आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211164SW0000717017

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1284/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad / H2697 to 4273

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-29/2021-22**
दिनाँक Date : **29.10.2021** जारी करने की तारीख Date of Issue : **10.11.2021**

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original Nos. **18/ADC/2020-21/MLM dated 19.10.2020**, passed by the Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Intas Pharmaceuticals Ltd (Formerly known as M/s. Astron Research Ltd.) Corporate House, Near Sola Road, S. G. Highway, Thaltej, Ahmedabad.

Respondent- Addional Commissioner, Central GST & Central Excise, Ahmedabad-North.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण **(सिस्टेट)** की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd **माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद** -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में **कर्तव्य मांग** (Demand) एवं **दंड** (Penalty) का 10% **पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम** पूर्व [illegible] **करोड़ रुपए** है।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* **खंड** 11D **के तहत निर्धारित राशि;**

(ii) **लिया गलत सेनवैट क्रेडिट की राशि;**

(iii) **सेनवैट क्रेडिट नियमों के नियम** 6 **के तहत देय राशि.**

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER IN APPEAL

This appeal has been filed by M/s. Intas Pharmaceuticals Ltd. (formerly known as M/s. Astron Research Ltd.), Corporate House, Near Sola Road, S.G.Highway, Thaltej, Ahmedabad -380054 (in short '*appellant*') against the OIO No: 18/ADC/2020-21/MLM dated 19.10.2020 (in short '*impugned order*') passed by the Additional Commissioner, Central GST, Ahmedabad North (in short '*the adjudicating authority*').

2. The facts of the case, in brief, are that the intelligence was gathered by Directorate General of Goods & Service Tax Intelligence (DGGSTI) to the effect that the appellant were not paying taxes on 'Scientific & Technical Consultancy' service provided to their foreign clients viz M/s. Thinq Pharma-CRO Pte Ltd Inc, Singapore; M/s. KRKA, Slovenia; M/s. Abdi Ibrahim, Turkey; M/s. Chemcial Works of Gedeon Richter Plc, Hungary etc considering the same as export of service.

2.1 As per the agreements entered with their foreign clients, it was observed that the appellant was required to conduct prescribed test & analysis on the "Drug" or "Molecule /API (Active Pharmaceuticals Ingredients) provided by their foreign clients and prepare "Dossier"/Test Report containing the detailed test conducted and finally sent it back to their respective clients. The payment for the said service was received in convertible foreign currency from their foreign clients. In the ST-3 return filed, it was noticed that the appellant treating the said activity as export of service, did not pay service tax payable from the F.Y. 2014-15 to F.Y. 2017-18 (upto June,2017).

2.2 As per Rule 3 of the Place of Provision of Service (POPS) Rules, 2012, generally the place of provision of a service shall be the location of the recipient of service. However, investigation revealed that the scientific & technical consultancy service rendered by the appellant for the purpose of chemical testing of active substances and formulations was performed in India, and at the time of provision of the service, location of the goods (active substances/API) were not outside India, hence the services cannot be considered as export of service, in terms of Rule 4 of POPS Rules, 2012 read with Rule 6A of the Service Tax Rules, 1994, though the goods were sent back to the foreign clients. From 01.07.2012, the services provided by the appellant were falling under purview of "service" defined under section 65B(44) and made taxable under section 66B r/w Section 66D of the Finance Act, 1994, as the same is neither covered by negative list nor by any exemption notification. As the service provided is performance based service and actually performed in India, the same appears to be covered under Rule 4(a) of the POPS Rules, 2012 with effect from 01.07.2012.

2.3 A Show Cause Notice (SCN for brevity) No: DGGI/AZU/Gr'E'/36-08/2019-2020 dated 16.04.2019, was issued to the appellant invoking extended period of limitation and proposing to consider the amount of Rs.10,58,55,173/- charged & received by the appellant as taxable amount for providing taxable service in terms of Section 66B of the Finance Act (F.A), 1994 read with Rule 4 (a) of POPS Rules, 2012; recovery of service tax amounting to Rs.1,41,44,222/- leviable on the value of taxable services amounting

to Rs.10,58,55,173/- for the period 01.10.2013 to 30.06.2017 under proviso to Section 73(1) of the F.A. 1994 read with Section 66B; recovery of interest on amount of Rs.1,41,44,222/- under Section 75 of the Act ibid; penalty u/s 76 for failure to pay tax; penalty u/s 77 (1) (b) for failing to keep, maintain or retain books of account and other documents and penalty u/s 78 for willful mis-statement, suppressing the facts & contravention of statutory provision with intent to evade payment of service tax, was also proposed.

2.4 The said SCN was adjudicated by the adjudicating authority vide the impugned order wherein the amount of Rs.10,58,55,173/- received against export of service was considered taxable and he confirmed the demand of service tax of Rs.1,41,44,222/- on the said value for the period 01.10.2013 to 30.06.2017, alongwith interest. Penalty u/s 76 was not imposed holding that the penalties under Section 76 & 78 are mutually exclusive and once penalty u/s 78 was imposed, penalty u/s 76 cannot be imposed. However, penalty of Rs.10,000/- under Section 77(I)(b) and equivalent penalty of Rs.1,41,44,222/- u/s 78, was imposed.

3. Aggrieved with the impugned order, the appellant preferred the present appeal mainly on following grounds:-

- The appellant owns the Intellectual Property Right (IPR) of the "Dossier" (containing technical know-how and product information of their pharmaceutical product). A company desirous of marketing a pharmaceutical product in a country has to obtain marketing authorization/product registration from the regulatory authority, for which they have to submit the dossier to the regulatory authority. The appellant charged licensing fee for granting IPR / technical know-how of the manufacturing process of a particular product. The said right to use is restricted to that particular country only & does not involve transfer of ownership of rights to the customer as the ownership remains with appellant.
- The service involves developing the manufacturing process of the product covering stages from the development of process, testing, development of dossier etc. The entire activities together can be called Scientific & Technical Consultancy services and customer makes payment on the basis of completion of various stages. Inputs are consumed during the testing/process and hence are not returned to foreign clients. The principal supply is product/process development and testing/formulation is just an ancillary activity in the contract for composite supply of service. In terms of by CBIC Circular No.118/37/2019-GST dated 11.10.2019, provisions of Section 13(3)(a) of IGST Act, do not apply separately where testing is an ancillary supply. Thus services rendered are not covered under Rule 4 of POPS Rules, 2012. They placed reliance on following case laws;
  - Sai Life Sciences Ltd- 2016 (42) STR 882
  - Swastik Tobacco Factory- 1966 AIR 1000
  - Advinus Therapautic Ltd- 2017 (51) STR 298
  - SGS India Pvt. Ltd.

- As the payment is received in foreign exchange, it should be treated as export of service in terms of Circular No.56/5/2003-ST dated 25.04.2003.
- Relied upon judgments were incorrectly ignored by adjudicating authority stating that there is no reference of POP Rules, 2012 in the said judgments.
- Nature and imposition of service tax is destination based consumption tax, as the services are consumed by foreign clients located abroad hence by all means it is export of services. Placed reliance on 2007(7) STR 625 (SC); 2014(35) STR 817 (T); 2014 (34) STR 554.
- Extended period not invokable as the unit was audited and all activities were within the knowledge of the department. The relied on Nizam Sugar factory (2006(197) ELT 465 (SC) & CBEC Circular No. 05/92-CX.4 dated 13/10/1992.
- Penalty u/s 77 & 78 not imposable as they were under bonafide belief. Reliance placed on Padmini Products-1989(43) ELT 195 (SC) & Gopal Zarda Udyog-2005(188) ELT 251 (SC). Accordingly, interest is also not chargeable u/s 75 of the F.A., 1994.

4. Personal hearing in the matter was held on 27.08.2021 through virtual mode. Shri Willingdon Christian, Advocate, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum and relied upon various case laws mentioned in written submission dated 27.08.2021.

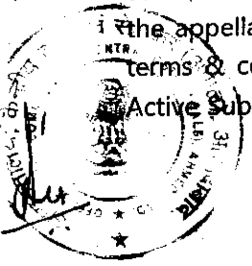
5. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as in the written submissions made at the time of personal hearing and evidences available on records. The issues to be decided under the present appeal are as under;

i. Whether the payment received by the appellant against the 'Scientific & Technical Consultancy' service rendered to their foreign clients, should be treated as taxable in terms of Section 66B of the F.A., 1994 read with Rule 4(a) of the POPS Rules,2012;

ii. Whether the demand of service tax of Rs.1,41,44,222/- charged on the value of taxable service of Rs.10,58,55,173/- for the period 01.10.2013 to 30.06.2017 is sustainable under provisions of Rule 73 (1) of the F.A. 1994 read with Section 66B and Rule 6 of the Service Tax Rules(STR),1994, alongwith applicable interest and penalty.

6. It is observed that the appellants are mainly providing services to their foreign customers/clients in relation to **(i)** Licensing of Dossier (i.e right to use the technical knowhow for obtaining marketing authorization in respective country) and **(ii)** Contract Research & Development of pharmaceutical products (i.e development of manufacturing process of pharmaceutical product) under contracts.

7. I have examined the contract dated 23.09.2006 and 21.07.2010, entered into by the appellant with KRKA, Slovenia and Abdi Ibrahim, Turkey respectively. As per the terms & conditions of the said agreements, the said foreign clients shall supply the Active Substances/Ingredients in the agreed quantities to the appellant and the entire



quantity of active substance shall be used by the appellant exclusively for developing a product with similar chemical and bio-equivalent to those of the reference product; the appellant shall carry out the development of the formulation of product and transfer the developed technology to enable industrial production of the product. Accomplishments of all studies necessary and analytical methods and valuation of methods as agreed to; all the data, documents & results, analytical methods, validation of analytical methods, specific qualitative & quantitative composition, technological solutions derived from the project will be the sole property of the clients. Payment for the same shall be made in convertible foreign currency.

7.1 The relevant extracts of the contract entered by the appellant with KRKA, Slovenia and with Abdi Ibrahim, Turkey are reproduced below;

Contract Development Agreement with KRKA Slovenia

" Whereas KRKA engages ASTRON to develop the bioequivalent product, the technology necessary to enable Krka to manufacture the products, transfer the developed technology , analytical methods for excipients... analytical methods and validation for finished product and manufacture for KRKA the agreed number of samples and prepare CTD file module 3 all as specified in Appendix 1 ..."

Appendix-1: Project development Plan

"a) KRKA will provide the API (2.0 kg), standards and samples of the originator tablets in the required amount..... ASTRON shall perform following analysis of 1 batch of API (Memantine hydrochloride):"

Product has been defined in **Article-1** as

"Product means film coated tablets containing 10 mg of memantine hydrochloride as Active Ingredients developed by ASTRON, being bioequivalent to the reference product Ebixa and having the same qualitative ingredients"

Para 2.5 of Article-2

"Transfer of the Technology to KRKA shall be deemed successful after 3 consecutive batches (min 100 000 tablets per batch) are manufactured."

Para 4.3 of Article 4

"If the product is not bio-equivalent with the original Product, ASTRON shall at its costs undertake Phase 1, 2 and 3 and develop a new tablet formulation within 3 months after the non-bioequivalent was established."

Para 4.4 of Article-4 ".... *payments shall be made by KRKA in EUROS within 30 days after receipt of ASTRON's invoice to the account as specified to KRKA by ASTRON"*

Contract Development Agreement with Abdi Ibrahim:

"WHEREAS, AI engage ASTRON to develop the product essentially similar to the currently marketed product together with the process, necessary to enable AI to manufacture the products, transfer the developed technology, analytical methods..., analytical methods and validation for the finished product and manufacture for AI the agreed number of pilot batches. Qualitative and quantitatively similar to reference product."

Article – I defines **Product** as

"Product means Injection containing Lornoxicam and which is developed by ASTRON for AI, exhibiting chemical and pharmaceutical comparable stability to the reference product, (the required amount of reference produce is provided by AI);"

Article-2 *" Transfer of the Technology shall be deemed successful, after 3 consecutive batches of each concentration are manufactured in the pilot scales. Final confirmation of successful used of the Technology transfer will be transfer to the production of AI's plant (industrial production scale)"*

Article-4 ".... *Payments shall be made by AI in euros in 30 days ....to the account of ASTRON"*

Article-5 *"Upon signature of the present Agreement, AI shall supply, or cause to be supplied to ASTRON without cost, the Active substance in the agreed quantities necessary for carrying out the Project, and all such Active substance shall be used by ASTRON exclusively for carrying out the project."*

7.2 On examining the agreements, I find that the activities carried out by the appellant involves, developing a pharmaceutical product with similar chemical & bio-equivalent to the "Active Substances/Molecule/API" provided by the client; preparing "Dossier/Test Report" on development of formulation of product, manufacturing records, analytical results, validation of analytical reports, transfer of analytical methods etc after conducting test / experiments on the "Active Substances/Molecule/API". All these activities are carried out against a consideration, received in foreign convertible currency. As the said activity neither falls under the negative list nor exempted by virtue of any notification, it shall fall under the purview of the definition of "**service**" as defined under Section 66B (44) of the F.A., 1994. The taxability of service or the charge of service tax has been specified in section 66B of the Act, which is reproduced below;

> ***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.]*

In terms of Section 66B, a service is taxable if provided within the taxable territory, and to determine the place where the services are provided or agreed to be provided, **"place of its provision"** shall be essential.

7.3 The Place of Provision of Services Rules, 2012 (POPS) have been framed in the exercise of powers conferred by sub–section (1) of Section 66C of the Act, to determine the taxing jurisdiction for a service in the context of import or export of services. The 'Place of Provision of Services Rules, 2012' has replaced the 'Export of Services, Rules, 2005' and 'Taxation of Services (Provided from outside India and received in India) Rules, 2006, therefore to examine the case on hand, POPS Rules has to be examined. In the SCN, it is alleged that at the time of provision of service, as the location of goods (Active substances/API) were in India and the services performed were in respect of these goods, therefore, in terms of Rule 4 of the POPS Rules, 2012, the said services shall be considered as actually performed in India, hence were taxable.

7.4 In order to examine the issue in proper perspective, Rule 3 & 4 of POPS Rules, 2012 are reproduced below;

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

> ***Provided** that in case 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.*

In terms of Rule 3 above, generally the place of provision of service shall be the location of the recipient of service. However, in terms of Rules 4(a), if the services are provided in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service, then place of provision of such services shall be the location where the services are actually performed. Further, para 5.4 of the Education Guide, in respect of Rule 4 of POPS Rules, 2012, clarifies that where the services are provided in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service, then such services are performance based services. 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. Such service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning, technical testing/inspection/certification/ analysis of goods, etc. Thus, 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.

7.5 The appellant on the other hand have strongly contended department's case by arguing that the goods received from the clients were consumed while carrying out the process and product development hence shall be governed by Rule 3 of the POPS Rules, 2012. In support of their argument they have placed reliance on the decision of Hon'ble Tribunal of Mumbai passed in the case of *Pr.CCE Vs M/s. Advinus Therapeutics Ltd* reported at **2017 (51) STR 298 (T).**

7.6 I have gone through the above case law, wherein the tribunal allowed refund holding that satisfaction of customer occurs upon outcome possessed by recipient and even if some of activities carried out in India, fulfillment of activity not to be considered in India. Therefore, inescapable conclusion is that location of actual performance of service is outside India and, even with special and specific provision of Rule 4 ibid, performance of service being rendered outside India hence export. Tribunal held that Rule 4(1) of POPS Rules relates to goods that require some activity to be performed without altering its form. Goods supplied to assessee subject to alteration in course of research and impugned goods, in altered or unaltered form, not sent back to service recipient. Consequently, provisions of Rule 4(1) ibid not attracted and, in terms of Rule 6A of Service Tax Rules, 1994, definition of export of services applicable thus entitling assessee to eligibility under Rule 5 of Cenvat Credit Rules, 2004, Sai Life Sciences Ltd. [**2016 (42) S.T.R. 882** (Tribunal)] contrary to law isolating expression in rule to deny general principle built into all indirect tax statutes for exempting export of services from levy.

The relevant portion of the decision is reproduced below;

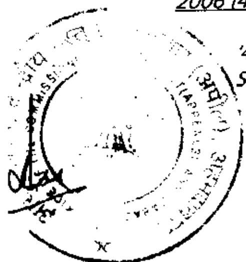
*"**13.** In the context of a catena of judgments and decisions that exports are not taxable and, with the most palpable manifestation of export of invisibles being the receipt of convertible foreign exchange from a recipient of service located outside the country, that services are taxable at the destination, 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.*** (Emphasis supplied)

__14.__ In this context, ...the Hon'ble High Court of Delhi that, in the course of dealing with other, more weighty matters in Orient Crafts Ltd. v. Union of India [2006-TIOL-271-HC-DEL-ST = 2006 (4) S.T.R. 81 (Del.)], took note of, and answered, one of the submissions thus -

> *'4. The contention of the learned Counsel for the petitioner, based on the interpretation of Section 66A ...*



5. We are not at all convinced by this argument of learned Counsel for the petitioner. The rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India is liable to service-tax. In the example given by the learned Counsel for the petitioner, there is no question on the service of haircut having been received in India.'

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 asseted. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Services Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. It is obviously not intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, ipso facto, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable. This is in consonance with the privilege of exemption afforded to export of services. The special and distinct role of Rule 4 becomes clearer.*

16. Not intended to tax the activity of altering goods supplied by the recipient of service or for repairs on goods, Rule 4(1) of Place of Provision of Services Rules, 2012 would appear, by elimination of possibilities, to relate to goods that require some activity to be performed without altering its form. The 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. (Emphasis supplied)

***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."*

7.7 As the facts in the above case law are similar to the facts of the case on hand therefore, by applying the ratio of above decision, I find that Rule 4 of the POPS Rules, 2012, shall not apply in the instant case, as the goods "API/Molecule/Active substances" received by the appellant are not returned to their foreign clients/service recipients but gets consumed during the process of developing a similar bio-equivalent product. If the goods cease to exist in the original form in which it has been

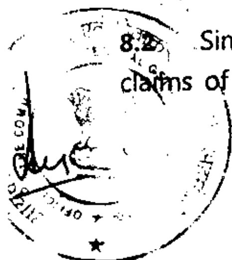
received, it cannot be construed that services provided were in respect of said goods. This is evident from the contract with KRKA, Slovenia, wherein the appellant is required to submit the reports and samples of bio-equivalent product in phase-wise manner and in the contract with Abdi Ibrahim, Turkey, the appellant has to manufacture the agreed number of pilot batches, qualitatively and quantitatively similar to the reference product. What the appellant is returning is the samples of bio-equivalent of the reference product and not the "API/Molecule/Active substances" received from the clients. As the goods gets altered in the course of research and not returned in its original form, it cannot be said that the services were rendered in respect of said goods as has been held by the Hon'ble Tribunal Mumbai in the case of Sai Life Science Ltd, above.

7.8 Moreover, the transfer of technology shall be deemed to be successful after three consecutive batches of each concentration are manufactured on pilot scale and final confirmation of successful technology transfer will be considered once the clients start using this technology for industrial production. It is obvious that the 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. As the fulfillment or completion of service is not within the taxable territories of India consequently, the provisions of Rule 4 cannot be made applicable to the instant case in light of the above decision of Hon'ble tribunal.

8. Further, I also find mention of aforesaid case laws in the SCN, which were distinguished on the ground that the decision of Hon'ble Tribunal passed in the case of Sai Life Science Ltd. has been made relying on the earlier decision of Hon'ble Bombay High Court in the case of SGS India Ltd where there is no reference to POPS Rules, 2012 as the period involved was prior to 2012 and that the issue covered in the case of Advinus Therapeutics Ltd is unsettled hence cannot be relied upon as appeals filed by the department before Hon'ble High Court of Mumbai are still pending.

8.1 I do not find merit in above argument. In the case of Sai Life Science Ltd, revenue's appeal was rejected by placing reliance on the decision of the Tribunal Mumbai 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.)]. Though in the case of SGS India Ltd, Export of Service Rules, 2005 were referred as the period was prior to 2012, however since the Export of Service Rules, 2005 were rescinded vide Place of Provision of Services Rules, 2012, any dispute for the period subsequent to June, 2012, shall be governed by POPS Rules. Consequently, in the case of M/s. Sai Life Sciences Ltd, to decide whether the activities of the party amount to export of services or not, POPS Rules, 2012 were referred. I, therefore, find that applying the ratio of the decision of Hon'ble High Court of Bombay passed in the case of *SGS India Pvt. Ltd.,* to the present appeal would not be inappropriate.

8.2 Similarly, in the case of Advinus Therapeutics Ltd, a 100% EOU, filed refund claims of accumulated Cenvat credit of tax paid on rendering 'scientific or technical



consultancy service'. The first appellate authority allowed the refund stating that the 'scientific or technical consultancy services' were exempted as the appellant while rendering these services has earned convertible foreign currency during the relevant periods. Department however preferred appeal before Hon'ble High Court on the contention that in terms of Rule 4 of Place of Provision of Services, 2012 the services rendered by the respondent do not qualify as exports as place of provision of service is in India. Though department has preferred appeal in this case, but I find that no stay was granted by judicial forum on the issue. Further, the appellant has relied on various other case laws wherein the decisions passed in the case of Sai Life Science Ltd and Advinus Theraputic Ltd, were relied upon. Therefore, in the absence of any ~~diverse~~ contrary judgment on the issue, I am left with no other option but to follow the judicial pronouncement made by Hon'ble Tribunal in the case of said party.

9. From the discussion made above, I find that in the instant case, the goods in relation to which the services are provided by the appellant gets used up and not returned to the clients in its unaltered form, also the fulfillment/completion of service is at the place of service recipient, which is outside the taxable territories. The essence of indirect taxation is that a service should be taxed in the jurisdiction of its consumption. In terms of this principle, exports are not charged to tax, as the consumption is elsewhere. Therefore, in terms of Rule 3 of the POPS Rules, 2012, the place of provision of service rendered by the appellant shall be the location of the recipient of service, which is outside the taxable territory and since consideration received is in convertible foreign exchange, hence cannot be considered taxable. In view of the settled law and above discussion, I find that the demand is not sustainable. When the demand is not legally sustainable, question of interest and penalty does not arise.

10. In view of the above, I set-aside the impugned order and allow the appeal filed by the appellant.

11. The appeal filed by the appellant stands disposed off in above terms.

29th October, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: .10.2021

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Intas Pharmaceuticals Ltd. - **Appellant**

Corporate House, Nr. Sola Road,
S.G.Highway, Thaltej,
Ahmedabad -380054

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Additional Commissioner, CGST, Ahmedabad North
4. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
5. Guard File.
6. P.A. File