सत्यमेव जयते

प्रधान आयुक्त का कार्यालय,
Office of the Principal Commissioner,
केंद्रीय जीसटी अहमदाबाद दक्षिण आयुक्तालय
Central GST , Commissionerate- Ahmedabad South,
चौथी मंजिल, अम्बावाड़ी अहमदाबाद ३८००१५.
4th Floor, GST Bhavan, 380015

फा.सं. STC/4-03/O&A/Veeda/2017-18 **DIN- 20221164WS00009959C6**

आदेश की तारीख: Date of Order: 22.11.2022

जारी करने की तारीख: Date of Issue : 13.12.2022

द्वारा पारित /Passed by: Shri Shravan Ram , JOINT COMMISSIONER

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मूल आदेश सं./Order-In-Original No.: 42/CGST/Ahmd-South/JC/SR/2022-23

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यह प्रति उस व्यक्ति लिए (जिनके) जिसके ,को (यों) यह आदेश जारी किया गया है ,उसके (उनके) व्यक्तिगत उपयोग के लिए नि:शुल्क प्रदान की जाती है ।

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यदि कोई व्यक्ति इस आदेश से स्वयं को असंतुष्ट अनुभव करता है, तो वह इस आदेश के विरुद्ध आयुक्त ,(अपील)केन्द्रीय जीएसटी ,केन्द्रीय जीएसटी भवनअहमदाबाद ,आंबावाड़ी ,–को प्रारूप 15 **एस.टी.–4** में अपील कर सकता है । उक्त अपील पक्षकार पर आदेश तामील होने अथवा अथवा उसे डाक द्वारा प्राप्त करने की तारीख से दो माह के भीतर दाखिल की जानी चाहिए । इसपर रुपए -/2.00केवल का न्यायालय शुल्क टिकट लगा होना चाहिए ।

Any person deeming himself aggrieved by this Order may appeal against this order in Form **S.T.4** to Commissioner (Appeals), Central GST, Central GST Bhavan, Near Government Polytechnic, Ambawadi, Ahmedabad -15 within sixty days from date of its communication. The appeal should bear a court fee stamp of Rs.2.00-/ only.

उक्त अपील दो प्रतियों में प्रारुप सं .एस.टी.–4 में दाखिल की जानी चाहिए । उसपर केन्द्रीय उत्पाद शुल्क 2001 ,नियमावली (अपील)के नियम के उपबंधों के अनुसार अपीलकर्ताओं जद्वारा हस्ताक्षर किए जाने चाहिए । इसकेसाथ निम्नलिखित को संलग्न किया जाए :

The Appeal should be filed in form No. S.T.4 in duplicate. It should be filed by the appellants in accordance with provisions of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be accompanied with the following:
उक्त अपील की प्रति ।
Copy of the aforesaid appeal.

निर्णय की दो प्रतियाँ उसमें से एक उस आदेश की प्रमाणित प्रतिलिपि होनी चाहिए) जिसके विरुद्ध अपील की गई है -/2.00 अथवा उक्त आदेश की अन्य प्रति जिसपर रु (का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
Two copies of the Decision (one of which at least shall be certified copy of the order appealed against) or copy of the said Order bearing a court fee stamp of Rs. 2.00/-.

इस आदेश के विरूद्ध आयुक्त में शुल्क के (अपील)7.5% जहां शुल्क एवं जुर्माना का विवाद है अथवा जुर्माना जहां शिर्फ जुर्माना के बारे में विवाद है उसका भुकतान करके अपील की जा सकती है ।
An appeal against this order shall lie before the Commissioner (Appeal) 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."

संदर्भ/Reference : कारण बताओ सूचना फा.सं. STC/4-03/O&A/Veeda/2017-18 dated 23.1.2018, M/s Veeda Clinical Research Pvt Ltd, Shivalik Plaza-A, Ambawadi Ahmedabad.

M/s Veeda Clinical Research Pvt Ltd, Shivalik Plaza-A, Ambavadi, Ahmedabad ("the assessee" for short) were engaged in providing Event management service, Business Auxiliary service, Transport of goods by Road, Sponsorship service, Management Consultant service, Manpower recruitment agency, Online information and data, Technical Inspection and Certification, Maintenance and repair and "Scientific & Technical Consultancy Services" as defined under Section 65 of the Finance Act, 1994 during the period prior to 01.07.2012. They were registered with Service Tax Department for the above services and held Service Tax Registration No. AAACCC3633QST001. During the course of audit and verification of records, it was noticed that they had also performed the services of clinical study of drugs from their registered premises in India and sent/delivered the clinical study reports to their foreign clients through e-mail, courier or web sites. However, they did not pay Service Tax on the amount received for such activity, claiming the same to be "Export of Services".

2. Upto 30.06.2012, the services provided by the assessee was "Technical Inspection and Certification service" as defined under clause (zzi) of Section 65(105) or under "Technical Testing and analysis service" as defined under clause (zzh) of Section 65(105) of the Finance Act, 1994. However, after 01/07/2012, since there was no service wise classification due to introduction of negative list, the activity carried out by the assessee fell under the purview of "Service" as defined in Section 66B read with Section 66D, and the same is neither covered by negative list nor by any exemption notification. Further, as the service provided is performance based and actually performed in India, it appeared that the same would fall under the purview of Place of Provision Rules, 2012 introduced under Notification No. 28/2012-ST dated 20.06.2012, with effect from 01.07.2012. The present issue would be under Rule 4 of the Place of Provision Rules, 2012, according to which the place of provision of services shall be the location where the services are actually performed. It appeared that the assessee continued with the practice of not declaring the value of taxable service and not paying Service tax even after the provisions of law changed and the activity became taxable.

3. Para 5.4 of the education Guide in respect Rule-4 of Place of Provision Rule, 2012 clarifies that Technical Testing/ Inspection/Certification/Analysis of goods is a Performance Based Service Hence, the service provided by the assessee is a performance based service. Para 5.4 of the Education Guide is reproduced as follows:

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 clearing 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 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.

4. 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, in the instant case the goods i.e. drugs 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 and testing of drugs cannot be done in absence of physical possession or control of the service provider.

5. Rule 4 of Place of Provision Rule, 2012 is reproduced as under:

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

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

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

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

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

6. Thus, as per the rule 4 ibid, the place of provision is the place where the services are actually performed and in the instant case, the services are actually performed in India therefore M/s Veeda Clinical Research Pvt. Ltd was required to pay the service tax after introduction of POP Rules, 2012 w.e.f. 01.07.2012 in terms of Section 66B read with section 66D of the Finance Act, 1994.

07. As per Place of Provision Rules, 2012 and Notification No. 6/2014-ST dtd. 11 July, 2014, the service of Technical Testing & Analysis for Newly Developed Drugs is now comes under the net of Service Tax with effect from 11.10.2014 and every assessee which have providing this service have to pay the Service Tax at applicable rates from 11, July-2014 onwards.

08. The said assessee vide their letter dated 04.02.2016 submitted information in respect of Export of Service for Technical Testing and Analysis carried out for Newly developed Drugs for the period from July-2014 onwards to 31.03.2015 .

09. The Service Tax liability has been worked out on the basis of figures provided by the assessee from their Ledger for the period 2015-16 as per Annexure-A attached to the show cause notice.

The term "taxable service" has been defined under sub-clause (zzh) of clause (105) of Section 65 of the Finance Act, 1994 which reads as under:

(zzh) to any person, by a technical testing and analysis agency, in relation to technical testing and analysis;

10. Further, it appeared that the services provided to the foreign countries by performing technical testing/ analysis/ certification/inspection in India, cannot be considered as 'export services' and it is taxable in terms of Rule, 4 of POP, Rules, 2012, Therefore, no exemption from payment of service tax is available on the said services provided by the said Assessee as in this case as discussed above, the said services have been actually performed in India only.

11. Since the assessee carried out 'Service" regarding technical Testing and Analysis for the purpose chemical testing of drugs and formulations in India only and at the time of provision of the service, goods or material or immovable property were not situated outside India but actually the services i.e. technical testing and analysis were performed on the drugs in India and therefore the service cannot be considered an export of service.

12. Thus, it appeared that services provided by the service provider were actually performed in India. Hence, as per the above mentioned provisions of the said Rule 4, the services provided to their foreign clients cannot be treated as 'export of services' and taxable as per rule 4 of Place of Provision Rules, 2012. Therefore, the service provider is liable to pay service tax on such services which are actually performed in India even though the results/reports thereof were sent outside India and were used outside India. It is clear that the entire "service "in respect of technical inspection and certification is performed actually in India. They are only sending clinical reports by courier outside India. They are at best, receiving the input service of courier outside India.

13. Further, it appeared that the services provided to the foreign countries by performing "service" in respect of technical testing/analysis/inspection/certification activities & Scientific Testing Consultancy is actually performed in India, and no exemption from payment of Service Tax is available on the said services provided by the said Assessee. No technical inspection and certification was performed by the service provider abroad. They were only a recipient of service performed by Courier Company. The "service" in respect of technical testing/analysis/inspection/certification

activities are not delivered, but only the clinical reports are delivered by a courier company, which neither be attributed to Export of Services nor exempted under any other notification.

14. Thus, the assessee has provided the services valued at Rs **11,79,51,619/-** from their various clients and service tax @12.36% amounting to Rs 1,64,63,183/- (inclusive of Education cess & H E cess) for the period from 01.04.2015 to 31-03-2016 (as detailed in Annexure-A to the Show Cause Notice), is required to be demanded and recovered from them under Section 73(1) of the Finance Act, 1994.

15. Section 68 of the Finance Act, 1994, provides that every person providing taxable service shall pay service tax at the rate specified in Section 66 in such mariner and within such period as may be prescribed. Rule 6 of the Service Tax Rules, 1994 stipulates that service tax shall be paid to the credit of the Central Govt., by the 5th of the month immediately following the calendar month, in which the payments are received, towards the value of taxable services.

16. The said assessee has failed to pay service tax for the period 01.04.2015 to 31-03-2016 in respect of Newly Developed Drugs i.e. other than Old Drugs as per the provision of section 67, on the rate prescribed in Section 66B of the Act, and, therefore, contravened the said provisions of rule 6 of the Service Tax Rules. 1994.

17. Section 70 of the Finance Act, 1994, provides that every person liable to pay the service tax, shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise / Service Tax, a return in such form and in such manner and at such frequency as may be prescribed. Rule 7 of the Service Tax Rules, 1994, prescribes that every Service Provider shall submit a half-yearly return in form ST-3 or ST-3 A, as the case may be, along with a copy of the form GAR-7 challans, in triplicate for the months covered in the half-yearly return. Further sub-rule 21 thereto also states that every Service Provider shall submit the half yearly return by the 25th of the month following the particular half-year.

18. The said assessee had also failed to correctly assess the tax due on services provided by them as they have not assessed the tax on the correct value of 'consideration' in money charged and received within the provision of section 67 of the Act as discussed in the foregoing Para's, and accordingly contravened the provisions referred in the above Para.

19. From the above facts of contravention of Finance Act 1994 as amended and rules made there under, the assessee appeared to have evaded Service Tax and therefore, the Service Tax not paid is required to be demanded and recovered from them under Section 73 (1) of the Finance Act, 1994, in as much as the said assessee has contravened the following provisions:

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

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

ST-3 Returns.

20. Further, as per Section 75 ibid, every person liable to pay the tax in accordance with the provisions of Section 68, or rules made there under, who fails to credit the tax or any part thereof, to the account of the Central Government within the period prescribed, shall pay simple interest (at such rate not below ten percent and not exceeding thirty six percent per annum, as is for the time being fixed by the Central Government, by notification in the official Gazette) for the period by which such crediting of the tax or any part thereof is delayed. As the assessee has yet not paid the Service Tax of Rs. 2,61,88,870/-, they appear liable to pay interest on the same amount of Service Tax in terms of Section 75 of the Finance Act, 1994.

21. All these acts of contravention of the provisions of Section 68, 69 and 70 of the Finance Act, 1994 read with Rule 6 and 7 of Service Tax Rules, 1994 appeared to be punishable under the provisions of Section 78 of the Finance Act, 1994 as amended for wilful mis-statement; and not disclosing the value of the said taxable service provided by them before the department with an intent to evade payment of service tax as mentioned above.

22. Therefore, Show Cause Notices bearing F. No. STC/4-8/O&A/14-15 dated 13.11.2014 and F. No. STC/4-87/O&A/15-16 dated 06.04.2016 were issued to the said assessee for the period 2012-13 to 2013-14 and 2014-15 respectively, by the Commissioner, Service Tax, Ahmedabad, demanding Service tax amounting to Rs 2,37,33,426/- and Rs 61,48,065/- respectively. These two Show Cause Notices were adjudicated by the Principal Commissioner, CGST, Ahmedabad South, vide Orders-in-Original No. AHM-EXCUS-001-COM-014-015-21-22 dated 29.11.2021, upholding the Service tax demand.

23. Since the assessee continued with the practice of not paying service tax on the value of taxable service of clinical trials of drug samples and delivery of test report to their clients located outside India, another periodical Show cause notice for the period from April, 2015 to March, 2016 was issued vide F. No. STC/04-03/O&A/Veeda/2017-18 dated 28.01.2018 by the Additional Commissioner, Central GST, Ahmedabad South, proposing the following:

(a) the amount shown as received against export of Services total amounting to Rs 11,79,51,619/- charged and received by them from their client should not be considered as the value / gross amount charged and received by the service provider for actually performed "service" in terms of Section 66B of the Finance Act, 1994, in India and not towards export of Services under the provisions of Section 67 of the Finance Act, 1994.

(b) Service Tax totally amounting to Rs 1,64,63,183/- (Service tax Rs 1,61,21,089 + Education Cess Rs 47,056 + SHEC Rs 23,528 + SBC Rs 2,71,510) on the value of taxable services for the period 2015-16, should not be charged, in terms of Section 66B of the Finance Act, 1994 and demanded and recovered from them under the provisions of Section 73(1) of the Finance Act, 1994.

(c) Interest as applicable on the amount of Service tax liability of Rs 1,64,63,183/- should not be recovered from them for not making payment in time, under Section 75 of the Finance Act, 1994.

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

(e) Penalty under section 77(2) of the Finance Act, 1994 should not be imposed on them for failure to self-assess service tax liability.

DEFENCE REPLY

24. The assessee submitted reply received in this Office on 19.10.2022, denying all the allegations/observations raised in the show cause notice and stated that the show cause notice is not sustainable on the basis of the submissions made below:

25. Regarding claiming of the exemption of export of service of technical testing & analysis for old drugs as per the rules of place of provision of service they submitted that they were engaged in providing the service of technical testing & analysis service, which involve following activities.

1. Technical testing & analysis service for the old drugs domestically.
2. Technical testing & analysis service for the old drugs exports.
3. Technical testing & analysis service for the new drugs domestically.
4. Technical testing & analysis service for the new drugs exports.

For the service provided as per Sr. 1 and No. 3, they are taxable and discharged service tax regularly under the category of "technical testing and analysis", while they are claiming exemption from the service tax for the new drug vide old notification 11/2007 & new mega exemption notification No.25/2012.

26. The assessee submitted that the department has denied exemption for technical, testing & analysis service for the old drugs exports on the basis that testing of drugs cannot be done in absence of physical possession or control of the goods for carrying out the service, In this regard the assessee submitted that since the Export Rules ceased to apply, a transaction will qualify as export when it meets following requirements:

(i) The service provider is located in Taxable territory;
(ii) Service recipient is located outside India;
(iii) Service provided is a service other than in the negative list.
(iv) The Place of Provision of the service is outside India, and
(v) The payment is received in convertible foreign exchange"

27. Assessee submitted that, from the above provision due to condition of services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service or to a person acting on behalf of the provider of service, in order to provide the service; following questions may arise:

(i) Whether sample has been sent by the service recipient for the testing purpose can be termed as goods or not.

(ii) Whether it can be termed as available with the service provider at the time of providing service to the service recipient or not.

(iii) Whether instead of sending back sample to a service recipient, if it will

destroyed by the service provider or handed over to the agent of service recipient, it is amounting to goods are not present with the service provider.

28. Further, the assessee submitted that, in terms of Rule 4, a lot of activities including technical testing, inspection, analysis of goods, certification services, etc. which are dependent on the activities to be physically performed on the goods provided by the service recipient, would be taxable in India. Whatever may be sent by the service recipient are not goods, but one of the sample/molecule/or object of the diseases i.e. formula of medicine. So the assessee is not treating the sample or molecule as goods, which has normally following characteristics:

- It is movable.
- It is marketable.
- It has been available for sale.

29. In service tax provision goods has been defined as a "goods" has the meaning assigned to it in clause (7) of section 2 of the Sale of goods Act, 1930 (3 of 1930);" Hence, the assessee is able to fulfill the criteria of place of provision of service & claiming the exemption from the service as an export of service.

30. Assessee submitted that as per rule 3 place of provision of service normally the location of the recipient of service. Even in rule 4 where place of provision of performance based service has been defined where also the assessee is fulfilling the all the condition of the rule. The assessee was not in receipt of any goods physically, but on the basis of IP (formula) / sample out of goods on which testing / analysis had been carried out by as and report sent to the respective service recipient located outside India, who are ultimate beneficiary for the result/ outcome of test report. So ultimate benefit of service accrues outside India based on earlier Circular No. 111/5/2009-S.T. dated 24-2-2009, when benefit accrue outside India, the assessee is eligible for the exemption from the service tax.

31. Further the assessee has drawn attention towards the recent Advance ruling in respect of TANDUS FLOORING INDIA PVT. LTD as reported at 2014 (33) S.T.R. 33 (A.A.R.) and claimed that they have complied with the rule 6A of EOS & POPs rule & rightly claimed exemption from the service tax under the rule.

32. The assessee submitted that "Section 65(105) of the Finance Act as it stood during the relevant period defined "taxable services" to mean any service provided to and by persons specified under the various sub-clauses of that section. Section 66 of the Finance Act which was the charging section provided that Service Tax was to be levied on the value of taxable services referred to in the various sub-clauses of Section 65(105). Thus, undisputedly, the taxable event of Service Tax is the provisions of services. However Section 64 of the Finance Act provides that the Chapter relating to Service Tax extends to the whole of India except the State of Jammu and Kashmir. Therefore value of services will be taxable under Section 66 of the Finance Act only if the taxable event occurs in India i.e. only if the place of provision of service is in India. The position is that

what is not taxable need not be exempted. In other words, the services rendered by the respondent were never taxable at all. Once they were not taxable at all, there is no question of exempting them.

33. The assessee submitted that "Services" are intangible in nature and hence the place of provision of services has to be laid down by legislature or by judicial pronouncements. This proposition is supported by the decision of Hon. Supreme Court in the case of the *Bengal Immunity Company Limited -(1995) 6 STC 446 (SC)* and *20th Century Finance Corporation Limited - (2000) 119 STC 182(SC).* Further C.B.E. & C. issued a circular on 25th April, 2003 to clarify the position with regard to the export of services. The C.B.E. & C. clearly stated that Service Tax was a destination based consumption tax and therefore it was not applicable on export of services. The assessee also submitted that On the same day on which the afore stated circular was issued, the Finance Minister also made a similar clarification in the Lok Sabha with regard to the taxability of export of services. The relevant extract of his speech in the Parliament is as follows:

> *"Some Hon. Members as also some trade representatives have also expressed apprehension that the withdrawal of exemption from Service Tax arising from payments received in convertible foreign exchange could affect our export of services. I want to clarify that a Service Tax is location based. Whatever service is exported abroad whether it be through outsource computer or medical, it will, by law, be outside the proposed code of Service Tax. Therefore, there ought to be apprehension or worry in this regard."*

34. The assessee submitted that although there was no provision in the statute which laid down the place of provision of services, there were clear administrative guidelines to the effect that Service Tax will not be applicable if services are consumed outside India. It is submitted that in the absence of any statute or judicial pronouncement to the contrary, such administrative guidelines should be considered to be the applicable legal position in this regard.

35. Service Tax is a destination based consumption tax is in conformity with international practice. It has been accepted internationally in order to avoid double taxation. It has also been recognized by the judgment of the Hon'ble Supreme Court in the case of *All India Federation of Tax Practitioners v. Union of India reported in 2007 (7) S.T.R. 625.*Assessee also relied in support of the contention on following citation:

(i) 2014 (35) S.T.R. 817 (Tri. - Del.) COX & KINGS INDIA LTD.
(ii) 2014 (34) S.T.R. 554 (Bonn.) SGS INDIA PVT. LTD.
(iii) 2014 (33) S.T.R. 33 (A.A.R.) TANDUS FLOORING INDIA PVT. LTD.

36. The assessee also contended that the show cause notice covers the period from 01.04.2015 to 31.03.2016 and was issued on 28.01.2018 whereas the facts were in the knowledge of the department. Hence extended period of limitation is not applicable and suppression cannot be alleged. They also submitted that penalty cannot be imposed under Section 76 and 77 as there

was no short payment of tax. They submitted that for imposing penalty, there should be an intention to evade payment of tax. They submitted that they were under the *bonafide* belief that they are not liable for payment of service tax and hence penalty cannot be imposed under Section 76 and 77 of the Finance Act 1994. They relied upon the cases *Hindustan Steel-AIR 1970 (SC) 253, Kellner Pharmaceuticals Ltd-1985 (20) ELT.80, Pushpam Pharmaceuticals Company-1995 (78) ELT.401 (SC), Chemphar Drugs and Liniments-1989 (40) ELT.276 (SC).* They have also submitted that penalties under Section 76 and 79 cannot be imposed simultaneously and relied upon a catena of decisions. They have further submitted that the issue involved is interpretation of statutory provisions and for that reason also penalties cannot be imposed.

37. The personal hearing in the matter was held on 06.12.2016 which was attended by Shri Vipul Khandhar, CA on behalf of assessee. Thereafter the decision of the show cause notice was kept pending and was transferred to call book on the ground that in identical case, the department has filed appeal before Supreme Court of India in the case of M/s SGS India Ltd. Since the case was dismissed as withdrawn, the show cause notice has taken out for decision and fresh personal hearing was granted. Thereafter, personal hearing was again held on 05.10.2021 when Shri Vipul Khandhar, Chartered Accountant appeared in virtual hearing and submitted that they were carrying out testing of drugs on humans on the sample drug or formula sent by the service recipient. The molecules are not marketable and they are availing exemption from Customs Duty also. Another personal hearing was held by the undersigned on 18.11.2022. Shri Vipul Khandhar, Chartered Accountant, appeared before me and reiterated the written reply filed earlier.

DISCUSSION AND FINDINGS

38. I have carefully gone through the facts of the cases on record and the submissions made by the assessee. The subject show cause notice has been issued on the grounds that the assessee has not paid service tax on the taxable service in terms of Section 66B read with Section 66D read with Section 65(B)(44) of Finance Act 1994 of 'Technical Inspection and Certification service' as defined under Section 65 (105) (zzi) or Technical Testing and Analysis Service as defined under Section 65 (105) (zzh) of the Finance Act 1994.

39. I find that, upto 30.06.2012, the services provided by the assessee was covered under "Technical Inspection and certification service" as defined under clause (zzi) of Section 65(105) or under "Technical Testing and analysis service" as defined under clause (zzh) of Section 65(105) of the Finance Act, 1994. However, after amendment of Finance Act 1994 with effect from 01.07.2012, there is no service wise classification due to introduction of negative list, and the activity carried out by the assessee falls under the definition of "Service" in terms of Section 66B read with Section 66D read with Section 65(B)(44) of Finance Act, 1994, as the same is neither covered by negative list nor by any exemption notification.

40. The issue was under litigation and the assessee was served with show cause notice F. No. STC/4-50/O&A/10-11 dated 18.10.2010 by the Commissioner,

Service Tax, Ahmedabad for the period 2005-06 to 2009-10. But the matter was settled in favour of the assessee by the Hon'ble High Court by judgment in case of M/s. B. A. Research Ltd., wherein it was held that "*it is very much clear that the performance of service is not complete until the testing and analysis report is delivered to its client. In the instant case, when such reports were delivered to the clients outside India, it amounts to taxable service partly performed outside India. The performance of testing and analysis has no value unless and until the service report is delivered to its clients outside India and the same used outside India.*" Accordingly, the same was considered as Export and therefore not taxable. And the same has been accepted by the department.

41. Prior to 30.06.2012, Export of Service Rules, 2005 were in existence. However, the same has been superseded vide Notification 28/2012-ST dtd.20.06.2012 with effect from 01.07.2012 which notified Place of Provision Rules, 2012. Since the judgment in the case of B.A Research Ltd was delivered in the context of Export of Service Rules, 2005, the ratio of the same cannot be made applicable for the services provided after 01.07.2012 when Place of Provision of Service Rules 2012 was introduced.

42. I find that the activities of the assessee primarily relates to technical testing and analysis service for newly developed drugs and old drugs by way of technical testing or analysis on human participants. Earlier, such services were exempted by Serial No.7 of Notification No. 25/2012-ST dated 20.06.2012. However, the said Sr. No.7 was omitted vide Notification No.6/2014-ST dated 11.07.2014 and, therefore, the service become taxable. Sr. No.7 of Notification No.25/2012-ST read as under:

> *7. Services by way of technical testing or analysis of newly developed drugs, including vaccines and herbal remedies, on human participants by a clinical research organisation approved to conduct clinical trials by the Drug Controller General of India;*

43. The said entry No.7 of Notification No.25/2012-ST was omitted by Notification No.6/2014-ST dated 11.07.2014 as under:

> *(1) In the said notification, in the opening paragraph,–*
>
> *(i) after entry 2A, the following entry shall be inserted, namely:-*
>
> *"2B. Services provided by operators of the Common Bio-medical Waste Treatment Facility to a clinical establishment by way of treatment or disposal of bio-medical waste or the processes incidental thereto;"*
>
> *(ii) entry 7 shall be omitted;*

44. From the above, there is no doubt that exemption granted to the services by way of technical testing or analysis of newly developed drugs, including vaccines and herbal remedies, on human participants by a clinical research organization has been withdrawn and the provider of service has to pay service tax on such services provided. The assessee has not contested the taxability of the service in their reply also.

45. I also find that in respect of the service provided to domestic recipients, according to the assessee himself, service tax was being paid. But in respect of the service recipients located outside the territory of India, they claimed it as

export of service and did not pay service tax. Therefore, the taxability of service is not disputed by the assessee and the only issue to be decided is whether the service provided to overseas clients can be treated as export of service or otherwise.

46. For the service provided after 01.07.2012, the matter needs to be examined in light of the provisions of Place of Provision of Service Rules 2012 which read 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*** *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.*
>
> ***RULE 4. Place of provision of performance based services.*** *— The place of provision of following services shall be the location where the services are actually performed, namely :-*
>
> *(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service :*
>
> ***Provided*** *that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:*
>
> *[**Provided** further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair;]*
>
> *(b) services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service.*
>
> .....
>
> ***RULE 14. Order of application of rules.*** *— Notwithstanding anything stated in any rule, 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.*

47. Assessee contended that as per rule 3, place of provision of service is normally the location of the recipient of service. Even in rule 4 where place of provision of performance based service has been defined, there also the assessee is fulfilling all the conditions of the rule. The assessee was not in receipt of any goods physically, but on the basis of IP (formula) / sample out of goods on which testing / analysis had been carried out by as and report sent to

the respective service recipient located outside India, who are ultimate beneficiary for the result/ outcome of test report. So, the ultimate benefit of service accrues outside India based on earlier Circular No. 111/5/2009-S.T. dated 24-2-2009, when benefit accrue outside India, the assessee is eligible for the exemption from the service tax. Further the assessee has relied upon the advance ruling as reported at *2014 (33) S.T.R. 33 (A.A.R.) TANDUS FLOORING INDIA PVT. LTD.* and submitted that they had complied with the rule 6A of EOS & POPs rule & rightly claimed exemption from the service tax under the rule. They submitted that value of services will be taxable under Section 66 of the Finance Act only if the taxable event occurs in India i.e. only if the place of provision of service is in India.

48. In this regard, I find that, for the services to be treated as export of service post 2012, the service provided needs to be tested in terms of rule 6A of the Service Tax Rules, 1994 read with POPS Rules. As per (d) of Rule 6A(1), for service to be export of service, the place of provision of service should be outside India. Assessee has argued relying on the provisions of the POPS Rules and para 5.4.1 of the Education Guide that place of provision of the service in their case is outside India.

49. The contention of the assessee regarding the conduct of testing/analysis on drugs, is that whatever may be sent by the service recipients are not goods but one of the sample/molecules/or object i.e medical formula and hence, rule 4 of Place of Provision of Service Rules is not applicable. This contention is not justifiable in as much as even a sample or molecule is to be considered as goods and testing is being done on such sample or molecule itself. Further, it has been admitted by the assessee himself that they are importing such samples/molecules/formula and claiming exemption from Customs Duty. Therefore, it cannot be disputed that the goods/compounds supplied by the clients are not abstract material but are movable objects or things that can be touched, felt or possessed as clarified in the Education Guide 5.4.1. On analyzing the contents of the aforesaid guidance note issued by the CBEC, I find that services in the nature of 'technical testing/ inspection/ certification/ analysis of goods' is very much covered within the ambit of Rule 4 of the PPS Rules. In fact, I find that the services provided by the assessee are in the nature of research and analysis of sample/compounds/formula supplied by the clients with reference to the drug and thereafter, transferring the outcome of the research effort to the foreign based client(s). Further, I find that it cannot be disputed that the services are conducted with reference to these sample/compounds/formula supplied by the client(s) and therefore, these sample/compounds/formula are the essence for provision of these services and without which, no research/study could be performed and the intended services rendered and delivered. In view of the above, the assessee's contention is not acceptable and I hold that the services provided by the assessee are performed on the goods supplied by their foreign based clients and hence, this service activity of the assessee is covered under Rule 4 of the PPS Rules. In this regard, I find support in Final Order No. A/86090/2019 dated 12.06.2019 of Mumbai Bench of Hon'ble Tribunal in respect of *M/s Sai Life Science Ltd.*

50. I also find that the assessee has relied upon the decision in the case of *Sai Life Science Ltd-* 2016 (42) S.T.R. 882 (Tri. - Mumbai) to argue that the services provided by them should be considered as export of services. In this regard, I find the said decision has been passed without considering the provisions of Place of Provision of Service Rules, 2012 and hence, clearly

distinguishable. I also find that Mumbai Bench of Hon'ble Tribunal in respect of *M/s Sai Life Science Ltd* itself, by its Final Order No.A/86090/2019 dated 12.06.2019 - *2019 (30) G.S.T.L. J145 (Tri. - Mumbai),* held that the said decision cannot have any precedence value. Hon'ble Tribunal has held as under:

> *5.9 ....Appellants have relied upon the decisions in their own case to argue that the services provided by them should be considered as export of services. We find that the said decision has been passed without considering the provisions of Place of Provision of Service Rules. Further the decision of tribunal does not lay down any where that the said decision is in respect of DMPK Standalone services being provided by the appellant. The said decision is clearly distinguishable on this account. Further as the said decision has not even considered the Place of Provision of Service Rules, 2012 which are soul of the scheme for determination of place of provision of service, for determining whether the same is provided in taxable territory (India) or outside the taxable territory, the said decision is per in-curiam and cannot have any precedence value.*

51. The assessee also relied upon the decision in case of *Advinus Therapeutics Ltd.* in their support. From the facts of the present case I find that the assessee has conducted Technical Testing and Analysis service in respect of the sample/molecule/formula provided to them by the overseas client. Rule 4 do not put any conditions in respect of alteration or alternation of the goods provided by the service recipient. Reading anything beyond what has been provided in the rules/ statue cannot be proper interpretation put to rules. Both the decisions in the case of *Sai Life Sciences* and *Advinus Therapeutic* have proceeded mainly on the principle that taxes should not be exported. In the present case, I find that, the activities under taken by the assessee in terms of Technical Testing and Analysis service squarely fall within the scheme of Rule 4 of POPS Rules, and hence, the location of service provider shall be place of provision of service which is in India and cannot be treated as export of service in terms of Rule 6A of Service Tax Rules, 1994. Therefore, the said cases laws are not applicable in the present cases.

52. I find that the case *Cox & Kings India Ltd* relied upon by the assessee pertains to tour operator service and in the case of *SGS India Ltd* the demand was for the period from 1-7-2003 to 19-11-2003 when POPS Rules were not in force and hence, not applicable to present facts and circumstances of the case.

53. In the instant cases, it is seen that the assessee failed to declare the taxable value in their ST-3 returns in as much as they have not declared the incentives received towards the services rendered by them and thereby, indulged in suppression of the taxable value. Section 70 of the Finance Act, 1994 stipulates that every person liable to pay the service tax shall himself assess the tax due. The Government has introduced self-assessment system under a trust based regime which casts the onus of proper assessment and discharging of the service tax on the assessee. The definition of "assessment" available in Rule 2(b) of Service Tax Rules, 1994 is reproduced as under:

> *"assessment" includes self assessment of service tax by the assessee, re-assessment, provisional assessment, best judgment assessment and any order of assessment in which the tax assessed is nil; determination of the interest on the tax assessed or re-assessed.*

In the instant case, the assessee has failed to properly assess the service tax liability and also failed to reflect the correct information in the ST-3 returns. Thus, they have resorted to suppression of material facts by not reflecting the taxable income in their ST-3 returns.

54 Further, it is noticed that during the material period, the assessee has neither discharged their Service Tax liability properly nor have furnished any material information to the Department relating to provision of such taxable services, either in their ST-3 returns, or otherwise. Had the audit officers not unearthed the material facts, the short payment/ non-payment of service tax would have not seen the light of the day resulting in revenue loss to the Government. I find that the assessee has suppressed their taxable income for the above mentioned period and contravened the various provisions of Finance Act 1994 and rules made thereunder as they have failed to properly assess their Service Tax liability within the time frame as prescribed under the law despite the fact that they were in possession of relevant facts/documents/records. Thus, I find that the assessee has short-paid/ not-paid service tax by resorting to suppression of facts and contravention of the provisions of law with an intent to evade payment of tax.

55. Moreover in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the assessee to the department and therefore, the department would come to know about such non-payment of duty/service tax only during audit or preventive/other checks. In the instant case, the assessee has failed to reflect the taxable income in their ST-3 returns and have concealed such income from the department deliberately, consciously and purposefully to evade payment of service 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 vs. 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. However, in the instant case, the demand has been raised within a period of thirty months in terms of the enactment of Finance Bill, 2016, under Section 73(1). Therefore, I find that the service tax is liable to be recovered as provided for under Section 73(1) of the Finance Act, 1994 along with interest in terms of the provisions of Section 75 of the Finance Act, 1994.

56. It was contended that penalty was not imposable since the issue involves interpretation of legal provisions. In the instant case, I find that the definition of the term 'service' is unambiguous and there is no room for doubt regarding interpretation of the same. Further, the assessee was discharging service tax on the same services, provided to domestic recipients. A demand raised for the earlier period has been adjudicated upholding the Service tax demanded.

57. As such, I find that penalty under Section 76 of the Finance Act, 1994 is imposable and the case laws cited by them do not come to their rescue. They have contravened the provisions of the Finance Act, 1994 and the rules made thereunder and as such, the consequences shall automatically follow. The Hon'ble Supreme Court, in the case of *Dharmendra Textile Processors reported in 2008 (231) E.L.T. 3 (S.C.)* and the case of. *R. S. W. M. reported in 2009 (238) E.L.T. 3 (S.C* observed that the presence of malafide intention is not relevant for

imposing penalty and *mens rea* is not an essential ingredient for penalty for tax delinquency which is a civil obligation. Thus, I find that the assessee have rendered themselves liable to penalty under Section 76 of the Finance Act, 1994.

Since a penalty under Section 76 is imposable in the case of non-payment of service tax for any reason, other than the reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions or of the rules made thereunder with the intent to evade payment of service tax, I conclude that penalty under Section 76 of the Finance Act, 1994 is imposable.

58. As regards, the provisions of Section 77(2) is concerned, the same is imposable in cases where no other penalty has been provided for under the law. In the instant case, I find that for act of failure of self-assessment leading to non-payment of service tax, penalty under Section 76 is found as imposable. Therefore, the provisions of Section 77(2) would also not be applicable to the instant case. For ease of reference, the provisions of Section 77 are reproduced under:

> ***SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere.*** —
>
> *(1) Any person, -*
>
> *"(a) who is liable to pay service tax or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to a penalty which may extend to ten thousand rupees;*
>
> *(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to [ten thousand rupees];*
>
> *(c) who fails to -*
>
> *(i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or*
>
> *(ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or*
>
> *(iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry,*
>
> *shall be liable to a penalty which may extend to ten thousand rupees or two hundred rupees for everyday during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;*

(d) who is required to pay tax electronically, through internet banking, fails to pay the tax electronically, shall be liable to a penalty which may extend to ten thousand rupees;

(f) who issues invoice in accordance with the provisions of the Act or rules made thereunder, with incorrect or incomplete details or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to [ten thousand rupees].

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees.

Accordingly, I refrain from imposing penalty on the assessee under Section 77 of the Finance Act, 1994.

59. This order is issued by virtue of the Saving clause provided in section 174 of the CGST Act,2017.

60. In view of my above findings, I hereby pass the following order:

ORDER

(i) I hereby order to consider the amount of Rs 11,79,51,619/- (Rupees Eleven crore Seventy nine lakh fifty one thousand six hundred and nineteen only) charged and received by them from their clients as a consideration towards providing service as defined under Section 65B(44) of the Finance Act, 1994 and the same is not towards export of service under the provisions of Section 67 of the Finance Act, 1994;

(ii) I uphold the demand of Service Tax amounting to **Rs 1,64,63,193/-** (Rs. One crore sixty four lakh sixty three thousand one hundred and ninety three only) under Section 73(2) of the Finance Act, 1994 and order to recover the same.

(iii) Interest at the applicable rate shall be charged and recovered from the assessee in terms of the provisions of Section 75 of the Finance Act, 1994;

(iv) I hereby impose a penalty of Rs 16,46,319/-, under Section 76 of the Finance Act, 1994;

(v) I refrain from imposing any penalty under Section 77(2) of the Finance Act, 1994;

Accordingly, the Show cause notice bearing No. F.No. STC/4-03/O&A/Veeda/2017-18 dated 28.1.2018 is disposed of.

(**Shravan Ram**)
Joint Commissioner
Central Tax,
Ahmedabad South

F.No. STC/4-03/O&A/Veeda/2017-18. Date: 13.12.2022

BY R.P.A.D/ HAND DELIVERY

To
M/s Veeda Clinical Research Pvt. Ltd,
Shivalik Plaza-A, Ambavadi,
Ahmedabad.

Copy to:

1. The Principal Commissioner, Central Tax, Ahmedabad South.
2. The Assistant Commissioner, Central Tax, Division-VI, Ahmedabad South.
3. The Dy/Asstt. Commissioner, Central Tax, TAR Section, HQ, Ahmedabad South.
4. The Superintendent, Central Tax AR-IV, Div.-VI, Ahmedabad South
5. The Superintendent, Central Tax, Systems HQ, Ahmedabad South for uploading on the website
6. Guard file