

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH**

Dated: 19/01/2016

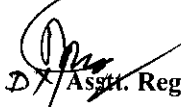
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/53908/2015-CU[DB] dated 03/12/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.


Dy. Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	ST/277/2012	WHIRLPOOL OF INDIA LTD. WHIRLPOOL HOUSE, PLOT NO. 40, SECTOR-44, GURGAON (HARYANA)
		Name and Address of Respondent
2		-C.C.E & S.T (LTU) NBCC PLAZA, PUSHP VIHAR, SECTOR-III, SAKET, NEW DELHI-110017

Copy To

3 Advocate(s) / Consultant(s):

Economic LawS Practic At Delhi
OFFICE NO. 801 A, 8TH FLOOR
KONNECTUS TOWERS, TOWER A,
BHAVBHUTI MARG, OPP. AJMERI
GATE, NEW DELHI AILWAY
STATION, NEAR MINTO BRIDGE,
NEW DELHI-110002
CENTRE, BARAKHAMBA LANE,
NEW DELHI, DELHI

4 Additional Party's Name & Address :

5 Bar Association, CESTAT, Delhi

6 Director Publications, Customs, Excise. I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

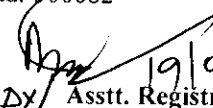
11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

14 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

15 C.D.R. 16 Office Copy 17 Guard File


Dy. Asstt. Registrar(CUSTOMS Appeal Branch)

DB - D

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi - 110 066.**

Date of Hearing/Order : 4.12.2015

Appeal No. ST/277/2012-CU(DB)

(Arising out of Order-in-Original No. 17/Commr/2011 dated 29.11.2011 passed by the Commissioner of Central Excise & Service Tax, New Delhi)

For Approval & Signature :

**Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)**

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Department Authorities?	

M/s Whirlpool of India Ltd.

Appellant

Vs.

CCE & ST, New Delhi

Respondent

Appearance

Shri Tarun Gulati, Advocate - for the appellant
Shri Kishore Kumar, Advocate

Shri Amresh Jain, DR - for the respondent

**CORAM: Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)**

Final Order No. 53908/2015

Per R.K. Singh :

Appeal is filed against order in original dated 29/11/2011 in terms of which service tax demand of Rs. 77,56,528/- for the period April 2005 to March 2008 was confirmed along with interest and penalties.



2. In terms of the impugned order the Commissioner has confirmed the following demands along with penalties.

- (i) Service Tax of Rs.45,29,167/- on the Technology Transfer fee paid to Whirlpool, USA during April, 2007 to March, 2008 under Section 73(1) of the Finance Act, 1994 ("the Act") along with appropriate interest under Section 75 of the Act;
- (ii) Service Tax of Rs.9,97,608/- short paid on Brand Fee under Section 73(1) of the Act along with appropriate interest under Section 75 of the Act;
- (iii) Cenvat credit of Rs.22,29,753/- for non-maintenance of separate records for taxable and exempted services under Rule 14 of Cenvat Credit Rules, 2004 (CCR) and Section 73 of the Finance Act, 1994 ("the Act") along with appropriate interest under Section 75 of the Act."

3. The appellant, apart from manufacturing goods, is also engaged in providing taxable services. It is also registered as input service distributor. The adjudicating authority confirmed the impugned demand essentially on the following grounds:

- (i) No service tax was paid on the technology transfer fee by the Appellant which was taxable under "intellectual property rights service";



(ii) The appellant utilized excess CENVAT Credit during the period of April, 2007 to March 2008 and is liable to pay the excess amount of credit taken as per the provision of Rule 14 of CCR read with Section 73 of the Act, based for the following reasons:

- a. That the Appellant is providing taxable as well as exempted services and has not maintained separate accounts for dutiable and exempted services.
- b. The exception provided under Rule 6(6) of the CCR is not applicable in case services are cleared for export under the Export of Services Rules, 2005.
- c. The Appellant is not authorised to avail credit of more than 20% of Service Tax payable on taxable services for the period April 2007 to March 2008.

(iii) The deduction of R&D cess by the Appellant from service tax paid on brand fee under IPR services for the period of 2007-08 was not admissible."

4. The appellant has contended that:

(i) The impugned order is based on non-application of mind. It does not specify what were exempted services rendered by it.



- (ii) While confirming the demand under intellectual property rights service the Commissioner did not give any finding on the various submissions of the appellant.
- (iii) The technology transfer fee was paid to Whirlpool USA for receiving technical know-how which is not covered in the taxable category of intellectual property rights service.
- (iv) Commissioner did not take into account that the benefit of notification 17/2004 - ST was admissible in respect of R&D cess paid on technical transfer fee.
- (v) Extended period is not invocable as there was no suppression or wilful misstatement and there is no finding that there was any wilful mis-statement or suppression with intent to evade service tax.
- (vi) An order passed without taking into account the contentions of the appellant is bad in law as has been held in the case of ***CCE Vs. Sheetal International*** - 2010 (259) ELT 165 (Supreme Court).
- (vii) The appellant was not providing any exempted services and therefore there were no requirement for maintaining separate account and so there was no limit of 20% on utilisation of CENVAT credit and the Commissioner has acknowledged this fact and still confirmed the demand.
- (viii) Technology transfer fee is not liable to service tax under the definition of IP service and detailed submissions of the appellant were not taken into account while confirming the demand under this



head. The agreement between Whirlpool Corporation, USA and the appellant clearly shows that it was an agreement for technology transfer and not for intellectual property. As per the agreement the purpose was supply of technology/information available with Whirlpool USA and therefore does not fall within the scope of intellectual property right. It was paying service tax on the brand fees under intellectual property rights service.

(ix) R&D cess has been paid on technology transfers and the service tax on the brand fee under intellectual property rights service was rightly paid after deduction of such R&D cess in terms of Notification 17/2004-ST as is evident from the language of the said notification.

(x) As in the extended period of limitation is not invocable in the present case as there was no wilful misstatement or suppression of facts, the demand is time-barred. The demands on technical transfer fee and relating to R&D cess were similarly raised earlier in a show cause notice dated 17/10/2008 for the period 2005 - 06 and 2006 - 07 and therefore the extended period cannot be invoked as in respect of these two components of demand, Revenue was already aware of the facts.

The appellant cited several judgements in support of its proposition which will be duly adverted to in due course.



5. Ld. Department representative contended that:

(1) In the ST 3 returns filed by the appellant for the period April 2007 to September 2007 and October 2007 to March 2008 it mentioned to be providing taxable service as well as exempted service.

(2) Services exported are to be treated in exempted services.

(3) Technology transfer agreement is enforceable under the Indian law (contract act) and therefore would be covered under IP service.

(4) R&D cess paid in respect of technology transfer fee cannot be offset against the service tax paid under intellectual property rights service on the brand fees paid by the appellant.

6. We have considered the contentions of both sides. As regards the component of demand pertaining to excess utilisation of CENVAT credit (beyond 20%) on the ground that the appellant provided taxable as well exempted services and did not maintain separate accounts, and therefore utilisation of CENVAT credit to the extent of Rs. 22,29,753/- was in excess of what was permitted in terms of Rule 6 of the CENVAT Credit Rules 2004, the appellant has vehemently pleaded that it was not providing any exempted service at all and no such service has been identified in the show cause notice which we find is borne out from the perusal of the show cause notice. We find



that the copy of the ST-3 return (on P-126 of appeal papers) submitted by the appellant shows that it was not providing any exempted service. The contention of Id. DR that the ST-3 returns referred to in the show cause notice (page 168 of the appeal papers) are different from the ST 3 return referred to by the appellant, the appellant maintained that it was not providing any exempted service and the Revenue could not show copies of the ST3 returns referred to in the show cause notice to substantiate its contention. We may however hasten to add that an ST -3 return cannot be a conclusive evidence of providing/not providing exempted service. The adjudicating authority in its order has recorded the following finding with regard to this issue:

"The SCN has not specified as to which services are taken as exempted and which services are taken as taxable. Only when it is proved that the noticee was providing exempted as well as taxable services that it can be held guilty of availing and utilizing CENVAT credit of service tax in excess of 20% of Service Tax paid on taxable service. Mere averment in the SCN cannot lead the adjudicating authority in deciding the case against the Noticee. The SCN has to come up with specific details of such allegation. However, this view of the adjudicating authority has not been accepted in review in noticee's similar case for previous period. In view of the foregoing and guided by the principal of judicial discipline, I am bound to adopt the views taken in review by the Committee of Chief Commissioners and hold that the noticee is providing exempted service along with taxable services and hence, they were not permitted to avail/utilise in excess of 20% of Service Tax paid on taxable services since they were not maintaining separate records."

(Signature)

The adjudicating authority is thus categorical in its finding that the onus to prove that the appellant was providing any exempted services has not been discharged by Revenue. The adjudicating authority is however wholly wrong in observing that judicial discipline requires him to be bound by the views of the Review Committee of Chief Commissioners. Adjudicating authority is only bound by the orders of the superior adjudicating authority like CESTAT and the observations of the Committee of Chief Commissioners are of administrative nature and not of quasi-judicial nature to have any binding effect on adjudicating authority. Thus there is no doubt that even in the opinion of the adjudicating authority, component of demand confirmed on account of non-maintenance of separate accounts of taxable and exempted services is not sustainable.

7. As regards the demand under IPR service on technology transfer fee, we have perused the agreement relating thereto entered into between Whirlpool Corporation USA and the appellant. The agreement is available on pages 15 to 18 of the appeal papers. It is evident from the agreement that it is only for the purpose of technical assistance pertaining to products so as to allow the appellant to design, manufacture and service products, parts or subassemblies therefor and to have appellant's parts suppliers make parts or subassemblies for appellant to be assembled into products.



Articles 1, II and III and VII of the said agreement are reproduced below for convenience:

ARTICLE 1

"6. The term "Technical Assistance" shall mean the supply by WHIRLPOOL to WOI of specific information and services relating to a Product based on the Technology supplied under Article II so as to allow WOI to design, manufacture and service such appliance or sub-assembly, and to have the WOI parts suppliers make Parts or Sub-Assemblies, therefore, Technical Assistance includes, but is not limited to, the items set forth in EXHIBIT B attached hereto.

7. The term "Technology" shall mean all of; the state of the art information and data or rights to such information and data, whether patented or unpatented, relating to the design, manufacture and service of the Products, originating within WHIRPOOL's organization as a result of research and product/process development activities. Technology includes, but is not limited to, all patents and patent applications, all copyrights, copyright registrations and applications, literary works, audio visual works, software, computer programs and processes, trade secrets, know-how, drawings specifications, lists of materials and other written or machine readable technical or business information relating to the design, manufacture or service of the Products.

ARTICLE-II

Supply of Technology

2.1 Subject to the limitations set forth below in Article IV and Section 2.3 of the Article II, WHIRLPOOL agrees to make available to WOI, all of its Technology, whether developed or acquired, and hereby grants to WOI an exclusive license in India to such Technology supplied to



WOI in accordance with Articles III and V of this Agreement. As to Technology developed or acquired during the term of this Agreement, WHIRLPOOL agrees to make available such Technology on a prompt and regular basis.

2.3

ARTICLE-III

Technical Assistance

3.1 WHHIRPOOL shall supply to WOI from time to time, Technical Assistant pertaining to Products, so as to allow WOI to design, manufacture and service Products, Parts or Sub-Assemblies therefore, and to have WOI's parts suppliers make Parts or Sub-Assemblies for WOI to be assembled into Products by WOI, or for sale by WOI as repair parts for Products manufactured or assembled by WOI.

ARTICLE VII

Royalties

"8.1 The products shall be deemed to have been sold, and royalties as specified in this Section shall accrue, when the Products are billed by WOI, if any Products are sold by WOI to any affiliated or related persons, then the royalties payable hereunder shall be computed on the basis of prices charged to purchasers who are not so related or affiliated. There shall be no separate charge for parts or sub-assemblies included in a finished appliances product subject to the above royalty.

8.2 The royalties shall be calculated and paid quarterly, WOI shall prepare statements for each quarter ending on the last day of March, June, September and December and each calendar year, setting up out the quantity of the Products sold, the sale price of the products, and the deductions made therefrom for determining the net ex-factory sales price and such other particulars as WHIRLPOOL may reasonably request to enable it to determine and verify the royalties payable to it under this Agreement. Each statement, together with the total amount of the royalties due, shall be delivered to

WHIRLPOOL within forty five (45) days from the end of the quarter covered by such statement.

8.3 WOI shall, during the term of this Agreement and for one year after expiration or termination hereof, maintain accurate records in the English language containing all data reasonably necessary to enable WHIRLPOOL to determine the total quantity of Products manufactured and sold and the sale price thereof, WOI shall permit a duly authorised representative or Chartered Accountant, appointed by WHIRLPOOL, at its cost, to inspect the said books and records and make copies of extracts therefrom during regular business hours.

8.4 All payments under this Agreement shall be made to WHIRLPOOL in United States Dollars at such place as may be designated by WHIRLPOOL from time to time. WOI shall apply to the Reserve Bank/Authorised Dealer in Foreign Exchange for permission to remit the sums due to WHIRLPOOL as soon as possible and shall pursue all such applications diligently."

It is evident that the agreement is entered for the purpose of supply of technology/technical assistance/information by Whirlpool, USA to the appellant and the remuneration received by Whirlpool, USA is only for the use of the same by the appellant. There is nothing ~~to~~ ^{on record} that any of the said technology/technical know-how/information is registered or patented under Indian law. Intellectual property right it defined in section 65 (55) (a) and (b) is as under:

"[(55a) "intellectual property right" means any right to intangible property, namely, trade marks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copyright;

G2

(55b) "intellectual property service" means, -
(a) transferring, ³[temporarily;] or
(b) permitting the use or enjoyment of any intellectual
property right;]

The appellant is also paying to Whirlpool, USA ~~and~~ brand fee on which it is discharging service tax. The amount on which service tax has not been paid relates to technical assistance and supply of technology by Whirlpool USA in terms of the said agreement. Transfer of technology and technical assistance do not fall in the ambit of intellectual property rights service ^{as} ~~the~~ Revenue has not shown that they were recognised under any law in India during the relevant period of 2007 - 08. Central board of Excise and Customs vide circular No. 80/10/2004 dated 17/09/2004 clarified the scope of intellectual property rights service as under:

"Intellectual property emerges from 9.1 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.



Thus only such intellectual property rights which are covered under Indian law in force alone are chargeable to service tax under IPR service. The Commissioner does not identify any Indian law under which the technology transfer and technical assistance involved in this case is covered. The Commissioner has confirmed the demand under intellectual property rights service essentially by observing as under:

“A reading of the Technical Transfer Agreement between the Noticee and Whirlpool, USA with a reading of the above mentioned definitions clearly establishes that Technical Transfer Fee is eligible to Service Tax under “Intellectual Property Service” and accordingly Service Tax on the same is recoverable from the Noticee.”

As is evident, the Commissioner has not taken into account the contentions of the appellant and has come to summary conclusion that technology transfer fee is liable to service tax under Intellectual Property Service. We find it totally nonspeaking and devoid of any reasoning. In the case of ***Tata Consultancy Services Vs. Commercial Service Tax*** - 2015 - TIOL - 2370 - CESTAT - Mumbai it was held by CESTAT that intellectual property rights not covered by the Indian laws would not be covered under taxable service in the category of IP services. In the case of ***Thermax Ltd. Vs. Commissioner of Central Excise Pune*** - 2013 - TIOL - 1092 - CESTAT - Mumbai it was held that payment for use of trade secret is not covered within the ambit of intellectual property service as there is no law governing trade secrets/confidential information in India.

✍

8. Coming to the demand on account of deduction of R&D cess from service tax paid on brand fee under IPR service, we notice that notification No. 17/2004 dated 10/09/2004 states as under:

In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided by the holder of intellectual property right to any person, in relation to intellectual property service, from so much of the service tax leviable thereon under Section 66 of the said Act, as is equivalent to the amount of cess paid towards the import of technology under the provisions of Section 3 of the Research and Development Cess Act, 1986 (32 of 1986) in relation to such intellectual property service."

It is evident that in terms of the above notification, service tax on IPR service is exempt only to the extent of the R&D cess paid towards the import of technology under the provisions of Section 3 of the R&D Cess Act, 1986 in relation to such intellectual property service (emphasis added). It is admitted that no service tax was paid under IPR service on the amount paid for such technology transfer which means that the appellant also was of the view that such technology transfer was not in relation to IPR service. Indeed in the preceding para, it is held that such technology transfer is not covered under IPR service. Consequently, the appellant was not eligible to deduct the R&D cess it paid on technology transfer from the service tax payable

(S)

under IPR service as such technology transfer was not in relation to intellectual property service. Thus the component of impugned demand amounting to Rs.9,97,608/- is sustainable on merit.

9. It is seen that the components of demand on technology transfer and with regard to R&D cess were the subject matter of an earlier show cause notice dated 17.10.2008 issued to the appellant covering an earlier period 2005-06 & 2006-07 and therefore in the light of the judgements of Supreme Court in the case of *Nizam Sugar factory* - 2006 (197) ELT 465 (SC) and *Pushpam Pharmaceutical Company Vs. CCE, Bombay* - 1995 (78) ELT 401 (SC) the extended period in the present case is not invocable which will make these components of the impugned demand time-barred because the show cause notice was issued on 05/04/2010 for the period up to March 2008.

10. In the light of the foregoing analysis, we do not find impugned demand sustainable and therefore the same is set aside and the appeal allowed.


(Justice G. Raghuram)
President


(R.K. Singh)
Member (Technical)

RM