CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/8/2009-DB

[Arising out of Order-in-Appeal No. 164/2008 dated 28/08/2008 passed by the Commissioner of Central Excise, Customs & Service Tax, Cochin]

AVT McCormick Ingredients
Marampilly, Aluva
Appellant(s)

Versus

Commissioner of Central Excise,
Customs and Service Tax,
Cochin
C.R Building,
I.S Press Road, Ernakulam,
Cochin - 682 018
Kerala
Respondent(s)

Appearance:

Mr. Kurian Thomas, Advocate
P.B. No.1911
IS Press Road,
Cochin – 682 018
Kerala
For the Appellant

Mr. Madhupsharan, Assistant Commissioner (AR)
For the Respondent

Date of Hearing: 17/07/2018
Date of Decision: 17/07/2018

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20998 / 2018

Per: S.S GARG

The present appeal is directed against the impugned order dated 28.08.2008 passed by the Commissioner (Appeals) whereby the

Commissioner (Appeals) has rejected the appeal of the appellant. Briefly the facts of the case are that the appellant is a 100% EOU engaged in the manufacture and export of spices and spice products. 50% of their issued capital is held by M/s. AVT group and 50% by M/s. McCormick Co Inc, USA. The appellants were receiving the services of the latter with reference to technical know-how and assistance as per an agreement entered into between them and they were paying fees for those services as royalty. As it appeared that the services of temporary transfer of technical know-how fall under "intellectual property services" as defined in Section 65(55a) of the Finance Act, 1994 and the appellant as service receiver is liable to pay service tax on the said services as the service provider is not a registered unit in India, having no office in India, a show-cause notice was issued to the appellant to demand an amount of Rs. 2,29,120/- (Rupees Two Lakhs Twenty Nine Thousand One Hundred and Twenty only) and Rs. 4,582/- (Rupees Four Thousand Five Hundred and Eighty Two only) towards service tax and education cess on the royalty paid by them under Section 73 ibid and proposing penalties under Section 76 and 77 ibid. The original authority after following the due process, confirmed the demand to the extent of Rs. 1,33,653/- (Rupees One Lakh Thirty Three Thousand Six Hundred and Fifty Three only) and education cess of Rs. 2,673/- (Rupees Two Thousand Six Hundred and Seventy Three only) under Section 73 of the Finance Act along with interest and penalty. Aggrieved by the said order, the appellant has filed appeal before the Commissioner who upheld the order and hence the present appeal.

2. Heard both the parties and perused the records.

3. The learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the correct position of law. He further submitted that the impugned order is contrary to the binding judicial precedent. He further submitted that the show-cause notice is ambiguous as it did not impute the know-how in question received by the appellant to any particular intellectual property to establish the provisions of intellectual property services. He also submitted that both the authorities have not given any finding that M/s. McCormick Co. Inc, USA is a holder of any form of intellectual copyright and further no transfer of any intellectual property has been established. The learned counsel also referred to the definition of intellectual property contained in clause 55(a) of Section 65 which is reproduced herein below:-

> *"Any right to intangible property namely trademarks, designs, patents for any other similar intangible property, under any law for the time being in force, but does not include copyright."*

He also submitted that the Central Government has clarified in its circular No.80/10/2004 dt. 17/09/2004 that phrase "law for the time being in force" used in the definition of intellectual property implies that such laws as applicable in India. Further his further submission is that right to use technical know-how can only be taxed if it is protected under the law in India. In support of his submission, he relied upon the following decisions:-

i. Navinon Ltd. Vs. CCE, Mumbai [2004(172) ELT 400]
ii. Rochem Seperation Systems (India) Pvt. Ltd. Vs. CST, Mumbai [2015(39) STR 112(Tri. Mum.)]
iii. Thermax Ltd. Vs. CCE, Pune [2014(36) STR 318 (Tri. Mum.)]

3.1. Learned counsel for the appellant further submitted that this Tribunal in the appellant's own case for the earlier period has allowed the appeal of the appellant and set aside the impugned order for the earlier period vide Final Order No. 23145/2017 dated 13.12.2017.

4. On the other hand the learned AR reiterated the findings of the impugned order.

5. After considering the submissions of both the parties and on perusal of the material on record, we find that in the appellant's own case for the earlier period, this Tribunal vide order dated 13.12.2017 has allowed the appeal of the assessee. While allowing the appeal of the assessee, the Tribunal in para 6 of the Final Order has observed as under:

> *"6. After considering the submissions of both the parties and perusal of the material on record, we find that the sole contention of the Department is that such technical know-how is recognised under international treaties to which India is a signatory and hence it is leviable to tax in India. We also find that as per Article 253 of the Constitution of India, for implementing any treaty agreement or convention with any country or any decision made at international conference etc., there should be a municipal legislation enacted for giving effect to such international agreement or treaties. Further we also find that the show-cause notice does not clearly state the nature of know-how which the appellant has availed from his foreign company. Further we find that in the case of Navinon Ltd. cited supra, it has been held by the Tribunal that receiving technical know-how from foreign company against payment of royalty not being an authorised*

representative of foreign company cannot be fastened with service tax liability. We also find that this decision of the Tribunal has been subsequently followed in subsequent decisions cited supra. Therefore by following the ratios of the above said decisions, we are of the considered opinion that the impugned order is not sustainable in law and therefore we set aside the same by allowing the appeal of the appellant with consequential relief if any."

6. By following the ratio of the above said decision, we are of the view that impugned order is not sustainable in law and therefore, the same is set aside by allowing the appeal of the appellant.

(Operative portion of the order was pronounced
in Open Court on **17/07/2018**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(S.S GARG)
JUDICIAL MEMBER

iss...