केंद्रीय कर आयुक्त (अपील)
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
सत्यमेव जयते केंद्रीय कर शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी अहमदाबाद-380015 Ambavadi, Ahmedabad-380015
079-26305065 टेलेफैक्स 079 - 26305136

क फाइल संख्या : File No : **V2(ST)0255/A-II/2016-17** /10016 to 10020

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-001-APP-116-17-18**

दिनाँक Date :25-9-2017 जारी करने की तारीख Date of Issue 23-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **AHM-SVTAX-000-ADC-29-2016-17** Dated **19.12.2016** **Issued by ADC STC,** Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

M/s. Veeda Clinical ResearchPvt Ltd
Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:–
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद–380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar,Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of

crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त,, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA)(उसमें से प्रमाणित प्रति होगी) और अपर
आयुक्त, सहायक / उप आयुक्त अथवा A2l9k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है –

(i) धारा 11 डी के अंतर्गत निर्धारित रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇨ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

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.

⇨ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, 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।

4(1) 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 Veeda Clinical Research P Ltd, Shivalik Plaza-A, Near IIM, Ambawadi, Ahmedabad 380 015 (henceforth, *"appellant"*) has filed the present appeal against the Order-in-Original No.AHM-SVTAX-000-ADC-29-2016-17 dated 19.12.2016 (henceforth, *"impugned order"*) passed by the Additional Commissioner, Service Tax, Ahmedabad (henceforth, *"adjudicating authority"*).

2. Briefly stated, the facts of the case are that a show cause notice was issued to the appellant on 6.4.2016 for recovery of service tax not paid on clinical testing of drugs for the foreign clients. It was alleged that the appellant's activity of clinical testing of drugs amounted to provision of 'service' in terms of section 65B(44) of the Finance Act, 1944, appellant was liable to pay the service tax of Rs.61,48,065/- for the year 2014-15. This show cause notice was in fact a periodic notice issued in terms of section 73(1A) of the Finance Act, 1944. The appellant was considering the said activity as 'export of service' and hence not paying the applicable service tax. The show cause notice was adjudicated vide impugned order and service tax of Rs.61,48,065/- was ordered to be recovered alongwith interest. Penalties under sections 76 and 77 were also imposed. The appellant has felt aggrieved with the impugned order and hence the present appeal.

3. Grounds of appeal, in very brief, are as follows-

3.1 As per appellant, rule 4 of the Place of Provision of Services Rules, 2012 (henceforth, "POPS rules") applied in the impugned order for determining the place of provision of service is not applicable; that said rule is applicable where services are provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service; that sample drugs received for testing are not 'goods'; that rule 3 should be applied according to which place of provision of service is the location of recipient of service.

3.2 The appellant has relied upon following case laws-

- Cox & Kings India Ltd v. Commr. of Service Tax, New Delhi [2014(35) STR 817 (Trib.-Del.)]
- Commr of Service Tax, Mumbai-II v. SGS India P Ltd [2014(34) STR 554 (Bom.)]
- Tandus Flooring India P Ltd v. Commr of Service Tax, Bangalore [2014(33) STR (AAR)]
- CCE v. Sai Life Sciences Ltd [2016(42) STR 882 (Trib.-Mum)]

- Pr. Commr. of Central Excise v. Advinus Therapeutics Ltd, Pune [2016-TIOL-3138-CESTAT-Mum) = 2017(51) STR 298(Trib.-Mumbai)]

3.3 According to appellant, entire demand is time barred and penalties cannot be imposed under sections 76 and 77 of the Finance Act, 1994.

4. A personal hearing was held on 7.9.2017, wherein Shri Vipul Khandhar, Chartered Accountant represented the appellant and reiterated the grounds of appeal. He also gave additional written submissions and citations in case of Sai Life-sciences Ltd and in case of Advinus Therapeutics Ltd referred in para 3.2 above.

5. I have carefully gone through the appeal papers. Non-payment of service tax on clinical testing of drugs by the appellant for his foreign clients is the issue involved. Appellant receives sample drugs, performs testing in his premises, prepares reports and delivers to the foreign clients by e-mail, courier, etc. According to appellant, this is export of services. Department's stand is that place of provision of service being in India, it is not export of services and hence, applicable service tax is payable. Appellant's counter is that place of provision of service is outside India as rule 3 of the POPS rules applies in the matter and not rule 4 applied in the impugned order. Thus, the issue boils down to the determination of place of provision of service in terms of POPS rules.

6. Since application of rule 3 and 4 of POPS rules is under dispute, it would be proper to reproduce the rules verbatim for quick reference -

> **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.
>
> **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.

6.1 Clearly, rule 3 is a default rule and according to this rule, the place of provision of a service shall be the location of the recipient of service. Rule 4 is a specific rule to determine the place of provision of performance based services. Further, as per clause (a) of this rule, 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, is one of the performance based services where rule 4 is applicable.

7. The relevant fact of the matter is that appellant conducts clinical testing of drug samples received from foreign based clients and testing/analysis reports are delivered to the clients. It is obvious that testing results in consumption of the drug samples and results of testing are conveyed to the clients. This is very distinct from the case where some goods are received for testing and same goods are returned back to the recipient after conducting the required testing or performing some other service on the goods. The decision of Hon'ble Mumbai Tribunal in the case of Pr. Commissioner of C.Ex., Pune-I v. Advinus Therapeutics Ltd is very much applicable in the present situation where Hon'ble Tribunal has enunciated that rule 4 ibid is intended to be resorted when services are rendered on goods without altering its form in which it was made available to the service provider. It was added that 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. Hon'ble Tribunal has clearly held in this case that 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. Paras 16, 17 and 18 of the Tribunal's decision are being reproduced here-in-below for ease of reference-

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

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

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

7.1 Earlier, the same Tribunal, in the case of Commissioner of C.Ex., Pune v. Sai Life Sciences Ltd [2016(42) STR 882 (Trib.-Mum)] had rejected the department's appeal by holding that service tax was a destination based tax and services which are received abroad and payment was remitted in foreign exchange are covered in export of services. The head-note of the citation as extracted below sums up the decision-

> Export of services - Refund - Unutilized/Accumulated Cenvat credit - Scientific and Technical Consultancy Service - Refund rejected on ground that since performance of service was within country, same not amounting to export of service - *HELD :* Appellant offering research and development expertise in new compounds of pharmaceutical products - Undisputedly some chemicals for research provided by service recipient, services provided are not in relation to these materials to invoke bar in terms of Rule 4 of Place of Provisions of Services Rules, 2012 - Settled law that Service Tax being a destination based tax, services which are received abroad and payment of which remitted in foreign exchange, are covered in export of services - Instant case, being covered under aforesaid settled law, refund of accumulated credit not deniable - Rule 4 ibid - Rule 5 of Cenvat Credit Rules, 2004.

8. Therefore, relying on the aforesaid decisions of Hon'ble Tribunal, I find that the place of provision of service is outside India and no tax liability can be fastened on the appellant on the consideration received against provision of such a service. Further, since tax demand has failed to sustain, there is no reason to charge interest or impose penalties.

9. Accordingly, appeal is allowed.

10. 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.

(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)

Date: 25.9.2017

Attested
S. Hudda
(Sanwarmal Hudda)
Superintendent
Central Tax (Appeals), Ahmedabad

By R.P.A.D.
To,
M/s Veeda Clinical Research P Ltd,
Shivalik Plaza-A, Near IIM,
Ambawadi, Ahmedabad 380 015

Copy to:
1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad -South.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax, Division-VI, Ahmedabad South.
5. Guard File.
6. P.A.