CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10589 of 2016-DB

[Arising out of Order-in-Original/Appeal No AHM-SVTAX-000-COM-24-15-16 dated 25.02.2016 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

Veeda Clinical Research P Limited **.... Appellant**
Shivalik Plaza-a, Ambawadi,
AHMEDABAD, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Ahmedabad **.... Respondent**
Principal Commissioner, CGST & Central Excise,
Ahmedabad South, 7th Floor, Central GST Bhavan,
Nr. Polytechnic, Ambawadi, Ahmedabad-380015

APPEARANCE :

Shri Vipul Khandar, Chartered Accountant for the Appellant
Shri Rajesh R. Kurup, Superintendent for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 27.06.2024
DATE OF DECISION: 14.08.2024

FINAL ORDER NO. 11772/2024

RAMESH NAIR :

The brief facts of the case is that during the course of audit of appellant's record, it was noticed that the appellant had performed service in India and delivered clinical study report to their foreign client through E-mail, Courier or website. The clinical study was carried out on the goods supplied by the service recipient. The appellant had not paid service tax on the amount shown under the heading Export of Service. The case of the department is that since the performance of service is in India and the clinical study was carried out on the goods supplied by the service recipient, therefore, the service of the appellant does not fall under the category of Export of Service in terms of Rule 4 of Place of Provision of Service Rules, 2012. Accordingly, the show cause notice dated 13.11.2014 covering the period 01.07.2012 to 2013-2014 was issued. The said show cause notice was adjudicated wherein the Adjudicating Authority i.e. Principal Commissioner of Service Tax, Ahmedabad passed the following order:-

"(i) I order that the amount of Rs. 19,20,18,008/- received by M/s. Veeda Clinical Research Pvt. Ltd., Ahmedabad during the period 2012-13 (from 01.07.2012 onwards) to 2013-14 as detailed in the show-cause- notice No. STC/04-08/O&A/14-15 dated 13.11.2014 is to be considered as taxable value received by them towards provision of "service" as per section 658(44) read with section 67 of the Finance Act, 1994:

(ii) I confirm demand of Service Tax amounting to Rs. 2,37,33.426/- [Rupees Two Crores Thirty Seven Lakhs Thirty Three Thousands Four Hundred Twenty Six only] leviable on the aforesaid taxable value of Rs. 19,20,18,008/- charged and collected by M/s. Veeda Clinical Research Pvt. Ltd.. Ahmedabad from their clients during the period 2012-13 (from 01.07.2012 onwards) to 2013-14 as discussed above. under section 73(2) read with section 68;

(iii) I order that the said assessee should pay Interest as applicable under Section 75 of the Finance Act. 1994 on the above confirmed demand of service tax totaling Rs. 2,37,33,426/-:

(iv) I impose a penalty of Rs. 23.73.343/ [Rupees Twenty Three Lakhs Seventy Three Thousands Three Hundred Forty Three only] under Section 76 of the Finance Act, 1994;

(v) I impose penalty of Rs. 10,000/- [Rupees Ten Thousands only] under Section 77(2) of the Finance Act. 1994 for their failure to self assess service tax liability and to file ST-3 return in the appropriate manner.

(vi) The amount of penalty imposed under Section 76 shall be reduced to twenty-five percent of the penalty imposed under this order as above. provided where such reduced penalty is also paid within a period of thirty days of the date of receipt of this order, along with the service tax and interest amount as above."

1.2 Being aggrieved by the aforesaid order dated 25.02.2016, the appellant filed the present appeal.

2. Shri Vipul Khandhar, Learned Chartered Accountant appearing on behalf of the appellant submits that the exclusion provided under rule 4 of Place of Provision of Service Rules, 2012 is in respect of goods such as machinery, equipment and not the goods which is in the present case. He submits that their main activity is to analysis the effect of the drugs supplied by the service recipient and it is not a case of testing of the drug but objective of testing is the analysis the effect of the drug, submission of the report of the same. Therefore, the goods is not significant in the present case. He also submits that this clinical trial conducted on drugs was approved by the Drug Controller. He submits that on the identical issue

various judgments have been passed, therefore, the issue is no longer *res-integra*. He placed reliance on the following judgments:-

(a) Commissioner Of Central Excise, Pune-I Vs. Sai Life Sciences Ltd – 2016 (42) STR 882 (Tri.- Mumbai)

(b) Dow Chemical International (P) Ltd. *Vs.* Commr. Of CGST, Navi Mumbai – 2020 (33) GSTL 424 (Tri.- Mumbai)

(c) Fertin Pharma Research & Development India Pvt. Ltd. Vs. Commissioner Of CGST, Navi Mumbai – 2020 (38) GSTL 33 (Tri. Mumbai)

(d) Principal Commissioner Of C. Ex., Pune-I Vs. Advinus Therapeutics Ltd – 2017 (51) STR 298 (Tri.- Mumbai)

(e) Apotex Research Pvt. Ltd Vs. Commissioner Of C. Ex. & S.T., Bangalore-I – 2022 (63) GSTL 99 (Tri. Bang)

(f) Commissioner of Central Tax, Bangalore vs. Medgenome Labs Ltd – 2023 (73) GSTL 586 (Kar.)

(g) Ayana Pharma Ltd vs. Union of India - 2022 (65) GSTL 165 (Guj.)

(h) Commissioner of CGST, Ex., Cus. & ST – Indore vs. Diabetes Thyroid Hormone Research Institute Pvt Ltd – 2019 (24) GSTL 560 (Tri.- Delhi)

2.2 He further submits that in the appellant's own case for the subsequent period i.e. October, 2016 to March, 2017, the Commissioner (Appeals) vide Order-In-Appeal No. AHM- EXCUS- 001- APP-265-2017-18 dated 24.01.2018 and Order-In-Appeal No. AHM–EXCUS-001- APP-469-17-18 dated 26.03.2018 decided the identical matter in their favor.

3. Shri R.R Kurup, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the appellant have carried out the clinical study on the drugs supplied by the foreign based service recipient. After carrying out the clinical study on the goods supplied by the service recipient the technical report thereof was supplied to the service recipient. The service recipient is located outside India. On the identical facts and the activity involved in the present case, various judgments have been passed which are as under:-

In the case of Commissioner Of Central Excise, Pune-I Vs. Sai Life Sciences Ltd (Supra) division bench of this tribunal passed the following order:-

"These appeals of the Revenue are against Order-in-Appeal No. PUN-EXCUS-001-APP-157 to 159-14-15, dated 15th January, 2015 passed by the Commissioner of Central Excise (Appeals), Pune-I.

2. *The impugned order has set aside the rejection of the refund claims by Dy. Commissioner of Service Tax, Pune-I. M/s. Sai Life Sciences Ltd., registered as providers of 'scientific and technical consultancy service' to clients located outside India, also offers research and development expertise in new compounds of pharmaceutical products. Unable to utilise the accumulated Cenvat credit, three refund claims for ` 79,55,273/- for July, 2012 to September, 2012, ` 73,39,010/- for October, 2012 to December, 2012 and ` 96,57,578/- for April, 2013 to June, 2013 were filed. The refund claims were rejected on the ground that in accordance with Rule 4 of Place of Provisions of Service Rules, 2012 performance of the service was within the country and hence the activities of M/s. Sai Life Sciences Ltd. did not amount to export of services. The first appellate authority has concluded that the two necessary conditions for classifying the place of provisions of service are that the goods are to be made available to the service provider and services are to be provided in respect of the goods. While acknowledging that some of the chemicals required for research and development are provided by the clients of the appellant and hence the condition that goods be made available by the service recipient has been complied with, the impugned order, holding that services are not rendered in relation to these materials, notes as below :*

"The 'deliverables' by the Appellants are neither supplied or owned by the service receiver nor the Appellants are providing any service in respect of the deliverables. Synthesis of a new compound using various chemicals, solvents, reagents, compounds cannot be called as service in respect of the said chemicals, solvents, compounds. Further, the Appellants are formulating the process of the manufacture of the new compounds and the process is being sent to their clients/service receiver. It is seen from the detail service agreement that the Appellants are engaged into converting compound 120 into compound 129."

3. *Learned Authorised Representative has cited specific provisions of Provisions of Services Rules, 2012. Further reliance was placed on Note 5 of the Service Tax Education*

Guide which relates to Place of Provision of Services Rules, 2012.

4. *Learned Counsel for the respondent has placed reliance on the decision of this Tribunal in SGS India Pvt. Ltd. v. Commissioner of Service Tax, Mumbai [2011 (24) S.T.R. 60 (Tri.-Mumbai)], which was upheld by the Hon'ble High Court of Bombay [2014 (34) S.T.R. 554 (Bom.)], and the relevant finding therein :*

"8. The view taken by the Central Board of Excise and Customs vide Circular No. 66/2005-S.T., is that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/99-S.T., dated 9-4-1999. The Board was examining the effect of withdrawal of Notification No. 6/99-S.T. This Notification exempted the taxable service specified in Section 65(48) of the Finance Act, 1994 provided to any person, in respect of which payment was received in India in convertible foreign exchange, from payment of service tax. The Notification, in a proviso, laid down that nothing contained in the Notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered was repatriated from or sent outside India. It was this Notification which was rescinded by Central Government by issuing Notification No. 2/2003-S.T., dated 1-3-2003. The Board was called upon to consider representations received from service sector, wherein an apprehension was raised that export of service would be affected adversely in the international market on account of withdrawal of Notification No. 6/99-S.T. The Board dispelled this apprehension by clarifying that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/99-S.T. This clarification is certainly binding on the Revenue. Consequently, it has to be held that the reinstatement of the above exemption through Notification No. 21/2003-S.T., dated 20-11-2003 cannot detract from the correct legal position clarified by the Board. For this reason, we hold that there can be no demand of service tax on the appellant on the ground that exemption Notification No. 6/99-S.T. was withdrawn in March, 2003 and identical exemption was reintroduced in November, 2003. As a matter of fact, none of the notifications referred to 'export of services'. Again, as a matter of fact, the Central Board of Excise & Customs held 'export of services' to be tax-free notwithstanding the notifications. The law which categorically exempted export of services from payment of service tax was brought into force for the first time through the Export of Services Rules, 2005. Undoubtedly, the period of demand, in the present case, is prior to 2005.

9. The view taken hereinbefore is supported by the judgment of the Hon'ble Supreme Court in All India Federation of Tax Practitioners' case (supra), wherein it was held that service tax was a destination-based consumption tax in the sense that it was on commercial activities and was not a charge on the business but on the consumer. The emphasis is on consumption of service. In the instant case, the services rendered by the appellant were consumed abroad where the appellant's clients used the service of inspection/test/analysis to decide whether the goods intended to be imported by them from India conformed to the requisite specifications and standards. In other words, the benefit of the service accrued to the foreign clients outside the Indian territory. By no stretch of imagination can it be said that there was no export of service. The services, in question, were exported. Export of service has ever been tax-free as observed by the CBEC. This exemption has never been affected by Notification No. 6/99-S.T. or its rescission. Ultimately, therefore, we hold that no service tax was leviable from the appellant."

5. *In view of those principles emphasized time and again and reiterated as above, the*

appeal is devoid of merits and is accordingly rejected. The stay petitions are also disposed of."

On the identical activity in the case of Dow Chemical International (P) Limited *vs.* Commr. Of CGST, Navi Mumbai – 2020 (33) GSTL 424 (Tri.- Mumbai). The Tribunal has taken the following view:-

"3. *I have heard Learned Chartered Accountant for the Appellant and Learned Authorised Representative for the Revenue and perused the record including the material supplied by the Learned Counsel during the course of hearing. According to Revenue, the Scientific and Technical Consultancy Service provided by the Appellant being performance based services therefore it falls under Rule 4 of Place of Provision of Service Rules. It was submitted on behalf of Revenue that as per Rule 4 ibid, the Place of Provision of Service shall be the location where the services shall be performed and since the services have been performed in India, the Place of Provision of Service is in India and therefore the Appellant fulfilled the condition, according to which the Place of Provision of Service should be outside India. According to Learned Authorised Representative, the service in issue cannot be treated as export of service. He also submitted that refund amount of Rs. 4844/- cannot be granted since the input service in three cases do not have any nexus with output service. Learned Chartered Accountant for the Appellant on the other hand submitted that the service provided by the Appellant is in the nature of Research and Development Service which is covered under Rule 3 of Place of Provision of Service Rules and not under Rule 4 of ibid. He also submitted that the refund claim was filed under Notification No. 27/2012-C.E. (N.T.),dated 18-6-2012 under Rule 5 of the CCR, 2004 which provides that in case refund claim sanctioned is less than the refund claim, then the difference shall be allowed as re-credit and therefore the difference of Rs. 13,27,192/- is accruing to the Appellant under the existing law. He also submitted that Scientific and Technical Consultancy Services performed by the Appellant has been considered as export of service by the department in previous years. According to him, the turnover of Scientific and Technical Services provided by the Appellant shall be considered under Rule 5 of CCR of 2004 when the amount due is received in foreign currency.*

4. *The reading of the provision of Rule 4 of Place of Provision Service Rules, 2012 makes it clear that the said Rule is applicable when the service is to be provided with respect to goods which are physically made available by the recipient of service to the provider of service. In the instant matter, as per agreement, dated 3-11-2007 between the Appellant i.e. Service Provider and Dow International Technology Corporation, USA (DITC)i.e. Service receipient, DITC shall be reimbursing the cost incurred by Appellant, including material cost for performing research & development activities at a mark up of 10%. Only on the basis of this Clause, the ld. Commissioner has come to the conclusion that goods/material have been purchased by the Appellant on behalf of DITC and therefore in a way the goods are made physically available by DITC to the Appellant and as such Rule 4 is applicable. It is not disputed that in the instant matter, the goods were purchased by the Appellant themselves for Research & Development as per their own choice/decisions. There is nothing in the agreement that the Appellant are bound to purchase particular goods or materials as per the instruction of DITC nor any clause/document have been*

brought on record which suggest that the Appellant is bound to purchase the material/goods as per the direction of DITC i.e. the service recipient. I have gone through the agreement and there is no clause in the agreement which mention that service recipient was to provide goods/material for research & development carried out by the Appellant. The CBEC vide Education Guide has explained the services which shall be covered under Rule 4(a) of Place of Provision of Service Rules, 2012. According to the said Education Guide, the essential characteristics 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. So far as reimbursement of material cost plus a mark-up of 10% on the same is concerned, it is a method of pricing considered in the agreement, since the result from research & development activity performed by the Appellant cannot be determined at any particular point of time. In my view, the aforesaid pricing method cannot be treated as reimbursement of expenses. Reimbursement means paying the service provider exact cost incurred by him on behalf of service recipient, therefore there is no reimbursement of goods involved in the matter. Since the research activity performed by the Appellant leads to formation of a new product different from the original raw material therefore Rule 4 of Place of Provision Of Service Rules, 2012 (hereinafter referred to as "Rules, 2012") will not be applicable. In my opinion, the research & development service falls under Rule 3 of Rules, 2012, according to which, the location of service provider shall be constructed as the location of recipient. In the present case, the location of service recipient i.e. DITC is outside India and therefore the said service shall be treated as export of service. The same is supported by the following decision also :

(i) Advinus Therapeutics Ltd; 2017(51) S.T.R. 298 (Tri.-Mum)

(ii) Sai Life Sciences Ltd; 2016 (42) S.T.R. 882 (Tri.-Mum)

(iii) Midas Care Pharmaceuticals Pvt. Ltd.; 2014-TIOL-1484-CESTAT-MUM = 2015 (37) S.T.R. 346 (Tribunal)

In view of the above, it can be safely said that the Research & Development Service performed by the Appellant is export of service in terms of Rule 3 of Rules, 2012. Earlier also for the period July, 2012 to September, 2012, October, 2012 to December, 2012 and January, 2013 to March 2013, the said services were treated as export of services by the department and no relevant material has been placed on record to treat the same differently for the period in dispute. Therefore the Scientific and Technical Consultancy Services provided by the Appellant to DITC is to be treated as export of service. Rule 5 of Cenvat Credit Rules, 2004 was amended vide Notification No. 18/2012-C.E. (N.T.), dated 17-3-2012 and after amendment the said rule provides that the refund of Cenvat credit is allowed to service provider when the output service is exported. After amendment of the said Rule, no nexus is relevant between input or input services with the output service and therefore the present refund claim which relates to the period April, 2016 to June, 2016 is correctly availed by the Appellant for the aforesaid service. So far as the rejection of the amount to Rs. 2184/- qua garden maintenance services is concerned, the Principal Bench of the Tribunal in the matter of HCL Technologies Ltd., 2015 (40) S.T.R. 369 (Tri. - Del.) held that the garden service qualified as input services and therefore following the said principle, I am allowing this refund claim. Similarly, recruitment service was rejected on the ground that there is no nexus between the recruitment service and the output

service provided by the Appellant. On this issue also, a co-ordinate bench of the Tribunal in the matter of Sai Life Sciences Ltd (supra) has held that since the company therein has recruited the employees having vast experience in research, therefore the credit is admissible. Following the same ratio, I am also inclined to allow the Cenvat credit under this head.

5. *In view of the discussions made hereinabove, the Appeal filed by the Appellant is allowed with consequential relief, if any."*

In the case of Fertin Pharma Research & Development India Pvt. Ltd. Vs. Commissioner Of CGST, Navi Mumbai (Supra).The tribunal observed as under:-

" ***6.*** *Heard both sides and perused the records. Undisputedly, the appellant had purchased the goods from the overseas company, on which they discharged appropriate Customs duty on its import into India. Necessary tests are carried out by them on the said goods in India and after analysis the relevant report was submitted to the overseas Denmark Company. In the process of providing the said output service, that is, "Technical Testing and Analysis Service/Scientific and Technical Consultancy Service" various input services were used on which they availed Cenvat credit. Since the services are exported, they claimed cash refund under Rule 5 of Cenvat Credit Rules, 2004, but Revenue rejected it alleging that the services since performed in India, therefore, do not fall under the scope of 'export of service'. I find that in their own case this Tribunal has already taken a view that the services rendered by the appellant are in the nature of export service and hence eligible to cash refund of accumulated Cenvat credit. Also, in the case of Advinus Therapeutics Ltd. (supra), this Tribunal more or less under similar circumstances discussing all aspects of the issue held that scientific or technical consultancy service provided for the development of drugs to the overseas recipient of service was held to be 'export service'. This Tribunal observed as follows :-*

"13. In the context of a catena of judgments and decisions that exports are not taxable and, with the most palpable manifestation of export of invisibles being the receipt of convertible foreign exchange from a recipient of service located outside the country, that services are taxable at the destination, the scope of Rule 4 must necessarily be scrutinized to ascertain if there was, indeed, legislative intent to deny acknowledgement as exporter to a certain category of service providers that were so privileged tell them. There is no dispute that the recipient of service is located outside India and that the consideration is received in foreign convertible currency. Yet, Revenue insists that performance of service is in India. A service is not necessarily a single, discrete, identifiable activity; on the contrary, it is a series of invisibles that cater to the needs of a recipient; it is upon the consumption of the service by the recipient that service is deemed to have become taxable. This has been so held by the Hon'ble Supreme Court in All India Federation of Tax Practitioners v. Union of India & others [2007 (7) S.T.R. 625 (S.C.)] below :-

'7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and

is not a charge on the business but on the consumer and it would, logically, be leviable on services provided within the country.'

It would appear from the exposition in the judgment that the tax was intended as a levy on activities that would otherwise be performed by the recipient for itself. The new industry of hiving out or outsourcing of what was, conceivably, being done within the enterprise was intended to be subject to the new levy. In the matter of service rendered by respondent, this activity could, but for commercial viability, will be executed by the recipient within its own organization or the territory in which it exists. The satisfaction of the customer occurs upon an outcome which is possessed by the recipient. Hence, even if some of the activities are carried out in India, by no stretch can it be asserted that the fulfilment of the activity is in India. Therefore, the inescapable conclusion is that the location of the actual performance of the service is outside India and, even with the special and specific provision of Rule 4 of Place of Provision of Services Rules, 2012, the performance of service being rendered outside India would render it to be an export.

14. In this context, the legislative intent of incorporating a special and specific provision in Rule 4 may yield further insights. The special provision, which may be seen as an exception to the general Rule 3, deals with services in respect of goods as well as those provided to individuals. Not unnaturally, the services that require the physical presence of the person is taxed where the consumer receives the service and not at his location which as per Rule 2(i)(iv) would be his usual place of residence. In what can be considered as a most telling example of the scope of this portion of Rule 4, we could do a lot worse than refer to a decision of the Hon'ble High Court of Delhi that, in the course of dealing with other, more weighty matters in Orient Crafts Ltd. v. Union of India [2006-TIOL-271-H.C.-DEL-S.T. = 2006 (4) S.T.R. 81 (Del.)], took note of, and answered, one of the submissions thus -

'4. The contention of the Learned Counsel for the petitioner, based on the interpretation of Section 66A of the Act, is that any service that is obtained by a person who has a fixed place of business in India is liable to tax for services availed by him in a foreign country. By way of an example, Learned Counsel for the petitioner has cited that if such a person in India goes abroad, and has a haircut, he would be liable to pay service tax in India on the basis of Section 66A of the Act.

5. We are not at all convinced by this argument of Learned Counsel for the petitioner. The rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India is liable to service tax. In the example given by the Learned Counsel for the petitioner, there is no question on the service of haircut having been received in India.'

The intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 of Place of Provision of Services Rules, 2012 may not serve to confer jurisdiction becomes increasingly obvious.

15. Accordingly, we can infer that the location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; for that, Rule 3 would have sufficed. A contingency that is not amenable to Rule 3 has been foreseen and remedied by Rule 4 and in the process, the sovereign jurisdiction to tax is asserted. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Services Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. It is obviously not

intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, ipso facto, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable. This is in consonance with the privilege of exemption afforded to export of services. The special and distinct role of Rule 4 becomes clearer.

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."

8. *I do not find merit in the contention of the Learned AR for the Revenue that the ratio laid down by the Hon'ble Bombay High Court in M/s. SGS India Limited's case (supra) cannot be made applicable to the facts of the present case on the ground that in the said case, the Place of Provision of Services Rules, 2012 was not considered. This Tribunal while interpreting the provisions of new Rules, that is, Place of Provision of Services Rules, 2012 followed the ratio laid down in the said case in reiterating the basic principle of levy of service tax and observed that it is a consumption-based levy, accordingly, the technical and consultancy service, commences from the stage of undertaking the test on the goods procured and the service is completed on delivery of the test report/certificate to the overseas client. I do not find any reason to deviate from the aforesaid observation of this Tribunal. Further, the judgments referred by the Learned AR for the Revenue, in my opinion, are not relevant to the facts of the present case, inasmuch as in the said judgment the issue raised was levy of service tax on procurement of FDA certificate for the goods to be sold in the respective country. In the result, following the aforesaid precedent, I do not find merit in the impugned order to the extent of holding that the services provided by the appellant are not the export service under Rule 6A of Service Tax*

Rules, 1994. Consequently, the appellants are eligible to cash refund of the accumulated Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004, except in relation to credit availed input services denied by the Learned Commissioner (Appeals) observing that necessary evidences in relation to Building maintenance charges were not produced to establish the nexus with the output service and secondly the rent-a-cab service since placed under the exclusion clause of the definition of input service after amendment to Rule 2(l) of the Cenvat Credit Rules, 2004 with effect from 1-4-2011. Accordingly, the matters are remanded to the adjudicating authority to calculate the admissibility of refund amount except the credit availed on input services viz. Building maintenance charges and rent-a-cab service.

9. *Appeals are disposed of accordingly."*

In the case of Principal Commissioner Of C. Ex., Pune-I Vs. Advinus Therapeutics Ltd (Supra) the division bench of this tribunal on the identical issue passed the following order:-

"6. *We find from a perusal of the decision in re Sai Life Sciences Ltd. that it has, in the context of claim of Revenue that Place of Provision of Service Rules, 2012 should, notwithstanding agreements with overseas client and payment in convertible foreign currency, determine whether exports have occurred for the purposes of refund of Cenvat credit, accorded a primacy to the principle that exports are not liable to be taxed. In support, it relied upon an earlier decision of the Tribunal in SGS India Pvt. Ltd. v. Commissioner of Service Tax, Mumbai [2011 (24) S.T.R. 60 (Tri.-Mumbai)] which found approval of Hon'ble High Court of Bombay.*

7. *We find that, in view of the contentions put forth by learned Authorized Representative for not acknowledging the applicability of the decision supra, we are called upon to elaborate the principle so espoused and the applicability therein.*

8. *The Place of Provision of Services Rules, 2012 was notified owing to the altered circumstances of incorporation of Section 66B as substitute for Section 66 of Finance Act, 1994 with effect from 1st June, 2012; consequently, the taxability of service was, thenceforth, not amenable to identification from the transaction defined in various sub-clauses of Section 65(105) of Finance Act, 1994. With the coming into force of 'taxable territory' as one of the determinants of taxability, Section 66C, viz.,*

'66B. Determination of place of provision of service. - *(1) The Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such service is provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.*

(2) Any rule made under sub-section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory.'

has been incorporated to establish the jurisdiction for levy of this tax on intangibles that could no longer be identified from its definition.

9. *The proposition put forth by appellant-Commissioner would, if accepted, circumscribe and limit Rule 5 of Cenvat Credit Rules, 2004 and jeopardize the privilege of exporters. Morever, that proposition would also lead to taxing the activities of the*

respondent for, if the place of provision of the service is India, it would place the consideration received thereof, notwithstanding its receipt from an overseas entity in convertible foreign currency, within the ambit of taxation under Section 66B of Finance Act, 1994. It is moot if such an interpretation of Place of Provision of Services Rules, 2012 can create a jurisdiction to tax and should be allowed to prevail over the principle that taxes are not be exported with goods or services. We are, in the present dispute, not called upon to determine the mode and manner in which the tax on export of service can be escaped and hence we do not propose to delve into the taxability of the service rendered by the respondent. This appeal is limited to the finding of the first appellate authority that the refund claims are within the entitlement of the respondent in accordance with Rule 5 of Cenvat Credit Rules, 2004. In the course of our determination, we may, perchance, answer the larger aspect too because the ground of appeal canvassed by Revenue is that one of the ingredients of export of service in Rule 6A of Service Tax Rules, 1994 is that the service is not provided in India.

10. *We take note that Rule 5 of Cenvat Credit Rules, 2004 has been substituted with effect from 1st April, 2012 and has, with effect from 1st July, 2012, incorporated a definition of export of services in lieu of the erstwhile reference to Export of Service Rules, 2005 in response to the compulsions arising from the new paradigm in taxation of services. The definition of export for the purpose of rebate of tax on exported services and on inputs/input services used in exported services, as well as for refund of accumulated credit of duty/tax on inputs/input services, have thus been aligned.*

11. *That the following ingredients which crystallize an activity as 'export of service' for the purposes of Rule 6A of Service Tax Rules, 1994, viz., that provider of service is in taxable territory, that recipient is outside India, that the service is not in the 'negative list', that payment is received in convertible foreign exchange and that the provider and recipient are not covered by the fiction in Explanation 2(b) of Section 65B(44) of Finance Act, 1994, are applicable to the service rendered by the respondent is common ground. The cavil is that the activity does conform to the provisions of Rule 4 of Place of Provision of Services, Rules, 2012 because the service is allegedly.*

'4 .....provided in respect to 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. .'

rendering the location of performance of service, i.e. India, to be pertinent to the activity of respondent.

12. *It is an admitted fact that the respondent had been rendering services that were, in the erstwhile pre-negative list regime, taxable but for the provider being an Export Oriented Unit under the entry in Section 65(105)(za) of Finance Act, 1994. In the scheme of Export of Service Rules, 2005, the various taxable services had been categorized as object-based, performance-based and recipient-based for the purpose of exemption under Section 93 of Finance Act, 1994. Though those Rules are no longer valid for the purposes of Rule 5 of Cenvat Credit Rules, 1994, their guidance value cannot be discountenanced. The 'negative list' regime was not intended to be either detrimental or beneficial to existing assessees except where such intent was specifically sanctioned by legislation. The respondent, prior to 1st July, 2012, was eligible for all benefits as the service rendered by them were treated as export with the recipient of the service being outside the country. The corresponding provision in Place of Provision of Services Rules, 2012 is Rule 3 which brings the service within the ambit of export of service in Rule 6A of*

Service Tax Rules, 1994. Revenue has not made any submission of legislative intent to deprive a provider of 'scientific or technical consultancy service' in the erstwhile regime of its status as exporter of service owing to change in the regime.

13. *In the context of a catena of judgments and decisions that exports are not taxable and, with the most palpable manifestation of export of invisibles being the receipt of convertible foreign exchange from a recipient of service located outside the country, that services are taxable at the destination, the scope of Rule 4 must necessarily be scrutinized to ascertain if there was, indeed, legislative intent to deny acknowledgement as exporter to a certain category of service providers that were so privileged tell them. There is no dispute that the recipient of service is located outside India and that the consideration is received in foreign convertible currency. Yet, Revenue insists that performance of service is in India. A service is not necessarily a single, discrete, identifiable activity; on the contrary, it is a series of invisibles that cater to the needs of a recipient; it is upon the consumption of the service by the recipient that service is deemed to have become taxable. This has been so held by the Hon'ble Supreme Court in All India Federation of Tax Practitioners v. Union of India & others [2007 (7) S.T.R. 625 (S.C.)] below :*

'7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable on services provided within the country.'

It would appear from the exposition in the judgment that the tax was intended as a levy on activities that would otherwise be performed by the recipient for itself. The new industry of hiving out or outsourcing of what was, conceivably, being done within the enterprise was intended to be subject to the new levy. In the matter of service rendered by respondent, this activity could, but for commercial viability, will be executed by the recipient within its own organization or the territory in which it exists. The satisfaction of the customer occurs upon an outcome which is possessed by the recipient. Hence, even if some of the activities are carried out in India, by no stretch can it be asserted that the fulfilment of the activity is in India. Therefore, the inescapable conclusion is that the location of the actual performance of the service is outside India and, even with the special and specific provision of Rule 4 of Place of Provision of Services Rules, 2012, the performance of service being rendered outside India would render it to be an export.

14. *In this context, the legislative intent of incorporating a special and specific provision in Rule 4 may yield further insights. The special provision, which may be seen as an exception to the general Rule 3, deals with services in respect of goods as well as those provided to individuals. Not unnaturally, the services that require the physical presence of the person is taxed where the consumer receives the service and not at his location which as per Rule 2(i)(iv) would be his usual place of residence. In what can be considered as a most telling example of the scope of this portion of Rule 4, we could do a lot worse than refer to a decision of the Hon'ble High Court of Delhi that, in the course of dealing with other, more weighty matters in Orient Crafts Ltd. v. Union of India [2006-TIOL-271-HC-DEL-ST = 2006 (4) S.T.R. 81 (Del.)], took note of, and answered, one of the submissions thus -*

'4. The contention of the learned Counsel for the petitioner, based on the interpretation of Section 66A of the Act, is that any service that is obtained by a person who has a fixed place of business in India is liable to tax for services availed by him in a foreign country.

By way of an example, learned Counsel for the petitioner has cited that if such a person in India goes abroad, and has a haircut, he would be liable to pay service tax in India on the basis of Section 66A of the Act.

5. We are not at all convinced by this argument of learned Counsel for the petitioner. The rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India is liable to service-tax. In the example given by the learned Counsel for the petitioner, there is no question on the service of haircut having been received in India.'

The intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 of Place of Provision of Services Rules, 2012 may not serve to confer jurisdiction becomes increasingly obvious.

15. *Accordingly, we can infer that the location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; for that, Rule 3 would have sufficed. A contingency that is not amenable to Rule 3 has been foreseen and remedied by Rule 4 and in the process, the sovereign jurisdiction to tax is asseted. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Services Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. It is obviously not intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, ipso facto, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable. This is in consonance with the privilege of exemption afforded to export of services. The special and distinct role of Rule 4 becomes clearer.*

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

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

services is applicable thus entitling the appellant to eligibility under Rule 5 of Cenvat Credit Rules, 2004.

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

19. *Appeals of Revenue are dismissed. Cross-objections are also disposed of."*

In the case of Apotex Research Pvt. Ltd Vs. Commissioner Of C. Ex. & S.T., Bangalore-I (Supra) similar view was taken by the division bench which is as under:-

"5. *We find that this Bench vide Final Order Nos. 21890-21891/2014, dated 15-10-2014 has decided the issue of Export of Services following the decision of the Tribunal in the case of B.A. Research Ltd. (supra), the Bench observed as follows :*

"……However we find that the reliance of the appellant on the decision in the case of BA Research India Ltd. is appropriate and the appellant is eligible for the benefit. Paragraphs 9 & 10 of the decision relied upon by the Learned Counsel are relevant and for better appreciation are reproduced below :

"9. The issue before us is whether the service conducting clinical trials provided by the respondents are taxable service under the category of technical testing and analysis as defined under the Act. In the instant case the respondent has shown as the service provided to their foreign clients as export of service to know the provisions of the export of service which are reproduced here as under :

"Export of Services Rules, 2005

3. Export of taxable service. -

(i) Export of taxable service shall, in relation to taxable services, -

xx xx xx

(ii) specified in sub-clauses (a),……(zzh), (zzi),……. and (zzzp) of clause (105) of Section 65 of the Act, be provision of such services as are performed outside India :

Provided that where such taxable service is partly performed outside India, it shall be treated as performed outside India;

(2) The provision of any taxable service [specified in sub-rule (1)] shall be treated as export of service when the following conditions are satisfied, namely :-*

(a) such service is delivered outside [provided from] India and used outside India; and*

(b) payment for such service [provided outside India] is received by the service provider in convertible foreign exchange.*

**[added or substituted w.e.f. 1-3-2007] #{deleted w.e.f. 1-6-2007}*

Reading of the above provisions of Export of Services Rules, 2005 (hereinafter referred to as "the Rules") makes it amply clear that the taxable service specified in sub-clause (zzh) of Clause (105) of Section 65 of the Act is covered under Rule 3(1)(ii) of the Rules. The performance is not complete until the testing and analysis report is

delivered to the client. In the present case, when such reports were delivered to the clients outside India, it amounts to taxable service partly performed outside India. The performance of the taxable service has no validity/sanctity unless its report is submitted to the service receiver/client. The clients do not have any value for merely performance if no report is delivered to them. Consideration of the service is received by the appellants only when they deliver the study report and the certificate of the testing and analysis of the clinical trials conducted by them. Thus, delivery of the report is an essential part of their service and the service is not complete till they deliver the report. The report is delivered outside India and the same is used outside India. These facts also fortify the views taken hereinabove that the service provided by the appellants was export of service and I am inclined to them such taxable service as export of service and therefore not taxable."

10. From the above provision it is clear that the said services came under Rule 3(1)(2) (sic) of the Rules. It is very much clear that the performance of the service is not complete until the testing and analysis report is delivered to its client. In the present case, when such reports were delivered to the clients outside India it amounts to taxable service partly performed outside India. The performance of testing and analysing has no value unless and until it is delivered to its client and the service is to be complete when such report is delivered to its client. Thus, delivery of report to its client is an essential part of the service report was delivered outside India and same was used outside India. This is not the disputed fact. We hold that the respondent satisfied the conditions of Rule 3(2) and accordingly the respondents are eligible for the exemption under Notification No. 11/2007-S.T., dated 1-3-2007. We do not find any force in the argument made by the Learned DR. With this observation, the impugned order is upheld and the appeal filed by the Revenue is rejected. Stay petition is also disposed off accordingly."

2. Since the issue is covered by the decision of this Tribunal, the stand taken by the lower authorities cannot be sustained and has to be set aside."

5.1 *We also find that the Department has also followed the same in the subsequent period while deciding a refund claim filed by the appellants.*

6. *In view of the above, we find that the impugned order is not sustainable and thus, liable to be set aside."*

The similar view was taken in the case of Commissioner of Central Tax, Bangalore vs. Medgenome Labs Ltd – 2023 (73) GSTL 586 (Kar.) wherein the Hon'ble Karnataka High Court ordered as under:-

This appeal by the Revenue, directed against the order dated April 1, 2022 in Final Order Nos. 20154 to 20155/2022 passed by CESTAT, Bangalore has been filed to consider following questions of law :

(i) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the activity undertaken by the Respondent can be considered as 'export of service' under the provisions of the Finance Act, 1994?

(ii) Whether in the facts and circumstances of the case, the Tribunal was right in holding that Rule 3 of the Place of Provision of Services Rules, 2012 is applicable to the activity undertaken by the Respondent?

(iii) Whether in the facts and circumstances of the case, the Tribunal was right in rejecting the Appeal filed by the Appellant?

2. Heard Smt. Preetha, Learned Advocate for the Revenue and Shri. Prasad Paranjape, Learned Advocate for the assessee.

3. Briefly stated the facts of the case are, assessee is a private limited company registered under the Finance Act, 1994. It is engaged in providing clinical genomic solutions. Various Pharmaceutical Companies approach assessee for analysis and identification of genetic patterns of a disease/ailment. It has set up laboratories to perform these functions and procures samples as per specific requirements for the purpose of test and analysis from hospitals and research centres. The reports are sent to the clients electronically. Assessee pays the service tax when such services are rendered to clients situated in India, when the services are rendered to clients abroad, assessee treats such services as export and does not pay service tax.

4. A show cause notice dated October 18, 2019 was issued to assessee proposing to deny benefits of export of services and a demand of Rs. 17,71,79,316/- was raised. The Commissioner of Central Tax passed an O-I-O confirming the demand and denied the benefit of export of services holding that the said services are within the taxable territory of India in terms of Rule 4 of Place of Provision of Service Rules, 2012. On appeal, CESTAT allowed assessee's appeal holding that place of provision of service is clearly outside India and assessee has satisfied the conditions required for treating the service as export of service. Feeling aggrieved, Revenue has preferred this appeal.

5. Smt. Preetha, for the Revenue, praying to allow the appeal submitted that :

- assessee receives samples from hospitals and research centres within India;

- PoPS Rules, provides that generally place of provision shall be the location of the service recipient, and if recipient is not available, then the place of provision will be that of the service provider;

- Rule 4(a) of the PoPS Rules provides that the place of provision of service shall be the location where the services are actually performed, where the services are provided in respect of goods that are required to be made physically available by the recipient to the provider;

- assessee conducts the tests in laboratories situated within India;

- 'Scientific testing and analysis services' cannot be treated as 'export' as per Rule 6A of the Service Tax Rules, 1994.

6. Opposing the appeal, Shri Prasad Paranjape, for the Assessee submitted that the services provided by the assessee fulfill all the conditions mentioned under Rule 6A of the Service Tax Rules, 1994 read with Rule 3 of the PoPS Rules.

7. We have carefully considered the rival contentions and perused the records.

8. Undisputed fact of the case is, payment of services received by assessee from foreign clients as a service provider is convertible foreign exchange.

9. One of the main contentions of the Revenue, that Rule 4(a) of the PoPS Rules will apply to assessee is untenable because, the Rule requires goods to be made physically available to the recipient by the provider. In the present case, no goods have been made physically available from the recipient to the provider.

10. Rule 6A of the Service Tax Rules specifies the conditions to be satisfied for treating a service provided as export of service. The CESTAT has rightly recorded that assessee has clearly satisfied the conditions required for treating the service as export of service.

11. In our view, the services provided by the assessee is an export of service under Rule 6A of the Service Tax Rules, and thus cannot be chargeable to service tax.

12. Hence, the following :

ORDER

(a) Appeal is dismissed.

(b) Final order Nos. 20145 to 20155/2022 dated April 01, 2022 passed by CESTAT, Bangalore is confirmed. No costs.

In the case of Ayana Pharma Limited vs. Union of India - 2022 (65) GSTL 165 (Guj.). The Hon'ble Gujarat High Court held as under:-

8. Having heard the Learned Counsels appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the respondent No. 4 is justified in rejecting the claim for the refund of tax on the ground that such claim has been put forward manually and not by way of online.

9. In the writ application, the writ applicant has raised various grounds wherein it is categorically stated that the respondent authority has straight way rejected application on technical ground and has failed to assigned reasons. At the outset, we notice that the impugned order is a non-speaking order. Further, the respondent authority without giving any opportunity of hearing has straight way passed the impugned order on highly technical ground. We find that the respondent authority acted *de hors* the basic principles of natural justice. Hence, on the sole ground of violation of principles of natural justice, the writ petition is required to be allowed.

10. At this stage, we notice that by impugned order 2-12-2020, at Annexure-A, the Deputy State Tax Commissioner, Circle-2, Ahmedabad has solely rejected the application of writ applicant company on the ground that instead of online application seeking refund, the writ applicant has submitted manual/physical application. So far as rest of the contentions raised in the affidavit in reply file by the Principal Commissioner, such contentions questioning *locus* of the writ applicant to seek refund is first time raised before this Court. The same are not forming part of reasons assigned recorded while passing impugned order of rejection, by the Deputy State Tax Commissioner, Circle-2, Ahmedabad. We are therefore of the view that non-furnishing of such reasons to writ applicant amounts to denial of right of the writ applicant to effectively deal with same.

The writ applicant has deal with aforesaid contentions raised by the Union, in the present writ proceedings by filing rejoinder affidavit. However, *prima facie* we are of the view that the writ applicant has categorically submitted before this Court that the amount realised as tax has been actually paid by the writ applicant company as the same was handed over to the "supplier of service", in terms of the contract. The same is borne out from the pleadings and is not specifically controverted by the respondent. For the foregoing reasons, we are of the view that the writ applicant being the real aggrieved party has *locus* to approach respondent authority seeking refund. So far as third limb of argument canvassed by the Union as regards "export of service" is concerned, the same has been raised for the first time before this Court. The writ applicant has responded by filing rejoinder affidavit.

At this stage it would be appropriate to examine the relevant provisions under the Act, 2017.

Section 2 provides for definitions of various expressions used in the IGST Act. Sub-section (6) is relevant. It defines '*export of services*'. Since this definition is relevant it is extracted as under :-

"**2.** 'export of services' means the (6) supply of any service when, -

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;"

Thus from the above it is seen that 'export of services' means the supply of any service when the supplier of service is located in India; the recipient of service is located outside India; the place of supply of service is outside India; payment for such service has been received by the supplier of service in convertible foreign exchange; and the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with *Explanation 1* in Section 8.

'Location of the recipient of services' has been defined in sub-section (14) of Section 2. Since this definition is also relevant, the same is quoted hereunder :-

"**2.** 'location of the recipient of (14) services' means, -

(a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;

(b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and

(d) in absence of such places, the location of the usual place of residence of the recipient;"

From the above what is deducible is that location of the recipient of services would mean where a supply is received at a place of business for which registration has been obtained, the location of such place of business; where a supply is received at a place other than the place of business for which registration has been obtained *i.e.*, a fixed establishment elsewhere, the location of such fixed establishment; where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and in the absence of such places, the location of the usual place of residence of the recipient.

Section 5 of the IGST Act is the charging section. Sub-section (1) says that subject to the provisions of sub-section (2) there shall be levied a tax called the Integrated Goods and Services Tax (IGST) on all inter-State supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under Section 15 of the CGST Act and at such rate as may be notified by the Central Government on the recommendations of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Sub-section (2) deals with integrated tax on the supply of petroleum, crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel.

That brings us to Section 13 which deals with place of supply of services where location of supplier or location of recipient is outside India. Sub-section (1) gives the intent of Section 13. It says that provisions of Section 13 shall apply to determine the place of supply of services where the location of the recipient of services is outside India. Sub-section (2) provides that except the services specified in sub-sections (3) to (13), the place of supply of services shall be the location of the recipient of services. However as per the proviso, where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services. Thus sub-section (2) lays down the general proposition that place of supply of services shall be the location of the recipient of services barring the exceptions carved out in sub-sections (3) to (13).

In view of aforesaid statutory provisions, in this case we are of the *prima facie* view that the writ applicant, being recipient of service is located outside India.

10. Now adverting back to the main contention and submissions canvassed on either side, as regards online or physical application, we must first look into few relevant provisions of the Act. Section 2(84)(h) which reads thus :

"Section 2(84)(h)
anybody corporate incorporated by or under the laws of a country outside India."
Section 54(1) reads thus :

"Section 54 : Refund of tax. Any person claiming refund of any tax and interest, if any, - (1) paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed."

Rule 89(1) of the Rules reads thus :

"Rule 89 : Application for refund of tax, interest, penalty, fees or any other amount. - (1) Any person, except the person covered under notification issued under Section 55,

claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Center notified by the Commissioner."

Rule 97A of the Rules reads thus :

"**Rule 97A : Manual filing and processing.** - Notwithstanding anything contained in this Chapter in respect of any process or procedure prescribed herein, any reference to electronic filing of an application, intimation, reply, declaration, statement or electronic issuance of a notice, order or certificate on the common portal shall, in respect of that process or procedure, include manual filing of the said application, intimation, reply, declaration, statement or issuance of the said notice, order or certificate in such Forms as appended to these rules."

11. The plain reading of Section 2(84) referred to above would indicate that the term "person" would include anybody corporate incorporated by or under the laws of a country outside India. In such circumstances, first objection raised by Mr. Sharma, the Learned AGP that the writ applicant being foreign Company could not have put forward its claim for refund of the tax, is not sustainable in law.

12. Section 54 of the Act referred to above provides that any person claiming refund of any tax and interest, if any, paid on such tax or any amount paid by him, can make an application before the expiry of two years from the relevant date in any such form and manner as may be prescribed. There is a proviso to sub-section (1) which provides that a registered person claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of Section 49 may also claim such refund in the return furnished under Section 39 in the manner as may be prescribed.

13. We now look into Rule 89. Rule 89 lays down the procedure for filing of an application for refund of tax, interest, penalty, fees or any other amount. Rule provides that any person except the person covered under the Notification issued under Section 55 claiming refund of tax, interest, penalty, fees or other amount paid by him other than the refund of integrated tax paid on goods exported out of India, may file an application electronically in the Form GST RFD-01 through the common portal. Relying on the aforesaid Rule 89, it is submitted on behalf of the respondents that claim, if any for refund of any tax has to be by way of an application electronically in the Form of GST RFD-01 through the common portal. However, it seems that the respondent No. 4 has no idea about Rule 97A of the Rules which starts with the *non obstante* clause. Rule 97A clarifies that notwithstanding anything contained in Chapter X of the Rules any reference to electronic filing of an application would include manual filing of the said application.

14. The Bombay High Court in the case of *Laxmi Organic Industries Ltd.* (supra) has explained the true purport of Rule 97A of the Rules referred to above in following words, we quote the relevant observations in Para 6, 7, 8, 9, 10 and 11.

The origin of the impugned circular can be "6. traced to section 168 of the Central Goods and Services Tax Act, 2017 (hereafter "the CGST Act", for short), which empowers the J.V. Salunke, PS 2-WP.7861.2021 Central Board of Indirect Taxes and Customs (hereafter "the Board", for short) to issue such orders, instructions or directions to the

central tax officers as it may deem fit and thereupon all such officers and all other persons employed in the implementation of the CGST Act shall observe and follow such orders, instructions or directions. There can hardly be any dispute that the said Superintendent was under an obligation to follow the terms of the impugned circular. However, it is axiomatic that the said Superintendent is also equally bound by the CGST Act and the CGST Rules and could not have turned a blind eye to rule 97A of the CGST Rules. In our considered opinion, the said Superintendent failed to appreciate that the impugned circular could not have been ignored on the face of rule 97A, which is equally binding on him in the discharge of his duties. We say so for the reason that follows.

Chapter X of the CGST Rules is titled 7. "Refund" and begins with rule 89. Rule 89 provides for the procedure to be observed while applying for refund of tax, interest, penalty, fees or any other amount. In terms of sub-rule (1) of rule 89, such an application could be made by the person eligible therefor electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner. We need not refer to the other sub-rules of rule 89 and the provisos appended to some of such sub-rules as well as rules 90 to 97, because the same have not been shown to us to be relevant for the purpose of a decision on this writ petition.

Adverting to rule 97A, which is the 8. sheet-anchor of the J.V. Salunke, PS 2-WP.7861.2021 petitioner's claim, we find that the same was inserted in the CGST Rules by a notification dated 15th November, 2017 and is the last rule in Chapter X. Obviously, such insertion was in exercise of the rule-making power conferred on the Central Government by section 164 of the CGST Act. It would be appropriate to reproduce below rule 97A in its entirety for facility of convenience :-

"**Manual filing and processing. - 97A.** Notwithstanding anything contained in this Chapter, in respect of any process or procedure prescribed herein, any reference to electronic filing of an application, intimation, reply, declaration, statement or electronic issuance of a notice, order or certificate on the common portal shall, in respect of that process or procedure, include manual filing of the said application, intimation, reply, declaration, statement or issuance of the said notice, order or certificate in such Forms as appended to these rules."

Since rule 97A contains a 9. *non obstante* clause, it is intended to override rules 89 to 97 of the CGST Rules forming part of Chapter X. The plain and simple construction of rule 97A is that despite rule 89 providing for electronic filing of applications for refund on the common portal, in respect of any process or procedure prescribed in Chapter X any reference to electronic filing of an application on the common portal shall, in respect of that process or procedure, include manual filing of the said application. If indeed the argument of Mr. Mishra that no application in any form other than online can be received and processed is accepted, rule 97A would be a dead letter and rendered redundant. Rule 97A cannot be construed in a manner so as to defeat the purpose of legislation. We, therefore, conclude that the impugned circular J.V. Salunke, PS 2-WP.7861.2021 would certainly be applicable to all applications filed electronically on the common portal, but the impugned circular cannot affect or control the statutory rule, *i.e.*, rule 97A of the CGST Rules or derogate from it.

The proposition of law laid down in 10. *F.S. Enterprise* (supra) that officers and all other persons employed in the institutions governed by the CGST Act and the CGST Rules are bound by instructions issued by the Board under section 168 of the CGST Act admits of no doubt. However, such decision did not lay down the law, as it could never

have, that in a given case governed by a statutory rule the tax officers would be at liberty to elect and apply the orders, instructions or directions issued under section 168 of the CGST Act ignoring such statutory rule framed under section 164 thereof while discharging public duties entrusted to them. For the reasons we have assigned above, such decision does not advance the case of the respondents.

11. We, therefore, dispose of this writ petition with the following order :-

(i) the impugned circular is clarified and it is observed that its terms shall be applicable only to applications filed electronically on the common portal but would have no applicability to an application for refund which is filed manually;

(ii) the letter dated 27th July, 2021 issued by the said Superintendent stands set aside;

(iii) the petitioner is permitted to file afresh the application for refund manually within a fortnight from date and on such receipt, the said Superintendent shall process the same and ensure that the application is taken to its logical conclusion in accordance with law as J.V. Salunke, PS 2-WP.7861.2021 early as possible, preferably within 2 (two) months thereof; and

(iv) should the application be rejected, the order must have the support of reasons but if it succeeds no time shall be wasted to effect refund to the extent the petitioner is found eligible."

15. In light of the aforesaid, the writ petition succeeds in part. We dispose of this writ petition with the following directions :

(1) The impugned order dated 2-12-2020 at Annexure A is hereby quashed and set aside.

(2) We further direct the Deputy State Tax Commissioner, Circle-2, Ahmedabad to treat the manual application dated 1-9-2020 as an application for refund. The respondents are further directed to permit the writ applicant to furnish it's stance to any objections, before the same is relied upon by the respondent authority, by providing sufficient opportunity to produce supporting documents and also to provide opportunity of hearing to the writ applicant. If any such documents are relied upon, it is expected of respondent to deal with such submissions and passed reasoned order.

(3) The respondent are directed to decide and process the application of refund, by keeping in mind the observations made by this Court. Any order which may be passed on the refund application may be communicated to the writ applicant.

(4) The respondent shall undertake such exercise within period of eight weeks from the date of receipt of writ of this Order.

4.1 In view of the above consistent view taken by various tribunal benches as well as High Courts, the issue is no longer res-integra. Accordingly, we are of the view that the activity of clinical trial on the drugs supplied by the foreign service recipient to the appellant amounts to export of service,

hence, same is not liable to service tax.

5. Accordingly, we set aside the impugned order. Appeal is allowed with consequential relief.

(Pronounced in the open court on 14.08.2024*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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