IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No: ST/50872/2014-CU[DB]

(Arising out of Order-in-Original No. 27-29/COMMR./NOIDA/2013-14 dated 12/12/2013 passed by Commissioner of Central Excise & Service Tax, Noida)

M/s Jubilant Chemsys Ltd. **Appellant**

Vs.

Commissioner of Central Excise& Service Tax, Noida **Respondent**

Appearance:

Shri Devinder Sharma (Advocate) for Appellant
Shri Pawan Kumar Singh (Supdt.) AR for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 10/10/2017
Date of Decision : 10/10/2017

FINAL ORDER NO. – 70759/2018

Per: Anil Choudhary

The issue in this, appeal is whether the appellant - assessee M/s Jubilant Chemsys Ltd. have exported their service and received convertible foreign exchange as required under the Export of Service Rules. The details of the SCN, period involved and the amount in dispute is as follows:-

Sl. No.	Date of SCN	Period covered	Service Tax (Rs.)	Penalty (Rs.)	Total (S Tax + penalty)
1.	09/03/2011	April 2007 to March 2010	1,22,79,345/-	1,22,79,345/- (Section 78)	2,45,58,690/-
2.	19/10/2011	April 2010 to March 2011	1,49,36,307/-	74,68,154/- (Section 76)	2,24,04,461/-
3.	18/09/2012	April 2011 to	2,01,56,148/-	41,46,372/-	2,43,02,520/-

		March 2012		(Section 76)	
	Total		**4,73,71,800/-**	**2,38,93,871/-**	**7,12,65,671/-**
	Service Tax Paid for normal period of limitation		**1,51,57,422/-**	**Nil**	**1,51,57,422/-**
	Appeal Filed		**3,22,14,378/-**	**2,38,93,871/-**	**5,61,08,249/-**

2. The brief facts of the case are that M/s Jubilant Chemsys Ltd. are registered with the Service Tax Department for providing services namely Online Information & Data Retrieval Service', Business Auxiliary Service**,** Scientific & Technical Consultancy Service and Transportation of Goods by Road. They are engaged in the research and development of drug chemicals and export thereof under the hundred percent EOU scheme. The appellant have been granted permission for carrying out manufacturing operations in a bonded warehouse under the Customs Act and also registered under the Central Excise Act as a manufacturer. The present appeal by the assessee have been filed against the order passed by the Commissioner, Customs, Central Excise & Service Tax, Noida, demanding service tax under Section 73 to the Finance Act, 1994 and also imposing penalty under Sections 78 and 76 of the Finance Act, 1994 for the reason that the supply of small quantities of organic compounds manufactured at laboratory scale and supplied to Eli Lilly and Company, Indianapolis (USA) and other drug manufacturing companies outside India, in collaboration with Jubilant Biosys Ltd, Bangalore, another hundred percent EOU (JBL for short) and Jubilant Life Sciences Ltd (JLL for short). As per the Revenue, the appellant have not actually exported their

services and/or products, but have given services and or sold their products to Jubilant Biosys Ltd., as a sub-contractor or agent of theirs. The amount received from JBL for supplies under the agreements, including the amount for the work, executed under agreement with Eli Lilly and other parties, jointly entered into by the appellant, JBL and JLL, were disclosed in the monthly returns of the appellant and subject to scrutiny by the jurisdictional authorities. The appellant also claimed refund of the cumulative Cenvat Credit of the input services under Rule 5 of CCR and the said refund was granted pursuant to verification of the Invoices, including the receipt of foreign exchange for the transactions in dispute, for which service tax have been subsequently demanded,

3. During the course of audit it was observed by Department that appellant JCL were rendering Research and Development (Scientific & Technical Consultancy Service) to Jubilant Biosys Ltd.*(their Associate Company)*, as reflected in their balance-sheet and accounts for the period in question, further investigation revealed that the appellant JCL was providing drug discovery services to their customers for which they were conducting Research and Development activity under contract research agreement and were charging contract research fee, shown as income in their accounts including balance sheets.

4. As per show cause notice dated 9th March, 2011, it appeared that for the Financial Year 2007-08 under the head

income Rs.51,58,10,000/-. from contract research fee was shown, Income under the head other income is Rs.8,25,000/-. Further profit and loss account for Financial Year 2008 -09 also shows the income from contract research fee of Rs.67,53,56,000/- as compared to other income of Rs.9,19,000/-. The other income during the period is from sale of residue and interest on the Income Tax refund. As per Note No. 7 to the accounts forming part of the balance-sheet, it is mentioned: Quantitative Details: the company is primarily engaged in the medicinal chemistry business, the sale and production of such services cannot be expressed in any generic unit, hence it is not possible to give the quantitative details of sales and certain information as required under paragraph 3, 4C and 4B of part II of schedule VI to the Companies Act. From the above it appeared that the compounds generated during the process of R&D undertaken by the assessee are secondary or only ancillary to the principal activity of the said medicinal chemistry services. The copy of approval/renewal letter issued by Department of Scientific and Industrial Research in the Ministry of Science & Technology, Government of India, states that the appellant company is registered as R&D Centre and is involved in research and development. Further, in their application for setting up EOU submitted to the SEZ, the assessee have not declared any item or capacity for production. Further, in the column VI of the said form, the quantity of production is not shown as the same is not required in case of a service unit. These facts are also evident from the letter of Commissioner, SEZ, Noida, wherein the approval has been given for the "Drug Discovery Services including but not limited to medicinal chemistry services, Syn, Organic Chemistry Services and Biology Services". The said approval also mentions the related products as chemical compounds, chemical libraries, scaffolds, analogue and/or lead compounds, intermediate Combi-chem libraries, proteins and protein structures, protein crystals, co-crystals, biological assay and screening data and analytical data for all the above. It appeared that from the study of related products that the same are normally required for conducting Research and Development activity in the sphere i.e. Drug Discovery Services in which the appellant assessee was engaged. It further appeared that the appellant is rendering services to JBL in accordance with terms and conditions mentioned in the Master Agreement dated 26th June, 2005 executed between the parties, namely, JBL and JCL. The said agreement reveals that the appellant is engaged in the business of supplying chemistry services to synthesize, improve synthetic processes. The said agreement, inter alia provides as follows:

> *1.* ***Services:*** *During the term of this agreement, Company (i.e. the party shall conduct chemistry and*

analytical services (the "Service") for Jubilant Biosys utilizing Company full time equivalent employee ("FTE(s)") to, including, but not limited to, synthesize, improve synthetic processes, manufacture, and/or supply synthetic organic compounds or class(es) of compounds and chemical analysis support to Jubilant Biosys ... "

....

....

*3. **Price:** As consideration for Company conducting the Services hereunder, Company shall perform the Services for Jubilant Biosys at a price mutually agreed upon in advance and set forth in the corresponding order. Such price shall included the cost of labour, facilities, raw materials, reagents, solvents, analysis, packaging, waste disposal, reports and delivery of the Compounds ...."*

....

....

*6. **Records:** Company shall prepare and maintain detailed laboratory notebook records of the preparation and analysis of each Compound. Company shall deliver to Jubilant Biosys by not later than fourteen (14) days following the completion of the Services under each Order a final report(s) in the English Language (the "Final*

Report(s)") including the following information: (I) end of Compound preparation report, including outlines of the Compounds) syntheses and analytical procedures. (2) synthesis completion dates and lot numbers and (3) a copy of all analytical data of compounds(s) obtained by Company hereunder.

....

....

8. ***Ownership and*** *Licenses: All information received from Jubilant Biosys or obtained as a result of Company's performance hereunder, including but not limited to, core structure, batch records, Results, data, reports, Final Reports, laboratory work sheets. methods, Compound information, process information, improvements and the like shall be the sole property of .Jubilant Biosys....... Until the expiration of Company's obligations of confidentiality and non-use under paragraph 9 thereof, Company covenants to promptly disclose to Jubilant Biosys all discoveries inventions, improvements, innovations and the like made by the Company hereunder or otherwise.....*

5. From the above clauses of the agreement, it appeared that the appellant is engaged in carrying out Research & Development Services in relation to the chemical processes. It further appeared that whatever results are obtained by the

appellant assessee as a result of the research/synthesis, the same are to become the property of the customer, namely, JBL. The compounds generated/synthesized as the result of research/synthesis as a part of the research work conducted by the party and are only ancillary as the same represent the proof of the results/outcome of the synthesis conducted. Agreement further shows that JBL are engaged in pharmaceutical research and desire to utilize the services of appellant JCL to synthesize, improve synthetic processes, manufacture and/or supply synthetic organic compounds for JBL.

6. Further scrutiny of purchase orders placed by JBL, Bangalore, during the period from 15/11/2005 to 15/01/2009, in accordance with the aforementioned master agreement shows that the purchase orders contain the details of services and price at which the appellant would render to JBL. Under the head price, the purchase order dated 30.01.2006 "as consideration for the services described in this order, Jubilant Biosys shall pay JCL US dollar375000/-." Other purchase order also carry similar information. Thus, these orders also substantiate that services namely R&D Services were being rendered by the appellant in accordance with the said master agreement. Statement of one Pradeep Kumar Tyagi Assistant Manager-Commercial of the appellant was recorded, who inter alia stated that they are exporting chemical compounds to the leading pharmaceutical

companies around the globe. However, as per the LOP issued by Development Commissioner, they are eligible to export the drug discovery services, including but not limited to medicinal chemistry services, as Syn. Organic Chemistry Services and Biology services and related products as chemical compounds, chemical libraries, scaffolds, analog and or lead compounds, intermediate, combichem libraries, proteins and protein structures, protein crystals, co-crystals, biological assay and screening data and analytical data for all the above. Their income is derived from contract research fee which includes cost of labour, facilities, raw materials, reagents, solvents, etc, The company is engaged in early-stage drug discovery compound, As per the Memorandum and Articles of Association of the appellant company, their main objects are to carry on all kind of business activities with respect to commercial research and development for drug (medicine) discovery and drug development including genomics, proteomics, chemistry, biology, bio-technology, biosciences, bio informatics, structural biology, medicinal, chemistry, etc.., including contract research services related to drug discovery, such as process and/or product development. Further, Para-6 titled 'records' in the Master Agreement, read with Para-8 of the said agreement, titled 'ownership and licenses'; all records of the synthesis/manufacturing of the compounds in the shape of lab notebook, have to be delivered to Biosys on periodic basis.

As per Para-8 of the Master Agreement, all the rights, ownership and licenses in respect of the activities undertaken in the appellant premises will be with Biosys Ltd., only. Further on going through the contents of ARE-! dated 26th April, 2007 and 27th January, 2006, wherein certain goods namely Non Haz Lab Chemicals, in powder form and lab chemicals were exported to Austin Chemicals, USA and on being asked to explain the quantity and price of the goods as mentioned in the said ARE-1 and as to whether the price was realized, it was stated that, I have gone through the ARE-1 dated 26/04/2007, vide which 1.460g of Non Haz Lab Chemicals have been exported and value shown in the invoices is notional, USD 419.51, with respect to ARE-I dated 27/01/2006, vide which 5.74g of lab chemicals have been exported, value shown is notional USD 445 only. As for service rendered, the payment is received through Biosys for which separate invoices are raised in the name of Biosys and the amount so billed was duly realized from them.

7. Ongoing through the company's website, namely www.jchemsys.com, the home page of the website describes about the various activities carried out at the premises of the appellant, such as collaborative research, development and manufacturing partnership with pharmaceutical companies. Further on being asked about the profile of the technical personnel deployed, the appellant company for the purpose of research, it was stated that the basic qualification of the

persons employed in their facility in MSc. (organic chemistry). However, the scientist employed in their organization have Ph.D. from the premier institutes in India and abroad. Further from the documents namely orders received by JBL from the customers, daily stock account, on scrutiny, it appeared that JBL were working for Eli Lilly & Co, USA. The copy of research service agreement between the said two companies shows that Jubilant (comprising of JBL and its subsidiaries and affiliates including the appellant JCL) are engaged in the business of providing Biology and Chemo informatics and related services. The recitals of the said agreement show that Lilly "proposed to retain Jubilant to provide to Lilly from time to time for the purpose of assisting Eli Lilly in researching and developing pharmaceutical products". Clause 5 of the agreement mentions that all inventions developed, generated, discovered, evolved or derived by Jubilant shall be assigned to Lilly. The part of the services under the said agreement have been outsourced to the appellant JCL by JBL in terms of the said agreement. From scrutiny of the stock register, it is evident that only laboratory level chemicals in small quantities, shown in grams were being generated during the course of research and development process. Further, as per the definition in Section 65(92) of the Finance Act, 1994, the appellant is a scientific organization engaged in research work. Particularly in the field of chemistry related services. The taxable services as per the said definition would cover consultation, which could be in the nature of an expert opinion/advice in regard to scientific or technical feasibility or any other scientific or technical aspect of a project process design recommending an apt technology, suggestion for improvement in existing technology process, etc. The appellant has been providing services with regard to improvement of chemical processes by conducting synthesis of various chemicals. The consultancy/advice is being given in the form of records/reports being prepared by the appellant as a result of the synthesis carried out by them and the results achieved become property of the customer that is JBL. Thus, it appears that the services provided by the appellant to JBL are covered under the said service under Section 65(92) of the Finance Act, 1994.

8. The audit objection dated 9th April, 2010, communicated to the appellant, directed the appellant to deposit the proposed amount on the grounds:

(i) That the master agreement dated 26th June, 2005 and the work orders issued in accordance with the said master agreement are for manufacture and supply of compounds and no services have been rendered and all the payments have been received against supply of compounds. In support of their claim they have stated that Clause I of the agreement between the appellant JCL and the JBL stipulates that appellant shall conduct chemistry and analytical services for

JBL. That the compound to be supplied and quantity and purity of each compound, price, time frame, delivery date etc., will be as per terms of the agreement and

(ii) That the services provided by them to JBL are not liable to service tax. As the actively involved amounts to manufacture and the same is excluded from the purview of service tax.

9. The aforementioned contentions of the appellant were not tenable to the Revenue in view of the fact that JCL have not raised any invoice charging the value of goods said to have been supplied by them. After conducting the necessary research and Development as per the requirement of JBL, Bangalore, appellant issued invoices for clearance of the sample of the compounds which were obtained after the research work. But only notional value, and not the actual value, thereof is being shown in the said invoice. The appellant did not collect any payment on the basis of the said invoices. The agreement does not speak about any sale and purchase of the goods. The terms of the payment are related only to the services provided/to be provided by the appellant to their customer/client JBL. This fact is also confirmed from the appellant's own version as per their letter dated 5th April, 2010, which reads as follows:

> "It is relevant to note here that the company is raising invoices for the synthesis work in two parts, one invoices raised for collecting the FTE (full-time equivalent) charges for the manpower employed and

other fixed and variable expenses during the period in which the synthesis activity is carried out. Another invoices raised for charging the cost of chemicals used during the period."

10. Thus, it appeared that appellant does not raise any invoice charging the value of the goods being supplied by them, which means that in fact, no goods manufactured or otherwise are being cleared/supplied by them. Had it been so the appellant must charge the value/price of such goods. It further appeared that the appellant was providing R&D Services to JBL which are amply covered under Section 65(92) and taxable under Clause 105 (za) of Section 65 of the Finance Act, 1994. Therefore, the appellant is liable to pay service tax on the amount charged by them from JBL. So far the invocation of extended period of limitation is concerned it is observed in the SCN that tax is leviable on the amount billed during the period 2007-8 to 2009-10 for the services rendered and the payment received. Therefore, on the basis of information available in the trial balance of the Unit for the period in question, a total tax of Rs.122.79/- lakhs was demanded. Further, it appeared that the appellant have suppressed these facts from the Department. Although they were registered under the said category of 'Scientific or Technical Consultancy' services, but did not discharge their liability of service tax on the said taxable service. The said transactions with regard to value of taxable service and the

service tax payable thereon was never mentioned in the ST-3 returns filed by appellant. These facts came to notice of the Department when audit of their account was conducted in January, 2010. It is further mentioned in the SCN that scrutiny of ST-3 returns shows that there has all along been an attempt by the appellant to conceal the material facts of provision of taxable service as the entire amount of receipts against said services under the category of Scientific or Technical Consultancy was claimed as exempt under export of service. Thus, there has been misrepresentation of facts as they never disclosed the said facts on their own, in any manner. On similar charges show cause for other period was also issued, as more fully described hereinabove.

11. The SCN's were adjudicated on contest and vide impugned common Order-in-Original, the demand was confirmed on the ground that the appellant have done the work in the nature of a sub-contractor or agent of JBL and have actually not exported their services. Accordingly, tax, Penalties and interest have been demanded as more fully mentioned hereinabove.

12. Being aggrieved the appellant - assessee is before this Tribunal. The Learned Counsel for the appellant-assessee Shri Devinder Sharma has urged that the issue involved in the present Appeal is identical to the issue involved in earlier appeals of another Unit of the Appellant located at D-12, Sector 59, NOIDA, which have been allowed by Final Order

No. ST/A/70562-70564/2017-CU(DB) dated 02/05/2017. The order has been passed after a detailed examination of the issue and the research service agreement entered on 14th November, 2005 between Eli Lilly & Company, Indianapolis, USA and jubilant Biosys Ltd., Bangalore (together with its subsidiaries and affiliates, including Jubilant Chemsys Ltd. and Jubilant Organosys Ltd., collectively called "JUBILANT"). This Tribunal has held that the appellant have satisfied both the conditions for export of service, namely, rending of service from India and receipt of the service by the client outside India and receipt of consideration in convertible foreign currency in India. Accordingly, the duty demand and penalties have been set aside.

13. The Learned Counsel for the Appellant-assessee further submits that in the present proceedings, covered by three Show Cause Notices, the Appellant has rendered services under ten different agreements wherein the terms and conditions of arrangements are similar to the agreement with Eli Lily and Company involved in the earlier proceedings. The details of the Agreements and the period involved are as follows:

SCN Dated 09/03/2011 for the period April 2007 to March 2010

Value of Services Provided and Service Tax Payable in Lakh Based on Audited Accounts and Auditor's Certificate				
Customer	**Apr 07 To Mar 08**	**Apr 08 To Mar 09**	**Apr 09 To Mar 10**	**Total**
Eli Lily	153.84	489.45	448.23	1091.

	(19.01)	(60.49)	(46.17)	52 (125.67)
Endo			22.59 (2.33)	22.59 (2.33)
Orion			71.91 (7.41)	71.91 (7.41)
Merck			19.40 (2.0)	19.40 (2.0)
Amgen		15.61 (1.93)	66.28 (6.83)	81.89 (8.76)
Sub-Total	**153.84 (19.01)**	**505.06 (62.42)**	**628.41 (68.86)**	**1327.31 (146.17)**
Forest		14.50 (1.79)	206.15 (21.23)	220.65 (23.02)
AstraZeneca			209.73 (21.60)	209.73 (21.60)
Sub-Total		**14.50 (1.79)**	**415.88 (42.83)**	**429.78 (44.62)**
Grand Total	**153.84 (19.01)**	**519.56 (64.21)**	**1044.29 (111.69)**	**1717.69 (194.91)**

Value of Services Provided and Service Tax Payable in Lakh Based on Audited Accounts and Auditor's Certificate			
Customer	**Apr 10 To Mar 11 SCN dated 19/10/2011**	**Apr 11To Mar 12 SCN dated 18/09/2012**	**Total**
Eli Lily	730.70 (75.36)	833.26 (85.83)	1563.96 (161.19)
Endo	87.24 (8.99)	300.31 (30.93)	387.55 (39.92)
Orion	44.08 (4.54)		44.08 (4.54)
Merck	135.34 (13.94)	22.70 (2.34)	158.04 (16.28)
Amgen		11.35 (1.17)	11.35 (1.17)
Sub-Total	**997.36 (102.73)**	**1167.61 (120.26)**	**2164.97 (222.99)**
Vega	111.08 (11.44)	11.35 (1.17)	122.43 (12.61)
AstraZeneca	291.76 (30.05)	422.77 (43.54)	714.53 (73.59)
Abbot	49.94 (5.14)	246.09 (25.35)	296.03 (30.49)
Motif		109.09	109.09

		(11.24)	(11.24)
Sub-Total	**452.78 (46.64)**	**789.29 (81.30)**	**1242.07 (127.94)**
Grand Total	**1450.14 (149.36)**	**1956.91 (201.56)**	**3407.05 (350.92)**

Considering the Revenue neutral nature of the dispute, the Appellant has paid duty on the services provided under the Agreements incorporated in the tables above for the normal period of limitation before the adjudication of the SCN through its CENVAT account and had also paid interest on the service tax amount for the period as sufficient balance was not available in the CENVAT account. The Appellant has recovered service tax from JBL and issued invoices so as to enable JBL to take CENVAT credit of the service tax paid. The Appellant had submitted before the Commissioner that neither any interest nor penalty is payable to the extent the service tax has been paid by the Appellant. However, the Commissioner has confirmed the demand of interest and penalty on such amount. Further, a part of the duty paid for the normal period of limitation has been appropriated against the demand for the extended period.

14. As regards the applicability of extended period of limitation, the learned counsel for the Appellant-assessee submits that conditions for applicability of the proviso to Section 73(1) of the Finance Act, 1994 are not satisfied for the following reasons:

(a) The SCN admits that it has been issued in pursuance to an audit objection and is based on the audited annual accounts (profit and loss account and balance sheet and notes to the accounts) of the Appellant;

(b) The SCN admits that the value of services has been recorded in the six monthly returns and claimed as export of services and exempt from payment of services tax;

(c) The SCN admits that the Appellant is claiming refund of the accumulated CENVAT credit under Rule 5 of the CENVAT Rules;

(d) The Appellant has claimed refund of the accumulated CENVAT credit for each of the quarter during the period from July, 2007 to September, 2009 and most of the orders including the order for the period January, 2008 to March, 2008 record the following facts:

(i) The Appellant has provided services to overseas clients which are covered by Rule 3 of Export of Service Rules, 2005;

(ii) The Jurisdictional Range Officer has verified and checked proof of export in respect of output services and verified the receipt of payment in convertible foreign exchange in respect of exports effected by the Appellant.

(iii) That no sale has been effected by the Appellant in Domestic Tariff Area.

The Learned Counsel further submits that four of the refund claims for the period are for amounts in excess of Rs.5 lakhs and accordingly have been pre-audited by the audit wing in the office of the same Commissioner. Therefore, it is case of difference of opinion on the issue between different teams in the audit wing.The Counsel relies upon the decision by the Supreme Court in the case of **Umang Chand Bhandari Vs Commissioner of Central Excise, Madras in 2004(167) E.L.T. 491 (SC)**. In addition, the Counsel submits that the entire transaction is Revenue neutral and has not resulted in any loss to the revenue or gain to the Appellant. The Appellant would have discharged its service tax liability utilizing the CENVAT credit available in its account for which refund was claimed subsequently. JBL was also eligible for taking CENVAT credit of the service tax paid on the input services used by it for providing output services which were exported out of India. JBL, during the relevant period, was also eligible to get refund and has, in fact, taken refund of the service tax paid on input services used for providing services which were exported out of India. Therefore, the intention to evade payment of service tax can't be established from the facts and circumstances of the case. Reliance is placed on ***CCE v. Coca-Cola India Private Ltd. - 2007 (213) E.L.T. 490 (SC)***.

15. As regards penalty under Section 76 of the Finance Act, 1994, the Learned Counsel submits that even if the service tax, which has been paid was actually payable on any transactions covering the normal period, there are sufficient grounds for invoking provisions of Section 80 of the Finance Act for not imposing any penalty. Appellant has already explained in details that the conditions for invoking proviso to

Section 73(1) of the Finance Act are not satisfied in the facts and circumstances of the case and consequently, there are no grounds for invoking penal provisions under Section 78 or 76 of the Finance Act. Moreover, the issue involves interpretation of the provisions of the Act and Rules and is Revenue neutral. Thus, there was reasonable cause for failure to pay service tax, if any, to justify applicability of Section 80 to the facts of the case and therefore, no penalty is to be imposed under Section 76 of the Act. Reliance has been placed on the following decisions of the CESTAT and High Court:

- **ETA Engineering Limited Vs CCE 2004 (174) E.L.T. 19 (T-LB)**
- **Daurala Organics Vs CCE 2014 (35) S.T.R. 214 (Allahabad-HC)**

16. As regards order on payment of interest on the amount of service tax paid by the Appellant for the normal period of limitation on five agreements, the Learned Counsel submitted that the issue is covered by the Tribunal in the case of **Oil and Natural Gas Corporation Limited Vs CCE Surat-2015 (38) S.T.R. 867 (Tri-Ahem).** The Learned Counsel prays that in view of the submissions made the Appeal may be allowed.

17. Mr. P. K. Singh Learned A.R. for the Department submits that the issue involved in the present Appeal is substantially the same as has been decided in Final Order No. ST/A/70562-70564/2017-CU(DB) dated 02/05/2017. However, he relies upon the impugned order including the applicability of

proviso to Section 73(1) of the Finance Act, 1994, imposition of penalty under Section 76 and demand of interest on the duty paid by the Appellant.

18. Having considered the rival contentions, we find that the issue on merits is covered by the Final Order No. ST/A/70562-70564/2017-CU(DB) dated 02/05/2017. The Commissioner in the impugned order has held that under all the agreements the services have been ultimately exported by Jubilant Biosys Limited. The Commissioner has examined and discussed the agreement between Eli Lilly and Company and Jubilant Biosys Limited (JBL), Jubilant Chemsys Limited (JCL) and Jubilant Life Sciences Limited (JLL) and has denied the benefit of export of services to the Appellant for the reason that they have not produced anything to establish that JBL Bangalore has acted as their agent.

19. We find that in the precedent Final Order dated 02/05/2017, we had examined the same agreement and have held as follows:

"15. Having considered the rival contentions, we are satisfied that the appellant is not a subcontractor, but a co-venture along with JBL in executing the research and development assignments for clients like Eli Lilly and Company Ltd., USA situated outside India. We are further satisfied that the appellant have exported their services under the agreements, and also received payments in convertible foreign exchange through the EEFC account operated by JBL, as the lead

venture, JBL have acted as the lead venture under the Research Agreement dated 14th November, 2005, as noticed hereinabove which clearly stipulates that JBL shall be the lead venture acting on behalf of all the three co-ventures, namely, JBL, JCL and Jubilant Organosys Ltd. The said agreement also provides that the foreign client, namely Eli Lilly and Company, USA shall give all notices, correspondence etc. to the lead venture JBL acting for all the three co-ventures. We further take notice of the clause in the said agreement that all the three are not subcontractors of each other, but they are all contractors in their individual capacity for the foreign client and JBL is the representative of all the three companies, as the lead partner. We also take notice of the certificate of chartered accountants, annexed in the paper book, which was also before the court below, which certifies that during the period in question, the affairs of the appellant have been verified and examined the payments made by Jubilant Biosys Limited to Jubilant Chemsys Ltd. for its share of activities under the work orders received from the parties located outside India. It further certifies that entire consideration for the work executed was initially received in EEFC account of JBL and thereafter, the Revenue share of JCL was transferred to its bank account in foreign currency. It further certifies that during the period April, 2005 to March, 2012 JBL, has not made any payment to appellant JCL for any research work carried out on account of JBL for which any [PR, if any, have been generated and have *become property of JBL. We also take notice of the fact that all the research work done by the appellant JCL forms part of the property of the client located outside India. Thus, we hold that the appellant have satisfied both the conditions for export of service, namely, rending of service from India and receipt of the service by the client outside India and receipt of consideration in convertible foreign currency in India. Accordingly, we allow appeals by the appellant – assessee (No. ST/546/2012 & ST/5175/2014) with consequent benefits and set aside the impugned order."*

20. As regards applicability of proviso to Section 73(1) of the Finance Act, 1994, we find that the fact of disclosure of the value of disputed services in the ST-3 returns is admitted in the Show Cause Notice. Further, SCN also records that the Appellant during the relevant period was claiming refund of the accumulated CENVAT credit. The refund orders passed by the Assistant/Deputy Commissioner record the fact that entire export turnover and receipt of the export proceeds in convertible foreign exchange has been verified by the Jurisdictional Range Superintendent. It is also on record that the Show Cause Notice has been issued in pursuance to an audit objection. Therefore, it is not a case of mis-declaration or suppression of facts but a case where there is a change of opinion on the manner of assessment by the Department. We hold that in the fact and circumstances of the case proviso to Section 73(1) and provisions of Section 78 of the Finance Act,

1994 are not applicable. Accordingly, demand for the extended period is not sustainable and mandatory penalty under Section 78 cannot be imposed.

21. As regards applicability of Section 80 of the Finance Act, 1994, we find that there is no contumacious conduct on the part of the Assessee and the entire issue involves interpretation of the legal provisions. Moreover, the assessee has paid service tax to avoid any further dispute, in a revenue neutral situation. Therefore, it is fit case for invoking the provisions of Section 80 of the Finance Act, 1994 and setting aside penalty under Section 76 of the Finance Act, 1994.

22. As regards the issue of payment of interest on the duty paid through the CENVAT account when sufficient balance was available on the date the duty liability crystallized, we find that the issue is squarely covered by the decision in the case of **Oil and Natural Gas Corporation Limited Vs CCE Surat-2015 (38) S.T.R. 867 (Tri-Ahem),** wherein this Tribunal has observed as under:

> ***5.1*** *In view of the above case law and also the settled proposition of law even in a clandestinely evasion cases also the Cenvat credit of inputs/input services admissible, during the period of offence, is allowed to be abated from the total duty demanded even at the appeal stage. The interest payable is only calculated on the duty liability finally determined and not with respect to the duty demanded in the show cause*

notice. In this case appellant stands on a better footing as the Cenvat credit was available in the Cenvat account but could not be debited. It has to be thus held that interest is not payable with respect to duty required to be debited in the Cenvat Credit Account provided sufficient balance was available in the Cenvat Credit Account. Nothing has been brought on record that such a credit was not available in the Cenvat Account during the relevant period for debit. Appeal of the appellant is thus required to be allowed on merits.

In view of the settled position of law we hold that interest is not payable by the Appellant on the amount of duty paid through CENVAT account.

23. The Appeal is allowed with consequential relief, if any, in accordance with law.

(Dictated & Pronounced in Court)

Sd/-	**Sd/-**
(Anil G. Shakkarwar)	**(Anil Choudhary)**
Member (Technical)	**Member (Judicial)**

Lks