CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 23356 of 2014

[Arising out of Order-in-Original No. 05/2014-15 dated 22.04.2014 passed by the Commissioner of Central Excise and Service Tax, Bangalore]

Hindustan Aeronautics Limited
Aircraft Division, Vamanapura,
Post Bag No. 1788,
Bangalore-560017 **.......Appellant**

VERSUS

Commissioner of Central Excise
Bangalore - I
P.B. No. 5400, C.R. Buildings,
Queens Road, Near Bangalore GPO,
Bangalore Urban – 560 001 **.......Respondent**

Appearance:

Mr. Mihir Rajan Mishra., Advocate for the Appellant
Mr. Rajesh Shastry, AR for the Respondent

Coram:

Hon'ble P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21627/2024

Date of Hearing: 21.06.2024
Date of Decision: 19.12.2024

Per: P.A. Augustian

The issue in the present appeal is whether the Appellant, who had paid license fee, Royalty and documentation fee to British Company, M/s BAE System (Operations), U.K, pursuant to purchase and license agreement towards transfer of technical knowhow and technical assistance for manufacture and maintenance of Hawk and Jaguar Aircraft, is liable to pay service tax under the category of 'Intellectual Property Right' services.

2. The brief facts are, M/s. HAL, the Appellant had entered into a purchase and license agreement on 30.08.2010 and by virtue of the said agreement, Appellant made payment of license fee, royalty and documentation fee to BAE during the period from 2008 to 2011-2012. Alleging that the consideration transferred for the above said activity is falling under the category of 'Intellectual Property Right' Service rendered by BAE and by virtue of Section 66A of the Finance Act, 1994, it is alleged that Appellant is liable to pay service tax on payments made under 'reverse charge mechanism' (RCM). The Adjudicating authority considered the issue in detail and held that the right to use technical information but not otherwise in relation to onward sale to third parties and envisages that all IPR rights in the technical information shall remain vested in the licensor. Moreover, Appellant was paying R & D Cess on all payment made towards the import of technology in terms of R & D Cess Act, 1986.

3. Further, Appellant was paying service tax on payments made by them to BAE for technical information under RCM after availing abatement on R & D Cess on such services. However, Appellant has not paid service tax on the royalty, license fee and documentation fee. Thus, Adjudication authority held that the services are classifiable under the category of 'Intellectual Property Right' services as defined under Section 65(55a) read with 65(105)(zzr) of Finance Act, 1994 and held as under:-

"Intellectual Property Right as per Section 65(55a) of Finance Act, 1994, means any intellectual property right other than copyright recognized under law for the time being in force, but does not specify any particular law for the said purpose, Section 65(55b) of Finance Act, 1994 defines Intellectual property service as transferring temporarily, or permitting the use or enjoyment of, any intellectual property right, and Section 65(105) (zzr) defines taxable service as "any service provided or to be provided to any person, by the holder of intellectual property right, in relation to intellectual property service."

4. Accordingly, Adjudication authority as per the impugned order, confirmed service tax demand of Rs.23,54,47,261/- on the basis of the consideration to the tune of Rs. 214,95,51,556/- under the category of 'Intellectual Property Right 'services along with interest and imposed penalty under Section 76, 77(2) and 78 of the Finance Act, 1994. Aggrieved by said order, present appeal is filed before the Tribunal.

5. When the appeal came up for hearing, learned Counsel for the Appellant draws our attention to the relevant provisions under Section 65 regarding 'Intellectual Property Right' service, 'Management, Maintenance or Repair' service, etc. The learned Counsel draws our attention to the Circular No. 80/2004 dated 17.09.2004, where 'intellectual property right' service other than copy rights is explained as follows:-

"9. Intellectual property services (other than copyrights) :

9.1 Intellectual property emerges from application of intellect, which may be in the form of an invention, design, product, process, technology, book, goodwill etc. In India, legislations are made in respect of certain Intellectual Property Rights (i.e. IPRs) such as patents, copyrights, trademarks and designs. The definition of taxable service includes only such IPRs (except *copyright) that are prescribed under law for the time being in force. As the phrase 'law for the time being in force' implies such laws as are applicable in India, IPRs covered under Indian law in force at present alone are chargeable to service tax and IPRs like integrated circuits or undisclosed information (not covered by Indian law) would not be covered under taxable services.*

9.2 A permanent transfer of intellectual property right does not amount to rendering of service. On such transfer, the person selling these rights no longer remains a 'holder of intellectual property right' so as to come under the purview of taxable service. Thus, there would not be any service tax on permanent transfer of IPRs.

9.3 ***In case a transfer or use of an IPR attracts cess under Section 3 of the Research and Development Cess Act, 1986, the cess amount so paid would be deductible from the total service tax payable (refer Notification No. 17/2004-S.T., dated 10-9-2004)."***

(Emphasis supplied)

6. As regards invoking the extended period of limitation, learned Counsel draws our attention to the Final Order of the Tribunal East Zonal Bench in Appellant's own case and as per **Final Order No. 75700/2024 dated 17.04.2024**, the issue regarding the limitation was considered and it was held that:-

"11.2. We however note that the impugned Show Cause Notice for the period indicated supra was issued to the appellant on 19.04.2013, invoking the extended period of limitation alleging suppression of facts unearthed during audit of the company's

record. In view of the fact that the appellant is a public sector company completely under the control of the Ministry of Defence and owned by the Government of India, we find it rather unacceptable and quite improper to assume intent to evade payment of duty on the part of the organization. We therefore are not in agreement with the findings of the learned Commissioner that the appellant had deliberately suppressed material information, wrongly classifying as 'Export of Service' with intent to evade duty. The appellant on the contrary has pointed out that it was rather inappropriately shown as Export of Service, however, nothing was concealed in the statutory records and returns filed. Thus, at best it could be a case of misinformation, wrong classification and not suppression. We do not find merit to impute the charge of suppression to a government organization owned by the Ministry of Defence, for the non-payment of duty/tax with intent to evade the same by suppressing the material information, more so when it is depicted inappropriately and construed accordingly.

……..............................

11.4. Thus, the demand for the extended period cannot be sustained as there is nothing on record to establish mal fides on the part of the appellant. We thus hold that the extended period of limitation is not invokable in the circumstances. Our understanding on the subject is further buttressed by the following cases:-

- *i. Commissioner of Central Excise, Indore Vs. NEPA Ltd.*
- *ii. Hindustan Insecticides Ltd. Vs. Commr of C. Ex., Delhi-I*

iii. Indian Oil Corporation Ltd. Vs. Commissioner of C.Ex., Ahmedabad."

7. The learned Counsel further submits that the issue is squarely covered by the decision of this Tribunal in Appellant's own case, **M/s HAL Vs. CC, Bangalore-2020 (38) GSTL 75 (Tri. Bang),** wherein it is categorically held that:-

"4. *Heard both sides and perused the records of the case. On going through the issue involved, the following emerges:*

Appellants received similar services by virtue of Inter-governmental agreements in the manufacture of Sukoyi aircraft at different locations in the country. The Department has viewed the services received in a different manner at different places while it has been viewed as Consulting Engineer Services in respect of the units in U.K. it was viewed as Scientific and Technical Consultancy Services in respect of the unit at Nashik and in the instant appeal, the Department seeks to categorize the services as Intellectual Property Rights Services. Ongoing through the agreement and Board's Circular issued in this regard, it is clear that there is a certain transfer of know-how involved it is not coming from the records of the case that such technical know-how, design, copy right etc., have been patented in India in view of the clarification given by the Board unless such technical know-how etc., are listed under the law for time being in force in the country and the services cannot be held to be a taxable service. Also we find that Tribunal Mumbai has gone into the issue of such contracts in an elaborate manner and have observed as follows:-

"4. Learned Chartered Accountant appearing on behalf of the appellant-assessee takes us through the entire case records. It is his submission that addendum issued by the Revenue is incorrect inasmuch as that the said addendum was issued after considering the written submissions made by the appellant-assessee. It is his submission that Revenue is trying to improve upon that case after considering the defence raised by the assessee. On merits, it is his submission that the contract entered by the appellant-assessee is on behalf of the Republic of India for the supply and transfer of licence for production of fighter aircraft, engines, air borne equipments. The said agreement was entered on 28 December 2000 accordingly, appellant-assessee paid the amounts to the foreign-based firm. He would take us through the agreement which was produced for perusal of the bench and submits that the findings do not indicate as to how the services can be construed as scientific or technical consultancy services. Learned Counsel would submit that there is no basis to hold that it would fall under the definition of the services "scientific and technical consultancy service" as provided under Section 65(60) of the Finance Act, 1994. He would submit that said definition would be applicable only in the case of consultation, advice or technical assistance provided by the scientist or a technocrat or science or technology institution. It is his submission that M/s. Rosobornexport is not a science or technology institution. In support of such a submission he produces a copy of the registration of said supplier with the authorities, which

indicates that M/s. Rosobornexport is registered as joint-stock company. He would rely upon the ratio of the decision of the Tribunal in the case of Kopran Ltd. - 2011 (23) S.T.R. 627 (Tri. - Mum.), for the proposition that an amount paid for transfer of technical know-how for manufacture will not be covered under scientific or technical consultancy services."

***5.** In view of the above and in view of the facts and circumstances of the case, we find that the services received by the appellants from Rolls Royce Turbomeca Limited, U.K. are not in the nature of Intellectual Property Services as defined under Finance Act, 1994. Therefore, we find no merit in the case of the Department. Therefore, the appeal is allowed with consequential relief, if any, as per law."*

8. Learned Counsel further submits that the Respondent has erred in holding that the technical knowhow and the technology transferred by BAE to the Appellant to qualify as 'intellectual property right' service in terms of Section 65(55a). The technology transferred by BAE is not registered under any law for time being in force. In fact, the technology shared by BAE is confidential in nature and only qualify as undisclosed information, which is specifically excluded from the meaning and definition of 'Intellectual Property Right' service. To support the same, the learned Counsel relied on the Circular No. 80/10/2004-ST dated 17.09.2004. It is further submitted that the CESTAT, Kolkata Bench in Appellant's own case vide Final Order No. 75700/2024 dated 17.04.2024 in Service Tax Appeal No.76328/2014 held that technology shared pursuant to technology transferred would not qualify as 'Intellectual Property Right' service and held as under:-

"9.3. We thus feel that the transfer of technology by M/s. Rosboronexport would not qualify as "intellectual property right" within the meaning of Section 65(55a) of the Act for the various aspects as listed in paragraph 3.1 of this Order and therefore, would not be covered under the definition of "intellectual property service" within the scope of Section 65(55b).

10. We further note that this Tribunal in the assessee's own case, on more than one occasion, has held that the service charge received against foreign technician fees for repair and overhaul of the aircraft, as undertaken with the assistance of foreign technicians, was not includible in the value of the taxable services [ref.: 2019 (21) G.S.T.L. 46 (Tri.-All.), 2015 (40) S.T.R. 289 (Tri.-Mum.), 2020 (38) G.S.T.L. 75 (Tri.-Bang.)].

10.1. It was further held by this Tribunal in the case of Munjal Showa Ltd. Vs. Commissioner of C.Ex. & S.T., Delhi (Gurgaon) that to tax a service under IPR, such rights ought to be registered with the trademark/patent authorities; there was nothing on record to show that the same were registered in India. In view of the law as propounded in the said case, we are of the view that the Department has not been able to make out any sustainable case, seeking recovery of tax with reference to the issue as made out in paragraph 3(i) of this Order."

9. *This view was upheld by Chandigarh Bench in the matter of* ***M/s Munjal Showa Ltd. Vs. CCE & ST., Delhi (Gurgaon****) reported in* ***(2017 (5) G.S.T.L 145 (Tri. Chandigarh)*** *relying on the 2004 Circular, it was held that the technical knowhow or technology to qualify*

as "Intellectual Property Rights ", the same ought to be covered under the law for time being in force.

10. As regards invoking the extended period of limitation, the learned Counsel submits that a show cause notice dated 07.03.2013 is issued for the demand for the period from 2007-2008, 2011-2012, which is beyond the normal period of limitation. Proviso to Section 73 can be invoked only under specified circumstances under fraud, collusion, suppression or any other omission committed by the assessee. The learned Counsel also relied on large number of decisions including the decision in the matter of **CCE, Indore Vs. M/s Nepa Ltd (2013 (298) E.L.T 225 (Tri.Del), M/s Hindustan Insecticides Ltd. Vs. CCE, Delhi-I (2017 (6) G.S.T.L 218 (Tri.–Del.) and M/s Indian Oil Corporation Ltd. Vs. CCE, Ahmedabad (2013 (291) E.L.T 449 (Tri. Ahmd.**).

11. As regards the imposition of penalty, learned Counsel submits that the Appellant being a public sector undertaking, there cannot be a suppression of facts by the Appellant with an intention to evade tax liability. The learned Counsel relied on large number of decisions and submits that in the above facts, no penalty can be imposed.

12. The Learned Authorised Representative (AR) for the Revenue reiterated the finding in the impugned order and draws our attention to the finding, where the Adjudication authority concluded that the overseas entity have transferred technical knowhow and exclusive right within the territory to use the technical information temporarily to the Appellant in terms of agreement entered for the purpose against payment of license fee, royalty and documentation fee. These facts have also been admitted by the Appellant. In fact, 'Intellectual Property

Right' has been transferred temporarily proves that it is not in the nature of un-disclosed information.

13. Heard both sides and perused the records.

14. We find that it is an admitted fact that during investigation, statement was recorded from the AGM (Finance) and he has categorically stated that HAL is importing technical knowhow and support services for the execution of work agreed upon. On being asked about the details of import of services by HAL from BAE system, Sri. Sudhakaran Nair had stated that as per the provisions of contract, BAE systems had provided technical assistance in the manufacture and assembly of Aircraft. Such import of services was classified under 'Scientific and Technical Consultancy' service and 'Consulting Engineer' Service and he had further categorically stated that scope of the contract involves transfer of technology. As regarding the payment of Cess, he had stated that as per clause 3 of R&D Cess Act, 1986, Cess is payable on all payment towards the import of technology and Cess shall be payable by an industrial concern, which imports technology on or before making any payment towards such import. Complying with the same, payment of R & D Cess was made on the import of technology made by HAL.

15. We find that the contract involves temporary transfer of technology by BAE to the appellant and to qualify as “Intellectual Property Right", the same ought to be covered under the law for time being in force. Hence, the payment of license fee, royalty and documentation fee to BAE by the appellant for the above said activity does not fall under the category of 'Intellectual Property Right' Service.

16. In view of the above discussion, considering the facts and the decision of this Tribunal in Appellant's own case the appeal is sustainable.

17. Accordingly, the appeal is allowed with consequential, if any, as per law.

(Order pronounced in Open Court on 19.12.2024)

(P.A Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

pa/iss