" is used in the present tense in Section 26(2) and in the past tense in Section 7. Both will have the same meaning as assigned to the word under Section 2(w). The moment a set of rules is issued either in respect of matters covered by Section 7 or in respect of matters covered by Section 26(1), there is no scope for invoking any other law for imposing any other condition.*
>
> *34. The benefit of exemptions granted under the notifications issued under Section 93 of the Finance Act, 1994, are available to any one and not necessarily confined to a unit in a special economic zone. Section 93 of the Finance Act, in that sense is a general power of exemption available in respect of all taxable services. But, Section 26(1) is a special power of exemption under a special enactment dealing with a unit in a special economic zone. Therefore, the notifications issued under Section 93 of the Finance Act, 1994 cannot be pressed into service for finding out whether a unit in a SEZ qualifies for exemption or not.*

87. They filed another submission dated 17.03.2020 wherein they inter alia, stated that the company basically provides two types of services, viz. synthetic chemistry services for development of compounds, and in some cases, clients request to provide further services of absorption, distribution, metabolism and excretion on such developed compounds. They have also described the nature of the above two services wherein synthesis services are bifurcated as Full Time Equivalent (FTE) basis and Fixed Price Project (FPP) basis. They have also submitted summary statement of invoices issued by them for each type of services provided to their clients and also explained the procedures followed in each of them viz. FTE, FPP and ADME methods. They have also furnished copies of Master Service Agreements as Annexure-2 and stated that typically, each MSA is for a period of 2-3 years wherein the nature of service is

specified in brief to explain that their actual service is chemical synthesis, and not testing and analysis services as perceived in the SCN. They further stated that all clients do not enter into MSA with them; and that on completion of preliminary investigation they provide draft proposal to the clients which are generally accepted. They further submitted that they have not received starting materials from the clients and in order to substantiate their point, they explained the nature of services provided to several clients such as Stiftelsen Alzecure, Novartis Institute for Biomedical Research Pvt. Ltd., Takeda Cambridge Ltd., Eisai Inc, Eisai Ltd., Sentinel Oncology Ltd., etc. They explained that the nature of service itself would substantiate their point that starting materials are not required for provision of their services.

88. The said assessee furnished another submission dated 19.09.2020 inter alia, stating that the Show Cause Notice has wrongly alleged that the company has provided Technical Testing and Analysis service. This allegation has been made merely on the basis that the category has been stated in the invoice raised to the customers. The consideration in the agreements of company are on the basis of FTE (Full Time Equivalent), viz. in this case the amount of invoice is based on the number of FTEs assigned to the customer and material used in the synthesis activity wherein details of material and its consumption is disclosed separately in the invoice., and FPP (Fixed Price Project) viz. in this case the consideration is inclusive of the cost of material. The main service of the Company is the synthesis of chemical substances. The synthesis is undertaken for chemical substances specified by customers. The name of substance is specified in the agreement itself. For example, in case of Bind therapeutic, the chemical substance Sialoside Ligands is specified in the project scope of the work order attached as annexure-2 to the reply of Show Cause Notice. In case of Principia Bio Pharma, the chemical substance Pyrazolopyridines has been stated in the work order 1 to Master Service Agreement attached as annexure-1 to their earlier submission. The company has to use various chemical substance, solvents and regents for the purpose of synthesis. These materials are broadly identified by the scientist at the time of designing the synthesis route. They are broadly informed to the client at the initial discussion, but they keep changing depending on the results of synthesis at various stages. Therefore, it is submitted that there is no certainty of the nature

of material being used for the synthesis. It depends on the research and subsequent testing of the developed compound.

89. The company has attached the Project Status Report of Bind for the period June 17 to December 9, 2013 as annexure-1 to substantiate the above submission. The Exhibit A to the Master Service Agreement (attached as annexure-2 to the reply to showcause notice) provide route of synthesis for Sialoside Molecules, Compound 1 to 4 and Compound 6. It will be evident the company had proposed in step 8 to 10 that they will alter chemical structure of Intermediate 7 to develop compound 1 to 4. The company also provided alternate route in which, intermediate A alternate 1 can be reacted with intermediate B to get intermediate 9. The intermediate will undergo chemical reaction which will generate compounds 1 to 4. However, the actual synthesis route used to develop compound 1 to 4 has been stated in the Project Status Report. Therefore, it is evident from above that the company is not aware of the synthesis route that will be used to develop the compounds. The synthesis route is finalized based on research and subsequent testing. Consequently, they are not aware of the material, solvents and reagents also that will be used for synthesis. Thus, the material cannot be provided by the client nor can be purchased on behalf of the client. The company has procured the material based on their research and development. They raise invoice for material as part of consideration for providing drug discovery services.

PERSONAL HEARING

90. A personal hearing was offered to the said assessee on 27.02.2020 which was attended on their behalf by Shri S.S. Gupta, Consultant and Ms. Manali Butala, Chief Manager (Finance). They filed a submission dated 26.02.2020, details of which have already been discussed in the foregoing paras, and sought for some time to furnish copies of contracts, relevant invoices, work orders, etc. Another hearing was held on 03.09.2020 wherein Shri S.S. Gupta, Consultant appeared on virtual mode while Ms. Manali Butala, Chief Manager (Finance) remained present. They reiterated their earlier submissions and requested to drop the

proceedings. Similarly, another hearing was held on 19.01.2021 which was virtually attended by Shri S.S. Gupta, Consultant while Ms. Manali Butala, Chief Manager (Finance) and Shri Premal Bhimani (Manager-Finance) remained present. They explained their aforesaid previous written submissions and argued that the demand raised in the said SCN is not maintainable. Due to the change in adjudicating authority, another personal hearing was offered to them on 15.07.2021 which was virtually attended by Shri S.S. Gupta, Consultant while Shri Premal Bhimani (Manager-Finance) remained present. They explained the nature of services provided and stated that there is no question of materials being supplied by the clients as what materials would be required are not known in the beginning. They contended that the demand is not sustainable on the grounds of their submissions.

DISCUSSION AND FINDINGS

91. Having carefully gone through the records of the case, which include the SCN, defence replies as well as the written and oral submissions made by the said assessee during the proceedings, I find that the following issues require determination: -

(i) Whether the Technical Testing & Analysis Services provided by the said assessee to their foreign clients would qualify export of services for the purpose of non-payment of service tax, or otherwise;

(ii) Whether the import of services received by the said assessee from their foreign clients for their SEZ unit would qualify exemption from service tax in terms of Notification No. 40/2012-ST dated 20.06.2012 as amended by Notification No. 12/2013-ST dated 01.07.2013, or otherwise; and

(iii) Whether the *ab initio* exemption availed by the said assessee at their SEZ unit for receiving services of renting of motor vehicles under Notification No. 40/2012-ST dated

20.06.2012 as amended by Notification No. 12/2013-ST dated 01.07.2013 was correct, or otherwise.

92. As regards Point (i) above, the issue involved is whether the specified services provided by the said assessee would be considered as "*Export of Services*" for the purposes of Rule 6A of the Service Tax Rules, 1994 or if the same would be a "Performance based Services", whereupon the place of provision shall be the location where the services are actually performed, in terms of Rule 4(a) of the Place of Provision of Services Rules, 2012 (POPS Rules). I find that the only ground invoked in the SCN to apply the provisions of Rule 4(a) of POPS Rules and to consequently deny the export benefit to the services rendered by the said assessee is that they, as a service provider, have undertaken such services in connection with the samples made available by their foreign clients or alternatively, with such samples procured by the said assessee locally and later got its cost reimbursed by the foreign clients. Before venturing into the legality of the issue, it is germane to examine the precise nature of services provided by the said assessee, which I would discuss as follows.

93. Their defence reply dated 26.02.2020 clearly states that the main service undertaken by the said assessee is synthesis of chemical substances; that the synthesis is undertaken for chemical substances specified by customers; and that the name of substance is specified in the agreement itself. For example, in case of Bind therapeutic, the chemical substance Sialoside Ligands is specified in the project scope of the work order attached as annexure-2 to the reply of Show Cause Notice. In case of Principia Bio Pharma, the chemical substance Pyrazolopyridines has been stated in the work order 1 to Master Service Agreement attached as annexure-1 to additional submission dated 17-03-2020. It is stated that the company has to use various chemical substance, solvents and regents for the purpose of synthesis. These materials are broadly identified by the scientists at the time of designing the synthesis route. They are broadly informed to the client at the initial discussion, but they keep changing depending on the results of synthesis at various stages. Thus, it is submitted that there is no

certainty of the nature of material being used for the synthesis, which actually depends on the research and subsequent testing of the developed compound.

94. The assessee has also submitted the Project Status Report of Bind for the period June 17 to December 9, 2013 to substantiate their arguments. The Exhibit A to the Master Service Agreement (attached as annexure-2 to the reply to show cause notice) provide route of synthesis for Sialoside Molecules, Compound 1 to 4 and Compound 6. It is noticed that the company had proposed in step 8 to 10 that they will alter chemical structure of Intermediate 7 to develop compound 1 to 4. The company also provided alternate route in which, intermediate A alternate 1 can be reacted with intermediate B to get intermediate 9. The intermediate will undergo chemical reaction which will generate compounds 1 to 4. It is stated with examples that the actual synthesis route used to develop the compound 1 to 4 has been changed during the process. It is also stated that the company is not aware of the synthesis route that will be used to develop the compounds; that the synthesis route is finalized based on research and subsequent testing. Consequently, they are not aware of the material, solvents and reagents also that will be used for synthesis; that the material cannot be provided by the client nor can be purchased on behalf of the client; that the company has procured the material based on their research and development; and that they raise invoice for material as part of consideration for providing drug discovery services.

95. I have also gone through their submission dated 17.03.2020 wherein the nature of services undertaken for different clients have been explained along with the summary of invoices issued to them. It is stated that they basically provides two types of services, viz. synthetic chemistry services for development of compounds, and in some cases, clients request to provide further services of absorption, distribution, metabolism and excretion on such developed compounds. They have also described the nature of the above two services wherein synthesis services are bifurcated as Full Time Equivalent (FTE) basis and Fixed Price Project (FPP) basis. They have also submitted summary statement of invoices issued by them for each types of services provided to their clients and also explained the procedures followed in each of

them viz. FTE, FPP and ADME methods. They have also furnished copies of Master Service Agreements as Annexure-2 and stated that typically, each MSA is for a period of 2-3 years wherein the nature of service is specified in brief to explain that their actual service is chemical synthesis, and not testing and analysis services as perceived in the SCN. It is further stated that all clients do not enter into MSA with them; and that on completion of preliminary investigation they provide draft proposal to the clients which are generally accepted. It is also submitted that they have not received starting materials from the clients and in order to substantiate their point, they explained the nature of services provided to several clients such as Stiftelsen Alzecure, Novartis Institute for Biomedical Research Pvt. Ltd., Takeda Cambridge Ltd., Eisai Inc, Eisai Ltd., Sentinel Oncology Ltd., etc. It is stated that the nature of service itself would substantiate their point that starting materials are not required for provision of their services.

96. After going through the documents and submissions on record, I am convinced that the said assessee is actually engaged in the research and development of specific chemical compounds through synthesizing various input compounds. The crucial part of the service undertaken by the said assessee is determining the appropriate route for synthesis for producing the target chemical compound by identifying the correct starting materials and other inputs. The defence replies submitted by the said assessee contain the aforesaid general and specific testimonials specifically stating that as a matter of practice, their clients do not provide any starting materials but only the detailed development procedure or route of synthesis to determine the target compound. In spite of these factual position, I find that the SCN does not refute such testimonials with any material evidences but merely creates an unsubstantiated impression that the said assessee invariably carry out some specific testing and analysis services on some specific materials either directly supplied by the clients or procured by the assessee on behalf of such clients and return the same to such clients along with the testing report. I am of the view that the department has not considered the usual R&D works associated with the pharmaceutical, chemical and drug industry where target molecules/compounds are created by

way of synthesizing the key starting materials, input compounds, etc. wherein the KSM and other input compounds get totally consumed or transformed by loosing its nature and character.

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

> *"(106) "technical testing and analysis" means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or information technology software or any immovable property, but does not include any testing or analysis service provided in relation to human beings or animals;*
>
> *Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause, "technical testing and analysis" includes testing and analysis undertaken for the purpose of clinical testing of drugs and formulations; but does not include testing or analysis for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals;"*

98. The above definition unambiguously indicates that the *'technical testing and analysis service'* would constitute physical, chemical, biological or any other scientific testing or analysis of *goods or material*. Thus, the definition covers various types of testing or analysis which are carried out primarily on some tangible goods or materials. This would mean that the activity of technical testing or analysis is required to be carried out for testing or ascertaining the physical, chemical, biological or any other scientific parameters of a given target of tangible goods. Meanwhile, the nature of services carried out by the said assessee, as discussed earlier above, reveals that they develop a target chemical compound which is further intended to be

integrated by their foreign clients as a drug or pharmaceutical compound, by using the different materials which include the KSM, where the KSM is either supplied by their foreign clients or procured by them locally or developed by themselves by using the route synthesis studied and determined by the said assessee and agreed upon by their clients. Although the explanation given under the sub-section supra also includes testing and analysis on drugs and formulations, the present testing process carried out by the assessee does not include any drugs or formulations, but it involves a research synthesis which would further be used in developing and manufacturing drugs or chemical compounds, etc. It is also stated that during the stage-wise synthesis of developing the candidate compound, the KSM gets consumed, irrespective of whether it was supplied by the foreign clients or procured by themselves from outside or developed by in-house synthesis. Thus, although the said assessee undertakes multiple testing and analysis right from the stage of determining the route synthesis through the process of development of candidate chemical compound, it cannot be said that such testing and analysis was carried out in respect of any specific goods or materials, or drugs or formulations for its physical, chemical, biological or scientific properties. In common parlance, in technical testing and analysis service, the goods/product on which such testing and analysis was undertaken remains intact and are returned to the client along with test reports and analytics. However, the details provided by the said assessee reveal that even the starting materials received by them in some cases gets consumed during the research and development process. It cannot be said that the said assessee was conducting any testing or analysis of the KSM received from their clients in such cases, but on the inputs and intermediate goods at various stages of its rout scouting and synthesis. It is stated that as a result of the route synthesis, research and development, the said assessee develop an altogether different item which is the target chemical compound further to be integrated as the pharmaceutical drug or chemical compound. It is also stated that during the route scouting and synthesis procedures, the assessee conduct testing and analysis at multiple stages, and send the test results and analytics to their foreign clients for follow up augmentation and escalation to further subsequent stages. Even the final outcome of the service undertaken by the assessee results in developing the target compound is integrally attached with the test reports and analytics. Therefore, I am of the view that the service carried out by the said assessee is more of

the nature of '*research and development*' comprising rout scouting, several stage-wise scientific research, testing and analysis right from conceptualization, route synthesis and development involving various materials such as KSM, raw materials, intermediates and the developed target chemical compound. Such research and development (R&D) process is a critical stage in drug development in the pharmaceutical and chemical industry, wherein the process starts after an initial candidate drug is identified and encompasses the rigorous research tests that determine its therapeutic suitability. I am also of the view that such stage-wise testing and analysis is being carried out by the said assessee not on any specific chemical compound or starting materials, irrespective of providing by their clients or by locally procuring by themselves or even by developing in-house, but on the various stages of research process involving intermediate, semi-finished or finished candidate chemical compound.

99. Having discussed about the nature of services carried out by the said assessee, I would now examine the legality of 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). SCN states that the services provided by the said assessee do not satisfy the condition (d) provided under Rule 6A of the Service Tax Rules, 1944 hence cannot be considered as '*export of service*'. For ease of understanding, the said Rule 6A is reproduced as follows: -

> *"6A. Export of services.- (1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-*
> *(a) the provider of service is located in the taxable territory,*
> *(b) the recipient of service is located outside India,*
> *(c) the service is not a service specified in the section 66D of the Act,*
> *(d) the place of provision of the service is outside India,*
> *(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and*
> *(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act"*

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

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

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

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

> *"5.4 Rule 4- Performance based Services*
> *5.4.1 What are the services that are provided "in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service"?- sub-rule (1):*
>
> *Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the service involves movable objects or things that can be touched, felt or possessed. Examples of such*

services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/inspection/certification/analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys."[Underlined for emphasis]

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

(i) The said assessee has not provided any technical testing or analysis service "*in respect of the goods*" provided by their clients, but conducted research for the synthesis and

development of a target compound as per the route scouting, and conducted testing and analysis of such candidate compound at different stages of its synthesis as KSM, raw materials, intermediate goods, semi-finished goods, and finished goods, etc.

(ii) SCN states that the clients had provided or made physically available chemical compounds to the said assessee. While the chemical compound is the end result of the research and development synthesis undertaken by them, the question of it being a drug or chemical arises only after the clients approving the candidate and after their testing and validation, etc before commercially integrated for manufacturing drugs or chemicals.

(iii) Service provided by the said assessee is not related to any specified goods, which required such goods to be made physically available by the service receiver. No goods or materials provided by the clients remained physically available through the process of service rendered by them.

(iv) It is submitted that the clients have not supplied any chemical compound on which any technical testing and analysis was required to be carried out by the said assessee. While in some cases, clients may have supplied KSM, in other cases the assessee has sourced or developed such materials out of the route synthesis provided by the clients. It is usual that even such KSM was consumed during the process of research and development of target compound. Therefore, it cannot be said that the service cannot be rendered without any chemical compound physically supplied by the client, or temporarily coming into the physical possession or control of the said assessee;

(v) The performance based services discussed in Rule 4 of POPS Rules and in the Explanation Guide requires a definite supply of goods for the purpose of testing and analysis, without which the service cannot be undertaken at all. It is illustrated in the examples, such as, there cannot be a courier service, storage or warehousing without parcels/packets, there cannot be a cargo handling service of loading, unloading, packing or unpacking without presence of

some cargo, there cannot be dry cleaning without clothes, and there cannot be testing/inspection without some goods. While the clarification specifies that such parcels/packets/cargo/clothes/ goods are invariably supplied by the client (or made available by them), it categorically excludes services where the supply of goods by the receiver is not material to the rendering of the service; and

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

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

104. As per Para 5.1.3 of the Education Guide, the essence of indirect taxation is that a service should be taxed in the jurisdiction of its consumption, and this principle is more or less universally applied. In terms of this principle, exports are not charged to tax, as the consumption is elsewhere, and services are taxed on their importation into the taxable territory. The basic philosophy of framing POPS Rules, 2012 is stated to make determination of the taxing jurisdiction easier, especially for persons who deal in cross-border services. The examples specified in the said para discuss the situations where multiple locations are involved

for the service provider or service recipients or both, and where third-parties are involved, etc. Since the services rendered by the said assessee to their foreign clients are on principal-to-principal basis without involvement of any third parties or multiple locations, I am of the view that the specific provisions of performance-based services as given in Rule 4 of POPS Rules are not applicable in the present case. I draw support in this regard from Rule 13 of POPS Rules, which is an enabling power to correct any injustice being met due to the applicability of rules in a foreign territory in a manner which is inconsistent leading to double taxation. Para 5.13 of the Education Guide clarifies that Rule 13 is in place due to the cross border nature of many services, wherein it is also possible in certain situations to set up businesses in a non-taxable territory while the effective enjoyment, or in other words consumption, may be in taxable territory; and that the Rule is also meant as an anti-avoidance measure where the intent of the law is sought to be defeated through ingenious practices unknown to the ordinary ways of conducting business. Thus, it is evidently clear that the provisions of POPS Rules, 2012 would come into play only when there is a difficulty in determining the correct place of provision of service, due to existence of multiple persons and locations or a camouflaged web of transactions. Where the services are rendered on principal-to-principal basis with no third parties or third locations involved, the question of invoking the exceptional provisions of POPS Rules is superfluous. This is in terms with the intention of the legislature as specified in Para 5.1 and Para 5.13 of the said Education Guide.

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

106. 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 said 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, and that this principle is more or less universally applied.

107. I also find that according to Rule 14 of POPS Rules, 2012 where the provision of a service is, *prima facie*, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that 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 said 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 STR, 1994 as made out in the SCN and therefore, the services rendered by the said assessee to their foreign clients would qualify as *'Export of Services'* as specified in the said Rule 6A ibid.

108. I have also gone through the various case laws that finally settled the present issue. In the case of *All India Federation of Tax Practitioners Vs. UOI cited at 2007 (7) STR 625 (SC)* Hon'ble Supreme Court has examined the constitutional aspects of levying service tax, and observed in Para 7 of the judgment that Service Tax is a value added tax which in turn is *destination based consumption tax* in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable *only on services provided* within the country. Further, Hon'ble High Court of Bombay has also examined a similar case in *re SGS India Pvt. Ltd. cited at 2014 (34) STR 554 (Bom)* and observed that if a service is consumed outside India, it will be considered as exports and not taxable in India. 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 universally valid for deciding present dispute. It is the same constitutional intent that is clarified in Para 5.1.3 of the Education Guide, as discussed in the foregoing paras, which also do not change with the advent of POPS Rules. Further, the facts are also not disputed to the extent that the service is consumed in a foreign location. Further, a contrary stand taken by the department has already been annulled by Tribunal in re *Fertin Pharma Research & Development India Pvt. Ltd. cited at 2020 (38) GSTL 33 (Tri.Mum).*

109. Further, in the case of *Advinus Therapeutics Ltd. cited in 217 (51) STR 298 (Tri. Mum.)* Hon'ble Tribunal has examined almost of all the aspects as covered in the present case. I find that the ratio of this decision is squarely applicable in the present case. In this case also, the respondent was a 100% EOU and rendering 'scientific or technical consultancy service', by entering into agreements with their foreign clients for generation of candidate compounds for pharmaceutical products on certain drug targets through research and drug development by

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

> *"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."

110. Again, in the case of *Fertin Pharma 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....."

111. In yet another similar case of *Steps Therapeutics Ltd. reported at 2017 (49) S.T.R. 114 (AAR)*, Advance Ruling Authority has ordered that while clinical pharmacology and

clinical research undertaken by the applicant in respect of the goods (tablets, capsules, syrup, etc.) for their foreign clients are taxable in terms of Rule 4 of POPS Rules, 2012, where service of clinical pharmacology is not provided by the applicant and only service of clinical research is provided, then such service would not be in relation to formulation provided by the service receiver located outside India, to the applicant, and hence, it would be not be taxable under the Act in light of Rule 3 of the Place of Provision of Services (POP) Rules, 2012 as the applicant renders said services to its customers and the place of provision is located outside India. It is observed that where service of clinical pharmacology (which is provided in respect of formulations received from service receiver located outside India) is not provided by the applicant and only service of clinical research is provided, then this service would not be in relation to the formulation.

112. 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.

113. I find that the aforesaid case laws irrefutably establish that the research and development activities of the type as carried out by the said assessee for synthesis of a target/candidate chemical compound, with or without any starting materials or any other goods or materials provided or physically made available by their foreign clients, would not be considered having rendered in respect of any goods, without which the service could not have been provided, and hence not covered under the purview of Rule 4(a) of the POPS Rules, 2012, hence, consequently, not excluded by way of condition (d) provided under Rule 6A of STR, 1994. Accordingly, I hold that the "*services*" rendered by the said 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 on this issue vide the subject SCN would not survive the test of law.

114. Although the SCN contains two other issues as categorized under Para 91 (ii) and (iii) supra, both of them propose to deny exemption from service tax availed by the said assessee in their capacity of an SEZ unit. In the first case, SCN seeks to demand service tax on the ground that the said assessee has not fulfilled the conditions of Notification No. 40/2012-ST dated 20.06.2012 as amended by Notification No. 12/2013-ST dated 01.07.2013 on the business support services received from their overseas associates. In the second case, SCN seeks to recover service tax on their renting of motor vehicle for transportation of staff members on the same grounds of not fulfilling the conditions of the same notifications. In both the cases, the SCN does not dispute receipt or consumption of services by the SEZ unit, and the only alleged contravention is not following the procedural conditions specified under Notification No. 40/2012-ST dated 20.06.2012 as amended by Notification No. 12/2013-ST dated 01.07.2013. Therefore, I would discuss both these two issues together.

115. I find no dispute from the said assessee that they have availed full exemption on the aforesaid two services (import of business support service and renting motor vehicles for transportation of staff members) without fulfilling the procedural conditions specified under the said notifications. Their only defence is that the services have been exclusively consumed

within the SEZ and that non-fulfilment of conditions is only a procedural lapse which cannot be formed basis for denying substantive benefits otherwise available to them. In order to better comprehend the issue, the relevant portion of Notification No. 40/2012-ST is reproduced below: -

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) read with sub-section 3 of section 95 of Finance (No. 2), Act, 2004 (23 of 2004) and sub-section 3 of section 140 of the Finance Act, 2007(22 of 2007) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 17/2011-Service Tax, dated the 1st March, 2011, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R.174(E), dated the 1st March, 2011, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the services on which service tax is leviable under section 66B of the said Act, received by a unit located in a Special Economic Zone (hereinafter referred to as SEZ) or Developer of SEZ and used for the authorised operations, from the whole of the service tax, education cess and secondary and higher education cess leviable thereon.

2. *The exemption contained in this notification shall be subject to the following conditions, namely :-*

(a) *the exemption shall be provided by way of refund of service tax paid on the specified services received by a unit located in a SEZ or the developer of SEZ and used for the authorised operations :*

Provided that where the specified services received in SEZ and used for the authorised operations are wholly consumed within the SEZ, the person liable to pay service tax has the option not to pay the service tax ab initio instead of the SEZ unit or the developer claiming exemption by way of refund in terms of this notification.

Explanation.- For the purposes of this notification, the expression "wholly consumed" refers to such specified services received by the unit of a SEZ or the developer and used for the authorised operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012(hereinafter referred as the POP Rules) is as under:-

(i) *in respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ ; or*
(ii) ....
(iii) ....

(b) ...

Explanation. - For the purposes of condition (b),-
(A) ...
(B) ...
(C) ...
(D) ...
(a) ...
(b) ...
(c) ...
(d) *for the purpose of claiming ab initio exemption, the unit of a SEZ or developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, in addition to the list specified under condition (c); the unit of a SEZ or developer who does not own or carry on any business other than the operations in SEZ, shall declare to that effect in Form A-1;*

(e) the unit of a SEZ or developer claiming the exemption shall declare that the specified services on which exemption and/ or refund is claimed, have been used for the authorised operations;

(f) ...

(g) ...

(h) ...

(i) exemption or refund of service tax paid on the specified services other than wholly consumed services used for the authorised operations in a SEZ shall not be claimed except under this notification;

(j) ...

3. The following procedure should be adopted for claiming the benefit of the exemption contained in this notification, namely :-

(a) the unit of a SEZ or developer, who has paid the service tax leviable under section 66B of the said Act shall avail the exemption by filling a claim for refund of service tax paid on specified services used for the authorised operations;

(b) the unit of a SEZ or developer who is registered as an assessee under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, or the said Act or the rules made thereunder, shall file the claim for refund to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the SEZ or registered office or the head office of the SEZ unit or developer, as the case may be, in Form A-2;

(c) ...

(d) ...

(e) ...

(f) ...

(i) ...

(ii) ...

(iii) ...

(g) ...

(i) the refund claim is complete in all respects;

(ii) the information furnished in Form A-2 and in supporting documents correctly indicate the service tax involved in the specified services used for the authorised operations in the SEZ, which is claimed as refund, and has been actually paid to the service provider,

shall refund the service tax paid on the specified services;

(h) a service provider shall provide the specified services falling under wholly consumed category, under ab initio exemption granted by this notification, to a unit of a SEZ or developer, for authorised operations, subject to the submission of list specified in condition (c) under paragraph 2 and a declaration in Form A-1;"

116. The relevant text of amended Notification No. 12/2013-ST reads as under: -

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) read with sub-section (3) of section 95 of Finance (No. 2), Act, 2004 (23 of 2004) and sub-section (3) of section 140 of the Finance Act, 2007 (22 of 2007) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 40/2012-Service Tax, dated the 20th June, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 482(E), dated the 20th June, 2012, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the services on which service tax is leviable under section 66B of the said Act, received by a unit located in a Special Economic Zone (hereinafter referred to as SEZ Unit) or Developer of SEZ (hereinafter referred to as the Developer) and used for the authorised operation from the whole of the service tax, education cess, and secondary and higher education cess leviable thereon.

2. The exemption shall be provided by way of refund of service tax paid on the specified services received by the SEZ Unit or the Developer and used for the authorised operations :

Provided that where the specified services received by the SEZ Unit or the Developer are used exclusively for the authorised operations, the person liable to pay service tax has the option not to pay the service tax ab initio, subject to the conditions and procedure as stated below.

3. This exemption shall be given effect to in the following manner :

(I) The SEZ Unit or the Developer shall get an approval by the Approval Committee of the list of the services as are required for the authorised operations (referred to as the 'specified services' elsewhere in the notification) on which the SEZ Unit or Developer wish to claim exemption from service tax.

(II) The ab initio exemption on the specified services received by the SEZ Unit or the Developer and used exclusively for the authorised operation shall be allowed subject to the following procedure and conditions, namely :-

(a) the SEZ Unit or the Developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, along with the list of specified services in terms of condition (I);

(b) on the basis of declaration made in Form A-1, an authorisation shall be issued by the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be to the SEZ Unit or the Developer, in Form A-2;

(c) the SEZ Unit or the Developer shall provide a copy of said authorisation to the provider of specified services. On the basis of the said authorisation, the service provider shall provide the specified services to the SEZ Unit or the Developer without payment of service tax;"

117. A simple reading of the above notifications makes it abundantly clear that the exemption has been provided under two different mechanisms, i.e. RCM payment and refund mechanism or *ab initio* exemption, with specific conditions and safeguards for different types of services received by the SEZ unit, e.g. wholly consumed services, partially consumed services, service used for authorized operations, etc. Separate procedures have been categorically prescribed for following either of these two routes for the purpose of availing exemption. Since there is no dispute regarding the services wholly consumed by the said assessee within the SEZ unit for their authorized operations, the said assessee could have opted for *ab initio* exemption route by filing proper declarations duly verified by the Specified Officer of the SEZ in addition to the specified list of documents and information. However, admittedly, the said assessee has not followed any such procedures or submitted any documents, information or declaration, nor got any certification/verification done by the Specified Officer of SEZ, while availing such *ab initio* exemption.

observance of the conditions of the aforesaid notifications and thereby made mis-declarion while filing periodical returns. Such deliberate non-payment of tax, willful mis-declaration and suppression of material facts from the revenue is in utter disregard to the requirements of law and breach of trust deposed on them, and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime, and cannot have been done but for their intent to evade payment of applicable tax. It also appears that the said assessee has not made payment of service tax. Moreover in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the said assessee to the department and therefore, the department would come to know about such transgression only during audit or preventive/other checks. In this case there is no dispute as regards the taxability of service tax on the services received by the said assessee from M/s Oxygen Bioresearch, M/s Reaction Biology Corp and M/s Piramal Enterprises, besides from the rent-a-cab operator, and the said assessee has not paid service tax on these services during the relevant period. However the quantum of income received on provisions of these services has been suppressed/concealed from the department, deliberately, consciously and purposefully to evade payment of tax. In the case *of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241,* it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In *2009 (23) STT 275, in case of Lalit Enterprises v CST Chennai*, it is held that extended period can be invoked when department comes to know of service charges received by appellant on verification of his accounts. Therefore, I find that all essential ingredients exist in this case to invoke the extended period under proviso to Section 73 of the Finance Act, 1994 to demand the service tax not paid. And for the same reasons, the said assessee is also liable for penalty under the provisions of Section 78 of the Finance Act, 1994, besides their liability to pay interest at the applicable rates under Section 75 of the Finance Act, 1994.

122. Therefore, from the factual matrix and the question of law as discussed in the foregoing paras, I pass the following order: -

ORDER

(i) I drop the demand of **Rs. 18,34,11,718/-** made towards service tax leviable on technical testing and analysis services provided by M/s Oxygen Bio Research Pvt. Ltd. [now M/s. Piramal Enterprises Ltd.], Ahmedabad to their foreign clients during the period from April-2013 to May-2015, as discussed in Para-12 of SCN 22.10.2018;

(ii) I confirm the demand of service tax amounting to **Rs. 4,67,50,637/-** [***Rupees Four Crores Sixty Seven Lakhs Fifty Thousand Six Hundred and Thirty Seven only***] from M/s Oxygen Bio Research Pvt. Ltd. [*now M/s. Piramal Enterprises Ltd.],* Ahmedabad leviable on the taxable value of Rs. 37,82,41,396/- involved on the services received from their foreign associates during the FY 2013-14 to May-2015, as tabulated in Para-22 of the SCN dated 22.10.2018, under Section 73(2) of the Finance Act, 1994;

(iii) I confirm the demand of service tax amounting to **Rs. 6,84,621/-** [***Rupees Six Lakhs Eighty Four Thousand Six Hundred Twenty One only***] from M/s Oxygen Bio Research Pvt. Ltd. [*now M/s. Piramal Enterprises Ltd.],* Ahmedabad leviable on the taxable value of Rs. 1,30,84,928/- involved on the rent-a-cab service availed during the FYs 2013-14 and 2014-15, as tabulated in Para-29 of the SCN dated 22.10.2018, under Section 73(2) of the Finance Act, 1994;

(iv) I order that M/s. Oxygen Bio Research Pvt. Ltd. [*now M/s. Piramal Enterprises Ltd.],* Ahmedabad should pay interest at the applicable rates under Section 75 of the Finance Act, 1994 on the above confirmed demands of service tax as per Para 122 (ii) and (iii) above;

(v) I also impose a penalty of **Rs. 4,74,35,258/-** [***Rupees Four Crores Seventy Four Lakhs Thirty Five Thousand Two Hundred Fifty Eight only***] on M/s. Oxygen Bio Research Pvt. Ltd. [*now M/s. Piramal Enterprises Ltd.],* Ahmedabad under Section 78 of the Finance Act, 1994.

(vi) The amount of penalty imposed under Section 78 of the Finance Act, 1994 as above shall be reduced to twenty-five percent of the service tax determined under Section 73(2) as per Para 122 (ii) and (iii) above, provided such reduced penalty is also paid along with the service tax so determined and the interest as applicable, within a period of thirty days of the date of receipt of this order;

(vii) Show-Cause-Notice F.No. VI/1(b)CTA/Tech-32/SCN/Oxygen/2018-19 dated 22.10.2018 issued to the said assessee is accordingly disposed off.

(AMARJEET SINGH)
COMMISSIONER
CGST & CEX, AHMEDABAD NORTH

F.NO. STC/15-58/O&A/2018
BY REGD POST AD

Date: 02.08.2021

To
M/s Oxygen Bio Research Pvt. Ltd.,
[Now Piramal Enterprises Ltd.]
18, Pharmaceutical Special Economic Zone,
Village Matoda, Taluka Sanand,
District Ahmedabad- 382213

Copy to:

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad
2. Commissioner, CGST, Audit Commissionerate, Ahmedabad
3. The Deputy Commissioner, CGST Division-IV, Ahmedabad-North
4. The Superintendent, CGST, Range-V, Division-IV, Ahmedabad North
5. Guard File.

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04.08.2021
R.R. 91-1
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