आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
GST Bhavan, Ambawadi, Ahmedabad-380015
Phone: 079-26305065 - Fax: 079-26305136
E-Mail : commrappl1-cexamd@nic.in
Website : www.cgstappealahmedabad.gov.in

सत्यमेव जयते

By SPEED POST

DIN:- 20240364SW000000B2B5

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/4398/2023/ 4229 – 32
(ख)	अपील आदेश संख्याऔर दिनांक / Order-In –Appeal and date	AHM-EXCUS-002-APP-301/23-24 dated 26.03.2024
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	30.03.2024
(ङ)	Arising out of Order-In-Original No. 162/ADC/MR/2022-23 dated 28.3.2023 passed by The Additional Commissioner, CGST & Central Excise, Ahmedabad North	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	Cadila Pharmaceuticals Ltd.a Cadila Corporate Campus Sarkhej Dholka Road, Bhat Ahmedabad - 387 810

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 पूवोक्त 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 :-

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 : -

(क) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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 मे हो माल की प्रकिया के दौरान हुई हो।

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.

(ख) 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।

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.

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

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

(घ) 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।

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.

(2) 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 भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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 :-

(2) उक्तलिखित परिच्छेद 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।

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

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 notwithstanding 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 संषोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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) एके प्रति अपीलो के मामले में कर्तव्यमांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 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 सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की मांग (Duty Demanded)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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.

(6) (i) 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

M/s. Cadila Pharmaceuticals Pvt. Ltd., Cadila Corporate Campus, Sarkhej Dholka Road, Bhatt, Ahmedabad-382210 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 162/ADC/MR/2022-23 dated 28.03.2023 (in short '*impugned order*') passed by the Additional Commissioner, Central GST, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*'). The appellant were holding Service Tax Registration No. AAACC6251EST002 and were availing cenvat credit of duty paid on input services under the CCR, 2004.

2. During a service tax audit, carried out by the Central Tax officers for the period from April, 2014 to June 2017, on scrutiny of the records of the appellant certain discrepancies were noticed based on which seven Revenue Paras were raised. In the present appeal, the appellant has contested the issued involved in Revenue Para-1, which is briefly furnished below;

Revenue Para-1: Non/Short-payment of Service Tax on expenditure in foreign currency for product registration fee and other expenses made to foreign government under the category of Import of Service-RCM:

During audit, it was observed that the appellant has incurred expenditure in foreign currency, during the period from April 2014 to March 2016, on payment of product registration fees and other expenses made to foreign governments. It appeared that such Product registration fees are paid to various governments for permission to access foreign markets so that the appellant can sell their products in that particular foreign country. Such payments made to various governments under the head "registration expense/fees", is nothing but market authorization fees. The USFDA (US Food and Drug Administration) collects three kinds of fees from the appellant which includes –

(1) application review fees paid by the sponsor for each drug or biologic application submitted;
(2) establishment fees paid by manufacturers annually for each of its facilities; and
(3) Product fees paid annually for each product on the market covered by PDUFA.

Each fee is paid in lieu of a very specific service i.e. Applications review fees are paid for ascertaining whether the drug can be marketed in the US market or not; Establishment fees are paid for verification and standard maintenance of the manufacturer plant and Product fees are paid for annual renewal for market access for the products. It appears that this act on the part of governments, allowing the appellant the access to their markets in lieu of payment of a consideration squarely falls under the category of 'service' as defined under Section 65B(44) of the Finance Act, 1994. Here, the foreign governments have provided a service to the appellant and the registration fee/ licensee fees paid by the appellant is the consideration paid to the service provider.

It appears that the provision of any facility/activity by a foreign government is not covered either under the Negative List specified in Section 66D of the Act nor under the Mega Exemption Notification No.25/2012-St dated 20.62012, and is therefore,

liable to service tax under Section 66B. In this case, the service provider is located in non-taxable territory while the service recipient is situated in the taxable territory. The provision of service by the foreign governments, located in the non-taxable territory, has resulted in access to foreign markets and such fees charged by foreign governments have permitted or allowed the appellant to manufacture produce/market/sell their products in the markets of the respective countries. Such activities of the foreign governments to facilitate the business of the appellant, in return for a consideration, comes within the ambit of service as per Section 65B (44) of the Act.

Further, in terms of Rule 3 of the Place of Provision of Service Rules (POPS), 2012, the place of provision of service shall be the location of the service recipient, in this case it is the business establishment of the appellant. As the services have been rendered by the government located in the non-taxable territory; the place of provision of service is in the taxable territory and the services have been received by the appellant located in a taxable territory, hence, the appellant shall be liable to pay service tax as a recipient of service.

In the instant case, the appellant i.e. service recipient is a limited company registered with the Registrar of Companies and is falling under the category of 'body corporate' and the service providers are foreign governments, located in the non-taxable territory. Thus, in terms of the provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(i) of the Place of Provisions Rules, 2012, Rule 2(1)(d) of the Service Tax Rules, 1994 and Notification No.30/2012-ST as amended, the appellant i.e. the service recipient, was liable to pay 100% of the service tax payable in respect of such services provided by the foreign governments. Thus, it appeared that the appellant has not paid service tax amounting to Rs. 96,92,030/- during the period 2014-15 and 2015-16.

2.1 Based on the audit observations (Revenue Para: 1 to 7) a show cause notice bearing F. No. VI/1(b)/CTA/Tech-39/SCN/ Cadila/2019-20 dated 04.10.2019 was issued to the appellant proposing demand and recovery of service tax not paid/short paid by them, on account of different revenue paras discussed therein.

2.2 The said show cause notice was adjudicated vide OIO No.25/ADC/2020-21/ MLM dated 26.11.2020 wherein the adjudicating authority confirmed the service tax demands pertaining to Revenue Para-2,3,4,5,6 & 7 along with interest and penalties. However, the service tax demand of Rs. 96,92,030/- (of Revenue Para 1) along with interest and penalty was dropped.

2.3 Being aggrieved with OIO No.25/A4DC/2020-21/MLM dated 26.11.2020, the department filed an appeal before the Commissioner (Appeals), Central GST, Ahmedabad to set aside the impugned order to the extent of service tax demand of Rs.96,92,030/- along with applicable interest and penalty.

2.4 The Commissioner (Appeal), Central GST, Ahmedabad vide OIA No. AHM-EXCUS-002-APP-39/2021-22 dated 01.12.2021 set aside the impugned order to the extent of demand of service tax amounting to Rs.96,92,030/- along with applicable interest and

penalty and remanded back the matter to the adjudicating authority with a direction to examine the said issue on merits as discussed in Para-7 of the said OIA and to decide it afresh, after following the principles of natural justice. Para-7 of the said OIA reads as under;

"In view of the above discussion, I find that the adjudicating authority has neither examined the relevant statutory provisions of Service Tax law, which have been particularly introduced in the Negative List Regime as discussed in the foregoing paras, nor delivered any findings in the impugned order as regards the applicability thereof to the facts of the present case. Accordingly, I find it proper to remand back the matter to the adjudicating authority to examine the statutory provisions of service Tax law applicable during the relevant period, and the applicability thereof to the facts of the present case and decide the issue afresh following the principles of natural justice."

3. In the remand proceedings, the adjudicating authority vide impugned order confirmed the service tax amounting to Rs.96,92,030/- alongwith interest and also imposed equivalent penalty under Section 78.

4. Aggrieved with the impugned order passed by the adjudicating authority, the appellant preferred the present appeal on the grounds elaborated below :-

- The question decided in the first Order-in-Original was that there was no service rendered. This finding was not challenged in appeal by the department. The department's appeal relied upon other grounds which were not relevant and not challenging the issue of there being no service. This was specifically pointed out in cross objection filed.

- The fees charged/ paid to foreign Government / agencies is not for any service and hence the same is not taxable. Entire service was carried out by the Foreign government / agencies within respective country. Even a small part of the service was not performed in India. Therefore, it is not taxable in the hands of the Appellant.

- Such fees are in the nature of tax and there is no element of service. Each country has regulations about the dealing, manufacturing of medicaments. This is undertaken by respective Governments. For these statutory functions, fees are charged. The fees are therefore in the nature of statutory levy. When the amount is paid to Government for statutory function, it is not a service and hence not liable to tax. This position is similar to the fees for Liquor licenses which are held to be not 'service'. In this connection, reference is made to Circular No 121/40/2019- GST dated 11-10-2019.

- The service was also excluded under negative service list under Section 66D(a) upto 1-4-16 and hence not taxable. The notice covers period from 2014-15 to 2015-16. During this period the said Section read as under:

"66D The negative list shall comprise of the following services, namely:--

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere-,

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;
(iii) transport of goods or passengers; or
(iv) support services other than services covered under clauses (i) to (iii) above, provided to business entities"

- The services were received and consumed out of India. Therefore, Service tax is not payable on such services. They relied on the Tribunal decision in the case of Cox & Kings India ltd., Travel Corporation of India ltd. Swagatam Tours Pvt. Ltd. vs CST, New Delhi reported in 2013 (12) TMI 1024 - CESTAT New Delhi = 2014 {35) STR 817 {Tri. - Del.). Appeal against this decision is dismissed on ground of delay - refer 2015 (7) TMI 1211 - SC ORDER - Commissioner Vs Cox & Kings India Ltd.

- The CBEC vide Circular No 89/7/2006 ST dated 18-12-06 had clarified that fee collected by sovereign/public authorities while performing statutory functions/duties under the provision of law would not be exigible to Service tax. Said circular reiterated an established principle that payment/fee levied and collected by Government authorities under the mandate of a statute are in the nature of compulsory levy and cannot be treated as provision of any service (by such Government authority) to any person/ entity for a consideration.

- The term "support services" in Section 66D(a)(iv) was omitted and replaced by "any service" vide the Finance Act, 2015 and corresponding amendments to Rule 2(1)(d)(i)(E) of the Service Tax Rules, 1994 (vide Notification No. 05/2015- S.T. dated March 01, 2015) and Clause (I)(A)(iv)(C) and S. No. 6 of Table of Notification No. 30/2012 - S.T. dated June 20, 2012 (vide Notification No. 07/2015 - S.T. dated March 01, 2015) were also undertaken. Consequent to this, both the amendments were brought into force from April 01, 2016 through Notification No. 17/2016 - S.T. dated March 01, 2016 and Notification No. 16/2016 - S.T dated March 01, 2016 respectively. The impact of the aforesaid amendment has been that all the services provided by the Government/Local Authority are taxable w.e.f April 01, 2016 unless specifically excluded, whereas in the case of the Appellant the alleged demand is for the prior period from April 2014 to March 2016, where the amendment to the term 'support services' was not carried out. Accordingly, there was per se no service, which was rendered pertaining to the production registration and other fees paid to the foreign government. To clarify the scope of the amendment, Circular No. 192/02/2016 - Service Tax dated April 13, 2016 came to be issued which provided inter alia that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service Tax. It further provides that it is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) forgetting a service in return (i.e., as a quid pro quo for the service received), it has to be regarded as a consideration for that service and taxable irrespective of by what name such payment is called. Further it provided that circular No. 89/7/2006-Service Tax dated December 18, 2006 was no longer valid.

- It is settled law, when demand itself is not sustainable, there can be no imposition of interest and penalty. Reliance placed on Karnataka High Court in the case of

Commisisoner of Central Excise, Bangalore Vs. Bill Forge Pvt. Ltd. , 2012 (279) E.L.T. 209 (Kar.); Supreme Court in the case of Pratibha Processors vs Union of India [1996 (88) ELT 12 (SC).

- There is no mens rea on our part to avoid payment of any tax. Reliance placed on the Tribunal decision in the case of Smitha Shetty Vs CCE [2004 (156) ELT 84] which was approved by the High Court in the case of CCE Vs Sunitha Shetty [2004 (174) ELT 313] wherein it was held that no penalty should be levied where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. It is submitted that there was no intention on behalf of the Appellant to deliberately not pay the Service Tax, as in the Appellant's case, the same is any way revenue netural. In such circumstances, the imposition of any penalty would be clearly unsustainable. The Appellant wishes to refer to the decision of the Honourable Supreme Court in Tamil Nadu Housing Board Vs. CCE [1994(74) ELT 9 (SC)],

- The period of demand is from April 2014 to March 2016 and the show cause notice is dated 4-10-19. The entire demand is therefore beyond the normal period of limitation. It is submitted that in any case, we would be entitled to full credit of the service tax, if paid. The situation is revenue neutral. Clearly therefore, as a bondafide assesse there was no intention to evade tax. Therefore, the extended period is not available to department. Even otherwise during material period, the negative list of service clearly excluded such Government services. We were therefore under bona fide belief as to non-taxability of such
services. Our conduct of subsequent payment from 1-4-16 also supports our belief. The matter is directly covered by Tribunal decision in the case of M/S Ahlcon Parenterals India Ltd. VS CCE, Jaipur-I – 2017 (8) TMI 1175 - CESTAT NEW DELHI.

5. Personal hearing in the appeal matter was granted on 13.03.2024. Shri Prakashkumar Mehta, Vice President and Shri Jayraj Solanki (Manger-Indirect Taxation) both appeared for personal hearing on behalf of the appellant. They reiterated the contents of the written submission. Further they informed that CESTAT has decided their appeal against the remanded order. They stated that they will submit the copy of CESTAT order by email.

5.1 The appellant via e-mail submitted the CESTAT Final Order No.11758/2023 dated 23.08.2023. The said order is the outcome of the appeal filed by the appellant against OIA No. AHM-EXCUS-002-APP-39/2021-22 dated 01.12.2021. In the appeal filed before hon'ble Tribunal they contended that the adjudicating authority vide OIO dated 26.11.2020 clearly held that the fees paid to USFDA is not against any service on the grounds that it is the statutory fees paid to the Government of USA therefore no service is involved, hence dropped the demand. They argued that in appeal against the said OIO, revenue before the Commissioner(A) never challenged the issue whether the activity is service or otherwise. Hence, the OIA remanding the matter is not legal. Hon'ble Tribunal of Ahmedabad bench however dismissed the appellant's appeal on the findings that the whether an activity is service or otherwise depends on the issue whether the USFDA should be treated as Government in terms of 'Negative List' under Section 65B(37). Therefore, the activity is service or otherwise is a consequential to the decision, whether the service

provider to the government or other than the government. Hon'ble Tribunal did not agree with the appellant and upheld the OIA dated 01.12.2021 stating that the decision of the activity as service has not attained finality as per said OIO.

6. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of **Rs.96,92,030/-** against the appellant along with interest and penalty, in the facts and circumstance of the case is legal and proper or otherwise. The demand pertains to the period **F.Y 2014-15 & 2015-16.**

6.1 The adjudicating authority in the impugned order has held that the various fees such as Product Registration fees, License fees, Inspection fees, shown in the financial records of the appellant is a consideration paid by the appellant to foreign governments for providing the appellant the access and market their products in foreign markets. The foreign governments have allowed or permitted the appellant to access their markets, in return for a consideration, and therefore the appellant has received a service as defined in Section 65B(44) of the Act, leviable to Service tax in terms of Section 66B of the Finance Act, 1994, unless specifically exempted under the Negative List under Section 66D of the Finance Act, 1994 or the Mega Exemption Notification No. 25/2012-ST dated 20.6.2012. It was also held that the any facility/activity by a Foreign Government is not covered either under the Negative List specified in Section 66D of the Act nor under the Mega Exemption Notification No.25/2012-St dated 20.6.2012, and is therefore, liable to service tax under Section 66B. It was held that in this case, the service provider is located in the non-taxable territory while the service recipient is situated in the taxable territory. The provision of service by the foreign governments, located in the non-taxable territory, has resulted in access to foreign markets and such fees charged by foreign governments have permitted or allowed the appellant to manufacture/ produce/ market /sell their products in the markets of the respective countries. Such activities of the foreign governments insofar as they facilitate the business of the appellant, in return for a consideration, comes within the ambit of service as per Section 65B(44) of the Act. Further, it also held that since the taxable service was rendered by a foreign government to the appellant located in the taxable territory, therefore, in terms of Rule 3 of the POPS Rules, the place of provision of service shall be the location of the service receiver, in this case, it is the location of the business establishment of the appellant. Hence, the appellant will be liable to pay service tax in terms of Section 68(2) of the F.A., 1994, as a recipient of service, as the services have been rendered by the government located in the non-taxable territory. It was also held that in terms of Notification No.30/2012-ST and Rule 2(1)(d) of the Service Tax Rules, the 100% liability to pay tax was on the appellant being a body corporate and recipient of the service.

6.2 The appellant however claim that the fees charged/ paid to foreign Government / agencies is not for any service hence not taxable as the entire service was carried out by the foreign government / agencies within their respective country i.e. out the taxable territory of India, at their end. They also claim that such services are covered in the negative list, hence no tax liability arises.

6.3 To examine their above claim relevant provisions needs to be examined. In terms of Section 66B, a service is taxable only when, inter alia, it is provided (or agreed to be provided) in the taxable territory. Thus, the taxability of a service will be determined based on the place of its provision. For determining the taxability of a service, the place of provision of the service needs to be examined. Whether the place of provision in taxable territory? If yes, then tax will be payable. If not, then tax will not be payable. If the provider is 'located' in the taxable territory then he will pay the tax. If not, then the service receiver located in taxable territory will be liable to pay tax on reverse charge basis. Further, is the service receiver an individual or government and whether the services are exempted, if not then the service recipient is liable to pay tax.

6.4 In the instant case, the appellant had incurred expenditure in foreign currency to foreign governments. The US FDA (US Food & Drug Administration) and other foreign governments have charged fees namely product registration fees, license fees and inspection fees, as consideration and in return have permitted the appellant to manufacture/produce/market/sell their products in the market of such country. Such activity carried out by foreign government for appellant against a consideration is covered within the scope of term 'service' defined in Section 66B (44) of the F.A. 1994. I find that the statutory functions carried out by the government are listed in 'negative list' defined in Section 66D. During the relevant period the said Section read as under:

> "66D The negative list shall comprise of the following services, namely:--
>
> *(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere-,*
>
> *(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;*
>
> *(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;*
>
> *(iii) transport of goods or passengers; or*
>
> *(iv) support services other than services covered under clauses (i) to (iii) above, provided to business entities"*

6.5 The term '**government**' is also defined in clause (26A) of Section 65B of the Act as;

> *['(26A) "Government" means the Departments of the Central Government, a State Government and its Departments and a Union territory and its Departments, but shall not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with article 150 of the Constitution or the rules made thereunder;';]*

The terms government means Central Government, State Government, Union Territories and its department. There is no mention of foreign government. As the foreign government does not fall within the scope of the definition of the term 'government', I find that any activity of foreign government shall remain outside the purview of negative list. Hence, the appellant's claim that the activity undertaken by respective foreign governments were statutory functions hence not a service being covered under negative list, is not entertainable.

6.6 Once it is established that the activity of foreign government is a service, then the next question arises is whether the service is taxable or not. Any service which is not covered under negative list is a taxable service including declared services. The terms '**taxable service**' is defined in clause (51) of Section 65B, as any service on which service

tax is leviable under Section 66B. In terms of Section 66B, 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. The term '**taxable territory**' is defined in clause (52) of Section 65B as the territory to which the provisions of this Chapter apply. In terms of Section 64, this Chapter extends to the whole of India except the State of Jammu and Kashmir. Further, the term 'person' is also defined in clause (37) as;

*(37) "**person**" includes,—*
(i) an individual,
(ii) a Hindu Undivided Family,
(iii) a company,
(iv) a society,
(v) a limited liability partnership,
(vi) a firm,
(vii) an association of persons or body of individuals, whether incorporated or not,
(viii) Government,
(ix) a local authority, or
(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

Thus, service tax shall be leviable if a taxable service is rendered within the taxable territory by one person to another against a consideration.

6.7 The appellant has contended that the service in the instant case was rendered outside the taxable territory hence not taxable. It is observed that clause (35) of Section 65B, defines the term "non-taxable territory" which means the territory which is outside the taxable territory i.e. whole of India except the State of Jammu and Kashmir. So, if the service provider located in non-taxable territory renders the services to service recipient in taxable territory, then such services are taxable. But to identify the taxing jurisdiction, The 'Place of Provision of Services Rules, 2012' were introduced. These rules are primarily meant for persons who deal in cross-border services. In terms of Rule 3 of the said Rules, the place of provision of a service shall be the location of the recipient of service. Relevant Rules is reproduced below;

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"(Inserted vide Notification 46/2012- Service Tax) 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.

In the instant case, I find that the service was rendered by the foreign government to the appellant who are located in taxable territory. Therefore, in terms of Rule 3 of POPS Rules, 2012, the place of provision shall be the location of appellant which is a taxable territory.

6.8 Further, in terms of Rule 2(1)(d) of the Service Tax Rules,1994, in respect of the taxable services notified under sub-section (2) of Section 68 of the Act, any taxable service other than online information and database access or retrieval services (Inserted vide Notification 48/2016-Service Tax) provided or agreed to be provided by any person which

is located in a non-taxable territory and received by any person located in the taxable territory, the recipient of such service shall be liable to pay service tax. Also, in terms of Notification No.30/2012-ST dated 20.6.2012, the person receiving the service is liable to pay service tax under reverse charge mechanism, "in respect of any taxable service provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory". The extent of tax payable is specified at Sr. No. 10 of the table in para 2(B)(II) which states that the recipient shall be liable to pay 100% of the tax liability. So, in terms of above provisions, I find that the liability to pay entire tax shall be on the appellant, being a recipient of service.

7. Another argument put forth by the appellant is that the finding of the OIO dated 26.11.2020 was not challenged in departmental appeal hence such issue cannot be re-adjudicated in remand proceedings. I find that in the departmental appeal filed before the then Commissioner(A), the matter was remanded vide OIA dated 01.12.2021 and the OIO dated 26.11.2020 was set-aside. Therefore, the impugned order re-examining the issue whether the activity is a service and taxable or not, is as per law and in concurrence with the directions issued by the Commissioner(A). Further, it is also a fact on record that the appellant's appeal challenging the aforesaid OIA was dismissed by Hon'ble Tribunal wherein it was observed that the OIA was sustainable but the appeal has no substance.

7.1 Further, the appellant has relied on the Tribunal decision passed in the case of Cox & Kings India ltd., Travel Corporation of India ltd. Swagatam Tours Pvt. Ltd. vs CST, New Delhi reported in 2013 (12) TMI 1024 - CESTAT New Delhi. I find that the said decision is not squarely applicable in the instant case as it dealt with the provisions prior to negative list. Similarly, I find that Circular No. 192/02/2016 - Service Tax dated April 13, 2016 is also not applicable to the present case as it clarifies that the activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service Tax. In the present case, the service provider is a foreign government located outside the taxable territory hence shall remain outside the purview of the definition of term 'government' or 'local authority' defined in the Act.

8. In light of above discussion, I find that the service provider i.e. the foreign governments located outside the taxable territory shall not be covered under negative list. Therefore, the appellant being recipient of service and having the location at the taxable territory shall be liable to pay 100 % service tax under Reverse Charge Mechanism (RCM). I, therefore, uphold the service tax demand of **Rs.96,92,030/-.**

9. When the demand sustains there is no escape from the interest liability and the same is also recoverable.

10. Regarding the imposition of penalty under Section 78, the appellant has claimed that non-payment of tax was under a bonafide belief that the payment of fees made to the foreign government is a fee and not a consideration against a service hence not taxable. I find it is evident that the appellant had admittedly not disclosed the amount recovered. Further there was nothing on record produced or referred to by the appellant substantiating the element of bonafide in the correct applicability of Service Tax. There was no evidence on record which suggest that the department was made aware

about the difficulties in understanding the levy and payment of service Tax regarding the Impugned services. Further, it was the self-assessment procedure by virtue of which the appellant was required to assess the taxability of impugned services vis-a-vis the legal provisions. Hence, it was imperative on the part of the appellant to ensure correct interpretation and application of legal provisions in the case. The evasion of Service Tax by the appellant detected by the department does not automatically construe to be arising out of bonafide element. All this clearly points out the intention of the appellant not to discharge their service tax liability. Hence, the appellant had contravened the said provisions with the intention not to pay Service Tax at the appropriate time. I, therefore, find that the imposition of penalty under Section 78 is also justifiable as it provides penalty for suppressing the value of taxable services. Hon'ble Supreme Court in case of *Union of India* v/s *Dharamendra Textile Processors* reported in [2008 (231) E.L.T. 3 (S.C.)], considered such provision and came to the conclusion that the section provides for a mandatory penalty and leaves no scope of discretion for imposing lesser penalty. Therefore, the appellant is also liable for equivalent penalty of Rs. 96,92,030/- imposed under Section 78.

11. In view of the above discussion and findings, the impugned order is upheld.

12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.

(ज्ञानचंद जैन)
आयुक्त(अपील्स)
Date: 26.03.2024

Attested

अधीक्षक (अपील्स)
केंद्रीय जी. एस. टी, अहमदाबाद

By RPAD/SPEED POST

To,
M/s. Cadila Pharmaceuticals Pvt. Ltd., - **Appellant**
Cadila Corporate Campus,
Sarkhej Dholka Road, Bhatt,
Ahmedabad-382210

The Additional Commissioner - **Respondent**
CGST & Central Excise,
Ahmedabad North

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (System), CGST, Appeals, Ahmedabad. (For uploading the OIA)
4. Guard File.