IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/87564/2016

[Arising out of Order-in-Appeal No: MUM-SVTAX-002-APP-399-16-17 dated 6th September 2016 passed by the Commissioner of Service Tax (Appeals), Mumbai – II.]

Indeus Life Science Pvt Ltd …***Appellant***

versus

Commissioner of Central Excise
Pune – II ***…Respondent***

Appearance:

Ms. Kirti Bhoite, Advocate for appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing:	**13/07/2017**
Date of decision:	**13/07/2017**

ORDER NO: A/92311 / 2017

In dispute is the disallowance of the refund of ₹7,63,725, though sanctioned by the original authority to M/s Indeus Life Science Pvt Ltd under rule 5 of the CENVAT Credit Rules, 2004, by Commissioner of Service Tax (Appeals), Mumbai – II *vide* order-in-appeal no. MUM-SVTAX-002-APP-399-16-17 dated 6th September 2016. Appellant had claimed refund of ₹ 9,73,425/- paid as service tax to providers of input services used in rendering ‘scientific and technical consultancy service’ to recipients outside India during July 2013 to September 2013 under rule 5 of the CENVAT Credit Rules, 2004 some of which were held to be ineligible while some others could not be linked to the output services that were exported leading to disallowance of claim of ₹ 2,09,700/-. Revenue filed an appeal against the order of sanction which culminated in the impugned order disallowing the entire claim for non-conformity with rule 6A of Service Tax Rules, 1994 leading to the appeal by assessee.

2. Heard Learned Counsel for appellant and Learned Authorised Representative for Revenue.

3. According to Learned Counsel an identical dispute had been decided by this Tribunal in *Commissioner of Central Excise, Pune – I v. Sai Life Sciences Ltd [2016 (4) STR 882 (Tri. Mumbai)]* which placed reliance upon the decision of the Tribunal in *SGS India Pvt. Ltd. v. Commissioner of Service Tax, Mumbai [2011 (24) STR 60 (Tri.-Mumbai)]* as affirmed by the Hon’ble High Court of Bombay. In that matter, as well as in the present dispute, it is the contention of Revenue that the place of provision of service was not outside India. While the assessee was of the view that rule 4(a) of Place of Provision

of Service Rules 2012 is applicable only when service is rendered on goods, the first appellate authority has come to the conclusion that the agreement between the recipient of the service M/s Disphar International BV and the present appellant referred to material requiring application of rule 4(a) of the Place of Provision of Service Rules, 2012.

4. It is in identical circumstances that the Tribunal had rendered its decision in *re Sai Life Sciences*. From that, it would appear that the findings in the impugned order are incorrect.

5. Before parting this matter it is also necessary to examine the circumstances in which Revenue had filed its appeal before the first appellate authority. M/s Indeus Life Science Pvt Ltd sought a refund claim in accordance with Rule 5 of the CENVAT Credit Rules, 2004. While restricting the claim to a lesser amount, the original authority had not issued any show cause notice to justify the proposed restriction. It was Revenue that chose to challenge the sanctioned amount in review proceedings. It is indeed questionable whether it was legal and proper for the appellate authority to hold to the detriment of an assessee by recourse to a belated and indirect notice in the form of an appeal by Revenue. Appeals lie before the Commissioner of Central Excise (Appeals) under section 85 of the Finance Act, 1994 on a grievance of a person and it is within the

jurisdiction of the first appellate authority to enhance service tax, interest or penalty after according a reasonable opportunity for showing cause against the proposed enhancement. An appeal of the Revenue to Commissioner of Central Excise (Appeals) lies under section 84 of Finance Act, 1994, such appeal being considered in the same manner as an appeal filed by an assessee under section 85 of the Finance Act, 1994. The statute does not specifically provide for enhancement of refund beyond that was claimed but specifies that there is scope for enhancement of that which was restricted subject to sufficient cause being shown to the respondent. This would presume that the enhancement detriment in appeal is limited to the show cause notice with which the proceedings leading to the appeal commenced. Such a show cause notice has not been issued in the present instance.

6. On the other hand, section 73 of Finance Act, 1994 provides for recovery of service tax that has not has not been levied or paid or has been short-levied or short-paid or erroneously refunded. It would therefore, appear from a harmonious construction of this with section 85 of the Finance Act, 1994 that it is not within the jurisdiction of the first appellate authority to enhance the amount of rejection of a refund claim that was disposed off by the lower authority in the absence of a show cause notice. The proper course of action for Revenue to dispute the sanction of refund claim by the original authority should have been the issue of a notice under section 73(1) of Finance Act,

1994. The failure to issue such a notice stultifies the present proceedings before the first appellate authority.

7. Owing to both these reasons, taken severally and jointly, the impugned order fails to meet the requirement of the statute and is consequently set aside.

8. Appeal is allowed.

(Pronounced in Court)

(C J Mathew)
Member (Technical)

**/as*