

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.**

Appeal No. ST/85957/2015

(Arising out of Order-in-Original No. PUN-EXCUS-001-COM-038-14-15 dated 20.01.2015 passed by Commissioner of Central Excise, Pune-I)

Sai Life Science Ltd.

Appellant

Building No.1, Plot No.2,
Chrysalis Enclave,
Phase No.11, International Park,
Hinjewadi, Pune 411 057.

Vs.

Commissioner of Central Excise, Pune-I Respondent

ICE House, 41-A, Sasson Road,
Opp. Wadia College,
Pune 444 001.

Appearance:

Shri Vinay Jain, Advocate, for the Appellant
Shri M.K. Sarangi, Authorised Representative for the
Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86090/2019**

Date of Hearing: 08.04.2019

Date of Decision: 12.06.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original no PUN-EXCUS-001-COM-038-14-15 dated 20.01.2015 of Commissioner Central Excise Pune I, holding as follows:

"28.1 I confirm the demand of Service Tax and Education Cess totally amounting to Rs.72,72,046/- (Rupees Seventy Two Lakhs Seventy Two Thousand and Forty Six Only) in respect of the standalone DMPK services, provided by the assessee, during the period from 01.07.2012 to

31.03.2014, as detailed in Annexure 'A' of the Show Cause Notice dated 01.10.2014, under the provisions of Section 73(2) of the Act. I further order appropriation of the Service Tax amounting to Rs.72,72,046/-, since paid by the assessee vide e-Challan dated 01.10.2014, against the aforesaid confirmed demand. However, the aforesaid service tax claimed to have been paid by the assessee will be subject to the verification of the relevant challans by the jurisdictional Assistant / Deputy Commissioner.

28.2 I also order recovery of interest, at the appropriate rate(s) as applicable during the relevant period, on the demand of service tax as confirmed at para 28.1 above, under the provisions of Section 75 ibid and further order appropriation of the amount of interest of Rs.14,53,595/- since paid by the assessee vide challan Nos.00067, 00071 and 0072, all dated 30.10.2014, against the aforesaid interest liability. However, the aforesaid interest claimed to have been paid by the assessee will also be subject to the verification of the relevant challans by the jurisdictional Assistant / Deputy Commissioner.

28.3 I impose a penalty of Rs.40,000/- (Rs.10,000/- each for every half yearly return filed during the period from July 2012 to March 2014), for their failure to furnish correct details in the ST-3 returns filed, under the provisions of Section 77(2) of the Act, read with the provisions of Section 70 of the Act.

28.4 I also impose a penalty @ Rs.100/- for every day during which the failure to pay service tax continued or @ 1% of the tax as determined at para 28.1 above, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax, for their failure to pay the Service Tax in accordance with provisions of Section 68(1) of the Act read with Rule 6 of the Service Tax Rules, under the provisions of Section 76 of the Finance Act, 1994.

However, the total amount of penalty payable by the assessee shall not exceed fifty percent of the service tax payable (i.e. 50% of Rs.72,72,046/- which is equal to Rs.36,36,023/-)."

2.1 Appellants are registered for providing taxable services under the category of "Scientific or Technical Consultancy Services" as defined under Section 65 (105) (za) (till 30th June 2012), and thereafter providing taxable services as defined by 65B(44).

2.2 Acting on the intelligence that the services provided by the appellants to their overseas recipients in respect of Drug Metabolism and Pharmacokinetics standalone services (DMPK) under Contract Research Agreements do not qualify as "Export of Services" in terms of Place of Provision of Services Rules, 2012 read with Rule 6A of Service Tax Rules, 1994, investigations were undertaken and show cause notice dated 01.10.2014 issued to the Appellants, demanding service tax amounting to Rs 72,72,046/- short/not paid during the period from July 2012 to March 2014. Demand for interest and penalties were also proposed.

2.3 After considering the submissions of the Appellant, Commissioner has in para 27 of impugned order summarized his findings stating-

- a) "That the standalone DMPK services provided by the assessee are covered within the ambit of Rule 4 of the PPS Rules, w.e.f 01.07.2012 and the assessee would be liable to pay service tax on the same.*
- b) That the said DMPK services provided by the assessee would not constitute export of service within the meaning of Rule 6A of the Rules.*
- c) That the assessee are liable to pay interest on the demand of Service Tax payable/ paid by them.*
- d) That the assessee are liable to penalty under the provisions of Section 76 of the Act, for their failure to*

pay the due service tax in accordance with the provisions of Section 68(1) of the Act read with Rule 6 of the Rules, during the period from 01.07.2012 to 31.03.2014.

e) That the assessee are liable to Penalty under the provisions of Section 77(2) of the Act for contravening the provisions of Section 70(1) of the Act read with Rule 7 of the Rules.”

After summarizing his findings as above Commissioner disposed of the Show Cause Notice as per the order referred to in para 1, supra.

2.4 Aggrieved by the order of Commissioner appellants are in appeal before the tribunal.

3.1 Appellants have in their appeal after explaining the activities undertaken by them under Contract Research Agreement in respect of DMPK research studies and the manner of undertaking the said activities have assailed the impugned order stating that-

- a. The order is non speaking as it fails to consider and render findings in respect of various submissions made by them before the adjudicating authority. Thus relying on the decisions in case of Cyril Lasardo (Dead) Vs Juliana Maria Lasarado [2004 (7) SCC 431, para 11 &12] and Shukla & Brothers [2010 (254) ELT 6 (SC)] the order needs to be set aside on this account itself.
- b. The made submissions in respect of the law as it existed prior to 01.07.2012, i.e. before the introduction of scheme taxable services and negative list of services. Since entire period of demand is post 01.07.2012 the submissions are not reproduced here.
- c. Post 1.07.2012, the Place of Provision of Service Rules, 2012 (POPS) determine whether the services have been provided in the taxable territory for the purpose of levy of taxes. As per Rule 3 of the said rules, the place of provision of service is the location of service

receiver. In their case the service recipient is located outside India. Therefore the place of provision of service as per the said rule is outside India. As per rule 6A of the Service Tax Rules, 1994, if the place of provision of service is outside India, then it is treated as Export of Services.

d. They are providing advice/ information in relation to DMPK studies. These services are not provided qua the goods and Hence Rule 4(a) of POPS shall not be applicable in the present case. Also as per the para 5.4.1 of Guidance Note dealing with Rule 4, the services provided by them will not fall within the category of services to which said rule is applicable.

e. DMPK study of drugs cannot be regarded as a test undertaken on goods sent by the service recipient. The innovator samples of NCE are sent by their clients located outside India. These NCE are administered to rats during study and accordingly, the test reports are prepared and sent to the client. These study services cannot be said that the activity of testing is being performed on the drugs (NCE).

f. In the VAT regime such services are treated as performance based services. The principle underlying VAT worldwide require the determination of VAT payable based on the character of the transactions. They refer to Australian Goods and Service Tax Ruling (GSTR) 20003/7 in support of the said contention.

g. The services are not performed on goods provided by the client, as those goods supplied by the client has to be formulated in a suitable vehicle so that it can be administered to animals for conducting the study. Without preparation of such formulations these studies could not have been affected.

h. It is settled principle that taxes should not be exported as per the decision of the Bombay High Court in case of Repro India [2009 (235) ELT 614 (Bom)].

i. Since they are not liable to pay any service tax, there is no question for imposition of penalty or payment of interest. [Coolade Beverages Limited [2004] 172 ELT 451 (All)].

j. In the case where such complex interpretation of law is involved penalty should not imposed as held in the following decisions:

o Sarup Tanneries Limited [2005 (184) ELT 217 (T)]

o Explicit Trading [2004 (169) ELT 205 (T)]

o Goyal M G Gases Ltd [2004 (168) ELT 369 (T)]

o Kathuria Portfolios [2003 (158) ELT 355 (T)]

o Goenka Woolen Mills [2001 (135) ELT 873 (T)]

k. They were under bonafide belief that service tax was not payable by them and hence they had not paid the tax. In such a situation when their bonafides are clearly established penalty should have not been imposed on them in view of the decisions in case of Flyingman Air Courier (P) Ltd [2004 (170) ELT 417 (T)] and Gamma Consultancy [2006 (4) STR 591 (T)].

l. In case of Vinay Bele & Associates [2008 (9) STR 350 (Bom)] & Ashish Patil [2008 (10) STR 8 (Bom)] it has been held that penalty under section 76, 77 & 78 are not mandatory in view of section 80.

m. Also in case of Hindustan Steel Ltd [1969 (2) SCC 627] it has been held that penalty should be impose for contumacious conduct.

4.1 We have heard Shri Vinay Jain, Advocate for the Appellant and Shri M K Sarangi, Additional Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellant, counsel while reiterating the submissions made in the appeal stated that .

a. The issue is no longer res-integra and in their own case issue has been decided in their favour. [2016 (42) STR 882 (T)]. Revenue has accepted the order of tribunal and no appeal filed against the same.

- b. Services provided by them fall within the default Rule 3 of POPS and are covered by Rule 6A of Service Tax Rules, 1994 as Export of Services.
- c. Rule 4(a) of POPS is not applicable in respect of the services provided by them. The DMPK services are not performed on the goods, they are providing advice/ information to their overseas client in relation to DMPK studies.
- d. The tests are not performed on the goods but on the subject of study i.e. rats who are given these compounds under various conditions. Rule 4(a) will thus not apply in such cases.
- e. Issue is squarely covered by the decision in case of Advinus Therapeutics Ltd [2017 (51) STR 298 (T-Mum)] and in case of Fertin Pharma Research and Development India Pvt Ltd, [2018-TIOL-3281-CESTAT-MUM].
- f. No penalty should have been levied pursuant to section 80 ibid as Appellants were under bonafide belief and issue is purely an interpretational one.

4.3 Arguing for the revenue, learned Authorized Representative submitted while reiterating the findings in the impugned order-

- a. The decision of the tribunal in the case of appellants referred to by the appellants is not applicable to the facts of present case. The said decision has been rendered in cases other than those of DMPK studies. This facts is clearly visible from the order in appeal of the Commissioner (Appeal) para 7, under consideration of tribunal in that decision.
- b. That decision of Tribunal has not examined the POPS and the issue in terms of the said rules. It has simply gone on the consideration that the taxes should not be exported.

- c. This decision of tribunal has been rendered relying on the earlier decision of Tribunal in case of SGS Ltd, which has been rendered in respect of period 01.03.2003 to 11.11.2003, before issue of exemption in respect of export of services on the ground that export of service is always free.
- d. Issue under consideration of tribunal in case of Advinus Therapeutics Ltd was in respect of Refund under Rule 5 of CENVAT Credit Rules, 2004 read with Rule 6A of Service Tax Rules, 1994. In para 16 and 17 it has been observed that Rule 4 of POPS is not applicable in situation where there is alteration in form in which it was made available to service provider. This observation made by the tribunal is in accordance with the Rules.
- e. In case of Star India Pvt Ltd [2015 (38) STR 884 (T-Mum)] it has been held that merely because payment was received in foreign currency cannot be determinant for liability/ non liability to service tax.

5.1 We have considered the submissions made in appeal, during course of arguments along with the impugned order.

5.2 Para 1.2 to 1.4, 2.1, 2.6, 2.8, para L on page 29 and para P on page 33 of the Appeal filed by the Appellant are reproduced below:

“1.2 The appellants are interalia engaged in integrated drug discovery and development of drugs. The drug discovery process goes through numerous stages before drug becomes commercially viable. The following are the broad steps involved in the process of drug discovery:

1.3 The appellants enters into Contract Research Agreements with clients for the development of drugs. The process of discovering and bringing a new drug to the public typically costs a pharmaceutical or biotechnology company nearly \$900 Million and takes an average of 10-

12 years. Prior to the commencement of the drug discovery process, the Appellant enters into Contract Research Agreement.

1.4 The appellants enter standalone DMPK studies with non resident Indians service receivers (Customers). Under the contract the appellants is engaged to carry out research on various effects of the compounds/ new chemical entities (NCEs). The client provides compounds/ new chemical entities (NCEs) to appellant DMPK studies.

2.1 DMPK stands for Drug Metabolism and Pharmacokinetics. DMPK research studies are required to understand the effect of drug compounds in the body over a course of time. DMPK studies are designed based on nature of compounds, therapeutic target, efficacy doses etc. This involves extensive knowledge sharing through emails and telecons from appellants and the study sponsor (customer) to come up with optimized design. The compounds/ new chemical entities (NCE) for DMPK research are provided to the appellants by the customer designated labs. After receiving the compounds DMPK research starts. The research involves four stages:

1. Dosing formulation development
2. Animal studies
3. Bioanalytical method developments and bioanalysis.
4. Pharmacokinetic analysis and reporting.

2.6 Thus, under the Contract research Agreement, the appellants is primarily required to provide scientific consultancy and advice with regard to drug discovery. Under the agreement, the consideration to be paid the appellants is based on the number of scientists who would work on the specific client's project. The consideration is received in foreign convertible currency. The appellants have been in this business since

2,8 The appellants have been classifying the activities carried on by them under the category of "Scientific or

Technical Consultancy” service. Since “Scientific or Technical Consultancy” service falls under rule 3(1)(iii) of the Export of Service Rules, 2005 and the recipient of the service i.e. the foreign clients are located abroad, the appellants is claiming export of service and not paying service tax on the amounts received by them from foreign clients.

L. The DMPK study of drugs cannot be regarded as a test undertaken on goods sent by the service recipient. In the present case, innovator samples of NCE are sent by the clients located outside India. These NCE are administered to rats during this study and accordingly, the test reports are prepared and sent to the client. This DMPK study services cannot be said that the activity of testing is being performed on the drugs (NCE). In this example, the above drugs are administered to the rats to determine their efficacy and safety level.

P. The (NCE) powder provided by the customer has to be formulated in a suitable vehicle so that it can be given to animals at suitable dose without causing any harm to conduct DMPK studies. The DMPK studies are conducted on the formulation of NCE prepared by the appellant. Without the appellants preparing the formulation of NCE the study cannot be conducted. The formulation preparation requires extensive research to choose right solvent or combination of solvents from hundred of odd acceptable solvents which are acceptable for animal studies. Many permutations and combinations being taken place before selecting the final formulation. Hence, the provision of Rule 4(a) of POPS Rules, 2012 is not applicable.”

5.3 The above paras have been reproduced from the appeal filed so that we are clear about the fact as stated by the appellant themselves and also the analysis, by them to argue that Rule 4(a) of POPS rules is not applicable to

the facts of the case. From the facts as recorded above it is evident that appellants-

- a. Appellants enter into Contract Research Agreement with their overseas client for the purpose conducting studies on certain compounds, formulations called New Chemical Entities (NCEs).
- b. These NCEs in respect of which these studies are to be conducted are provided to them by their overseas client.
- c. The study undertaken by the Appellants called DMPK standalone studies on NCEs involve research in to formulation of doses in suitable carrier (solvent), administering those doses to identified guinea pigs (rats) and studying the effect of the doses administered and reporting the outcome of studies to the overseas client.
- d. Appellants admittedly were classifying these services provided by them to overseas clients under the category "Scientific or Technical Consultancy" service.
- e. From para L and P reproduced above, it is quite evident that the basic submission of the appellants is that the DMPK Studies undertaken by them are not on the NCE supplied by the foreign clients but are on the formulations and chosen guinea pigs, hence Rule 4 of POPS not applicable in their cases.

5.4 Rule 3 and 4 of Place of Provision of Services, Rules, 2012 are 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 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 sub-rule shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs, reconditioning or reengineering for re-export, subject to conditions as may be specified in this regard.

(b)

14. Order of application of rules.-

Notwithstanding anything stated in any rule, where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration.

5.5 Rule 6A of Service Tax Rules, 1994 read as follows:

a. 6A. Export of services. -

(1) *The provision of any service provided or agreed to be provided shall be treated as export of service when, -*

(a) the provider of service is located in the taxable territory,

(b) the recipient of service is located outside India,

- (c) *the service is not a service specified in the section 66D of the Act,*
- (d) *the place of provision of the service is outside India,*
- (e) *the payment for such service has been received by the provider of service in convertible foreign exchange, and*
- (f) *the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act*

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

5.6 Thus for the services to be treated as export of service post 2012, the service provided needs to be tested in terms of rule 6A of the Service Tax Rules, 1994 read with POPS Rules. As per (d) of Rule 6A(1), for service to be export of service, the place of provision of service should be outside India. Appellants have argued relying on the provisions of the POPS Rules and para 5.4.1 of the Education Guide that place of provision of the service in their case is outside India. However we find that in case of Step Pharmaceuticals,[2017 (049) STR 114 (AAR)], Authority for Advanced Ruling has in similar situation held that the provision of service is within India and hence cannot be said to be export of service. Relevant Excerpts from the said decision are reproduced below:

“2. *In terms of the sample Agreement, the applicant will be undertaking clinical trials of the drugs of the customers*

situated outside India on volunteers in India. The said volunteers will be given dosages of the drug as prescribed by the customers and medical professionals and thereafter, the applicant will be conducting screening of such volunteers wherein the volunteers are kept under observation and their blood samples are tested for identification of various parameters as required by the customers. Pursuant to the said clinical trials, the applicant will be required to report the test results through online medium to the customers. The applicant will be charging consideration from the customers on project to project basis. The above activities form part of the main activity of providing research assistance services to the customers and would not be provided in isolation. However, the activities of Bio-Statistics & Programming and Compliance services may be provided independently.

3. *The present application is being filed for a definitive ruling on the following questions :*

Whether the proposed activities of undertaking Clinical Research and Clinical Pharmacology by the applicant are taxable under the Act in light of Rule 3 of the Place of Provision of Services (POP) Rules, 2012 as the applicant renders the said services to its customers and the place of provision is located outside India?

4. *Applicant inter alia submits that since Rules 5 to 12 are not applicable to the applicant's case, the two rules which are to be considered are Rule 4 and Rule 3; that since the scope of proposed activities to be carried out by the applicant are research based advisory services and are neither related to (a) goods or, (b) requiring physical presence of the customers located outside India and therefore, Rule 4 is not applicable to the activities proposed by the applicant; that the advisory research activities of the applicant are not executionary or performance based service as envisaged in Rule 4 of POP*

Rules and therefore, the said services are not covered under Rule 4.

5. *Revenue submits that in terms of Rule 4(a) of POP Rules, the essential ingredient to levy Service Tax on any service is the location, where the service is provided in respect of goods required to be made physically available by the recipient of service to the provider of service. Further, in terms of Rule 6A(1)(d) of the Service Tax Rules, 1994, any service can be termed as export of service where the place of provision of service is outside India. By synchronous reading of Rule 6A(1)(d) of Service Tax Rules and Rule 4(a) of POP Rules, any service to be termed as export of service, it should be performed in relation to the goods which are made physically available by the recipient of the service in the non-taxable territory i.e. outside India to the provider of service located in India. In the instant case, the samples are made available to the applicant, the service provider, in India and location of actual performance of services is the premises of the applicant. Thereafter, only the report is being sent to the service recipient. As the said samples are entirely available in India either provided by the foreign customer or otherwise, the provisions of Rule 4(a) of POP Rules are aptly applicable to the instant case. Further the fact of location of actual performance of service also confirms the applicability of Rule 4(a) of POP Rules.*

6. *In short, the issue involved is whether the services i.e. Clinical Pharmacology and Clinical Research proposed to be provided by the applicant shall be liable to Service Tax, as place of provision of service would be location of the recipient of service in terms of Rule 3 of POP Rules or the location where services are actually performed in terms of Rule 4 of POP Rules. It is noticed that as per Rule 14 of POP Rules, whereas the provision of a service is prima facie, determinable in terms of more than one rule, it shall*

be determined in accordance with the rule that occurs later among the rules that merit equal consideration. Therefore, in the case before us, if proposed services are covered by Rule 4, then Rule 3 shall not be applicable.

7. *Relevant portion of Rule 4 of POP Rules is reproduced as under :*

“Rule 4. Performance based services. -”

8. *Applicant submits that a reading of the provisions of Rule 4 provides that the conditions which are required to be fulfilled for the place of provision of services is the place where the services are performed, are as under :-*

i. Where the services are performed with respect to goods, the said goods should be physically made available to the service provider;

ii. Where the services are performed in the ordinary course of business, the said service should require physical presence of the service recipient or his representative;

that the activities of the applicant are not with respect to any goods and are not provided in presence of the offshore customers and therefore, the activities of the applicant will not be covered under Rule 4.

9. *It is observed from the above referred Rule 4(a) *ibid* with respect to this case that the place of provision shall be the location where services are actually performed, if*

(a) services are provided in respect of goods and

(b) said goods are required to be made physically available by the recipient of service to the provider of service.

10. *It is noticed that applicant's proposed service of Clinical Pharmacology is study carried out for generic drugs. Further, study is proposed to be undertaken using formulations in the form of tablets, capsules, gels sprinkles, syrups, sprays, inhalers, etc., provided by*

applicant's customers located outside India, on eligible volunteers in India. Therefore, it is clear that the formulations in various forms (goods) shall be provided by applicant's customers located outside India, who is recipient of service from the applicant - provider of service. Further, service of Clinical Pharmacology is in respect of said formulation, which is provided to the applicant by its customers from outside India. Therefore, said service of Clinical Pharmacology satisfies above referred 2 conditions and therefore would fall in the ambit of Rule 4(a) of POP Rules.

11. *The contention of the applicant is that as per requirement of Rule 4(a) of POP Rules, it is mandatory that the services are provisioned qua the specific goods and not class thereof. It is observed that the language of said Rule 4(a) does not state that services provided be in respect of specific goods. Therefore, the contention of the applicant is not correct.*

12. *Further, applicant placed reliance on Paragraph 5.4.1 of the Education Guide published by TRU, which is one of the Wings under Central Board of Excise & Customs (C.B.E. & C.). Said paragraph is reproduced as under :*

5.4 Rule 4 - Performance based services

5.4.1 *What are the services that are provided "in respect of goods that are made physically available by the receiver to the service provider, in order to provide service"? - sub-rule (1)*

Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the

service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packaging or unpacking of cargo), technical testing/inspection/certification/analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys.

13. *Based on above, applicant submits that Rule 4 only contemplates a situation where the goods are temporarily handed over to service provider for servicing and returned after servicing; that their interpretation is supported by the example of detergent packets distributed and feedback by such prospective customers are not said to be covered by Rule 4. It is to be observed that the Education Guide gives example of some services covered under Rule 4 *ibid* and technical testing/analysis of goods, which are akin to clinical testing, are also included in the example. This example is similar to the proposed service, as compared to the example of detergent packets. The said paragraph of Education Guide also mentions that “it will not cover services where the supply of goods by the receiver is not material to the rendering of the service”. In the instant case, there is no doubt that receipt of formulation by the applicant for the purpose of clinical trials is crucial to rendering of services. Therefore, service relating to Clinical Pharmacology will be covered under Rule 4(a) *ibid*, even as*

per Education Guide relied upon by the applicant. It is noticed that Paragraph 1.2 of Education Guide clarifies that it is neither a Departmental Circular nor a manual of instructions issued by C.B.E. & C. Further, it states that it does not command the required legal backing to be binding on either side in any manner. In any case, contents of Education Guide cannot be substitute for POP Rules. As provisions of Rule 4 of POP Rules are clear, Education Guide cannot take precedence over it.

14. *Applicant submits that the other service provided by him to the customers located outside India would be Clinical Research, which involves Project Management, Regulatory Affairs, Medical Writing, Project Monitoring, Bio-Statistics & Programming and Compliance.*

15. *It is observed from the application submitted by the applicant that he would be charging consideration from the customers on project to project basis. It is apparent that list of such services to be provided by the applicant will not be uniform and will vary as per the requirements of project/customer. In case, said Agreement is examined in light of Rule 4 of POP Rules, there shall be two types of situations;*

(a) Service provided in respect of goods - Applicant has admitted that all above activities would not be provided in isolation. Therefore, when Clinical Research, i.e., Project Management, Regulatory Affairs, Medical Writing, Project Monitoring, Bio-Statistics and Programming and compliance is carried out in respect of formulations that are required to be made physically available to the applicant (i.e. service provider) by the service receiver located outside India, such service shall be covered under Rule 4(a) ibid. Clinical Research carried out in respect of formulations received from the service receiver, that are consumed in the process of clinical testing, which are necessary for carrying out other processes of Clinical

Research, would also be covered under this category, as these services will be provided in respect of formulation.

*(b) Service relating to Clinical Research provided on stand-alone basis - During personal hearing on 22-7-2016, applicant submitted that services relating to Clinical Pharmacology and Clinical Research would be provided on stand-alone basis and separate invoices would be issued for each service. Applicant submits that the Clinical Research service proposed to be undertaken by the applicant can also not be considered to be service provided in the physical presence of an individual, represented either as the service receiver or a person acting on behalf of the receiver in terms of Rule 4(b) *ibid*; that the volunteers which are identified, selected and gathered by the applicant are in India and such volunteers having nothing to do with the Drug Company, i.e., the service recipient, and therefore the said volunteers cannot be said to be acting on behalf of the receiver; that the activities of the applicant essentially involves provision of expert opinion on test results and as such are advisory services as opposed to executionary services and therefore, are not covered under Rule 4 of the POPS Rules for the place of provision to be in India. It is observed that where service of Clinical Pharmacology (which is provided in respect of formulations received from service receiver located outside India) is not provided by the applicant and only service of Clinical Research is provided, then this service would not be in relation to formulation. Further, there will not be physical presence of an individual, represented either as the service receiver or a person acting on behalf of the receiver, in terms of Rule 4(b) of POP Rules. Therefore, such service will not fall in the ambit of Rule 4 *ibid*."*

5.7 In our view the services provided by the appellants in present case are akin to services of Clinical Pharmacology considered by the Authority for Advance

Ruling in the decision referred to above. It cannot be disputed that in the present case the studies conducted are in respect of NCE provided by the overseas client to the Appellant. Commissioner has dealt various issues raised by the appellant to argue that the DMPK studies undertaken by them are not qua the goods provided by the overseas suppliers in para 23 of the impugned order. In para 23.1.3 and 23.1.4 Commissioner has recorded his findings stating as follows:

“23.1.3 In this regard, I find that the activities of the assessee primarily relates to drug discovery services which involves medicinal chemistry, DMPK & pre-clinical services. Further, I find that Shri B.V.N.B.S. Sarma, Vice President of the assessee company in his statement dated 26-08-2014, has, interalia, deposed that DMPK services are performed in two ways: In-Vitro & In-Vivo; that In-vitro studies involve use of enzymes, proteins, plasma etc. in solution, whereas, In-vivo studies involve use of smaller animals, like mice & rats; that their role involves understanding the solubility, distribution, metabolism & pharmaco kinetic activity of the compound in solution & subsequently in animals; that in stand-alone DMPK services client will provide the materials to conduct these studies; that in cases of stand-alone DMPK services, the compounds are exclusively made by the clients based upon the activity as a part of drug discovery . process, for which the clients have exclusive rights and these will not be available in the market for sourcing. Further, I also find that Shri A. Srinivasa Raju, Director (Corporate Affairs) of the assessee company, in his statement dated 26-08-2014, has, interealia, admitted that the stand-alone DMPK services, wherever client provides the compounds and asks them to perform DMPK studies, may fall under Rule 4 of the PPS Rules and hence service tax may be applicable on these services only and that they would pay service tax in respect of these stand-alone DMPK services w.e.f. 01-07-2012.

23.1.4 From the above, I find that the assessee have agreed to the fact that in the case of stand-alone DMPK services, the goods / compounds are supplied by the clients for carrying out In-Vitro & In-Vivo studies and thereafter

the outcome of the research effort is transferred to their clients located abroad. This is further evidenced by the copies of Invoices and Purchase Orders/Quote Estimates submitted by the assessee during the course of investigations. Further, I find that the instant Show Cause is limited to stand-alone. DMPK services provided by the assessee, and therefore, in view of the above facts, I have no hesitation in holding that in respect of these services the foreign based clients of the assessee have made the goods/compounds physically available to the assessee for performing services in relation to these goods as required under Rule 4 of the PPS Rules. Consequently, as the goods are made physically available to the service provider i.e. the assessee in India, for performing services in relation to these goods, the place of performance of such services would be in India as stipulated under Rule 4 of the PPS Rules."

5.8 In para 23.2.3 and 23.2.4 after considering the submissions made by the appellants in respect of applicability of Rule 4 of POPS and Education Guide para 5.4.1, Commissioner has recorded as follows:

"23.2.3 On analyzing the contents of the aforesaid guidance note issued by the CBEC, I find that services in the nature of 'technical testing/ inspection/ certification/ analysis of goods' is very much covered within the ambit of Rule 4 of the PPS Rules. In fact, I find that the services provided by the assessee are in the nature of research and analysis of compounds supplied by the clients with reference to the drug distribution metabolism and pharmacokinetic study (DMPK), and thereafter transferring the outcome of the research effort to the foreign based client(s). Further, I find that it cannot be disputed that DMPK services are conducted with reference to these goods/ compounds supplied by the client(s) and therefore these goods/compound are the essence for provision of these services and without which, no research / study can be performed and the intended services rendered and delivered. Further, I find that, Shri B.V.N.B.S. Sarma, Vice President, in his statement dated 28-06-2014, has categorically confirmed the fact that in cases of stand-alone DMPK services, the compounds are exclusively made by the clients based upon the activity as a part of

drug discovery process, for which the clients have exclusive rights and these will not be available in the market for sourcing. Thus, the exclusivity of the goods/ compound offered for research to the assessee by the client goes on to show that these goods/ compounds have come into the possession of the assessee only temporarily, for the purpose of research study and submitting the analysis report thereof. Further, return of the goods/ compounds to the client after the service is provided, is not sine qua non for these services to be covered under Rule 4 of the PPS Rules, because, contrary to the interpretation of the assessee, no such statutory stipulation exists nor does the Guidance Note support this view. In fact, I find that the clients would give certain goods/ samples for testing/inspection/certification/analysis', the intended purpose of which would be the testing/inspection or analysis report relating to these goods/ samples as regards their features/ characteristics, etc. The intention that these goods/ samples would be returned back to them would not be the paramount in the minds of the clients behind offering these goods/samples for such analysis. Further, the assessee's contention that during the course of provision of services, certain goods locally procured by them are also used along with the goods/compounds submitted by the clients, would have no bearing on this case as far as the goods / compounds made available by the client(s) are worked upon for delivering the intended services. Further, I find that it cannot be disputed that the goods/compounds supplied by the clients are not abstract material but are movable objects or things that can be touched, felt or possessed as clarified in the Guidance Note.

23.2.4 In view of the above, the assessee's contention that the services provided by them is not qua the goods is not acceptable and I hold that the standalone DMPK services provided by the assessee are performed on the goods! compounds supplied by their foreign based clients and hence this service activity of the assessee is covered under Rule 4 of the PPS Rules."

5.9 In view of the discussions as above we are not in agreement with the submissions made by the appellant that in case of DMPK Standalone Studies, where NCE has

been made available to them by the overseas client for undertaking the said studies, the services will be covered by Rule 3 of POPS and hence Export of Services under Rule 6A of Service Tax Rules, 1994. Appellants have relied upon the decisions in their own case to argue that the services provided by them should be considered as export of services. We find the said decision has been passed without considering the provisions of Place of Provision of Service Rules, 2012. Further the decision of tribunal does not lay down anywhere that the said decision is in respect of DMPK Standalone services being provided by the appellant. The said decision is clearly distinguishable on this account. Further as the said decision has not even considered the Place of Provision of Service Rules, 2012 which are soul of the scheme for determination of place of provision of service, for determining whether the same is provided in taxable territory (India) or outside the taxable territory, the said decision is per in curiam and cannot have any precedence value.

5.10 Appellants have also relied upon the decision in case of Advinus Therapeutics Ltd. in their support. They have specifically referred to para 16 & 17 of the decision reproduced below:

***“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."*

From the facts of the present case we find that appellant have conducted DMPK Studies in respect of the NCE's provided to them by the overseas client. Rule 4 do not put any conditions in respect of alteration or alternation of the goods provided by the service recipient. Reading anything beyond what has been provided in the rules/ statue cannot be proper interpretation put to rules. Both the decisions in case of Sai Life Sciences and Advinus Therapeutic have proceeded mainly on the principle that taxes should not be exported. The taxes are to be determined as per the taxing statue and it is for legislator and tax policy makers to determine as to what should be taxed and what should not be taxed. High sounding phrases as this cannot restrict or expand the scope of taxing statue. In case something falls

within the scheme of taxation the same cannot be exempted till specifically exempted by a proper notification. In the present case we find that the activities under taken by the appellants in terms of DMPK studies squarely fall within the scheme of Rule 4 of POPS Rules, and hence the location of service provider shall be place of provision of service which is in India and hence cannot be treated as export of service in terms of Rule 6A of Service Tax Rules, 1994.

5.11 We do not find any relevance of the ruling from Australia in respect of VAT relied upon by the appellant's relevant in present facts and circumstances. A constitutional bench of Supreme Court has in case of Dilip Kumar & Company [2018 (361) ELT 577 9SC)] laid down the law with regards to interpretation of taxing statute as follows:

“25. We are not suggesting that literal rule de hors the strict interpretation nor one should ignore to ascertain the interplay between ‘strict interpretation’ and ‘literal interpretation’. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well-settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

26. Justice G.P. Singh, in his treatise 'Principles of Statutory Interpretation' (14th ed. 2016 p.-879) after referring to *Re, Micklethwait*, (1885) 11 Ex 452; *Partington v. A.G.*, (1869) LR 4 HL 100; *Rajasthan Rajya Sahakari Spinning & Ginning Mills Federation Ltd. v. Deputy CIT, Jaipur*, (2014) 11 SCC 672, *State Bank of Travancore v. Commissioner of Income Tax*, (1986) 2 SCC 11 and *Cape Brandy Syndicate v. IRC*, (1921) 1 KB 64, summed up the law in the following manner -

"A taxing statute is to be strictly construed. The well-established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY AND LORD SIMONDS, means : 'The subject is not to be taxed without clear words for that purpose : and also that every Act of Parliament must be read according to the natural construction of its words. In a classic passage LORD CAIRNS stated the principle thus : "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. VISCOUNT SIMON quoted with approval a passage from ROWLATT, J. expressing the principle in the following words : "In a taxing Act one has to look merely at what is clearly said. This is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

It was further observed :

“In all tax matters one has to interpret the taxation statute strictly. Simply because one class of legal entities is given a benefit which is specifically stated in the Act, does not mean that the benefit can be extended to legal entities not referred to in the Act as there is no equity in matters of taxation....”

Yet again, it was observed :

“It may thus be taken as a maxim of tax law, which although not to be overstressed ought not to be forgotten that, “the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him”, [Russel v. Scott, (1948) 2 All ER 1]. The proper course in construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible [Ormond Investment Co. v. Betts, (1928) AC 143]. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity [Mapp v. Oram, (1969) 3 All ER 215]. It has also been said that if taxing provision is “so wanting in clarity that no meaning is reasonably clear, the Courts will be unable to regard it as of any effect [IRC v. Ross and Coutler, (1948) 1 All ER 616].”

Further elaborating on this aspect, the Learned author stated as follows :

“Therefore, if the words used are ambiguous and reasonable open to two interpretations benefit of interpretation is given to the subject [Express Mill v. Municipal Committee, Wardha, AIR 1958 SC 341]. If the Legislature fails to express itself clearly and the taxpayer escapes by not being brought within the letter of the law, no question of unjustness as such arises [CIT v. Jalgaon

Electric Supply Co., AIR 1960 SC 1182]. But equitable considerations are not relevant in construing a taxing statute, [CIT, W.B. v. Central India Industries, AIR 1972 SC 397], and similarly logic or reason cannot be of much avail in interpreting a taxing statute [Azam Jha v. Expenditure Tax Officer, Hyderabad, AIR 1972 SC 2319]. It is well-settled that in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the Legislature to determine the same [Kapil Mohan v. Commr. of Income Tax, Delhi, AIR 1999 SC 573]. Similarly, hardship or equity is not relevant in interpreting provisions imposing stamp duty, which is a tax, and the Court should not concern itself with the intention of the Legislature when the language expressing such intention is plain and unambiguous [State of Madhya Pradesh v. Rakesh Kohli & Anr., (2012) 6 SCC 312]. But just as reliance upon equity does not avail an assessee, so it does not avail the Revenue.”

The passages extracted above, were quoted with approval by this Court in at least two decisions being Commissioner of Income Tax v. Kasturi Sons Ltd., (1999) 3 SCC 346 and State of West Bengal v. Kesoram Industries Limited, (2004) 10 SCC 201 [hereinafter referred as ‘Kesoram Industries case’ for brevity]. In the later decision, a Bench of seven-Judges, after citing the above passage from Justice G.P. Singh’s treatise, summed up the following principles applicable to the interpretation of a taxing statute :

“(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed : it cannot imply anything which is not expressed : it cannot import provisions in the statute so as to supply any deficiency : (ii) Before taxing any person, it

must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly".

5.12 Thus the demand of service tax has to be upheld on merits. It is settled principle in law that in case that when certain taxes have been short paid or not paid by the due date then they are to be paid along with the interest. In case of P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] Hon'ble Bombay High Court has stated as follows:

"10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

"Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as

determined under sub-section (2) or has paid the duty under sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate”

The terminal part in the quotation above, which is couched with the words “shall” and “be liable” clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional.”

Thus we uphold the demand of interest under Section 75 of the Finance Act, 1994.

5.13 Penalties under Section 76 and 77 of Finance Act, 1994 are in nature of civil penalties and are imposed in cases where the person who by his act of omission or commission has failed to fulfill the obligations cast on him under the statute.

- o By not paying the service tax on due date appellants have made themselves liable to penalty under section 76 of Finance Act, 1994 for the period of delay in the payment of the taxes.
- o By not furnishing the correct information as required on ST-3, appellant have made themselves liable to penalty under Section 77(2) read with Section 70 of the Act.

Hence the penalties imposed upon by the adjudicating authority are upheld. We do not find any merits in the claim of the appellants for waiver of penalty under Section 80. Section 80 of the Finance Act, 1994 is not the licence to condone the irregularities in the payment of taxes and

filing of the returns. It was provided to remove the genuine difficulties that tax payers would have encountered during the initial implementation of tax regime on services. The scheme of taxation of services was introduced in 1994 and the case under consideration is for period July 2012 to 2014. Thus we do not find any merits in such submissions.

5.14 Thus in view of discussions as above appeal filed by the appellants is dismissed.

(Order pronounced in the open court on 12.06.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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