IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
East Zonal Bench,
Kolkata.

DATE OF HEARING : 25/06/2018.
DATE OF DECISION: __/__/2018.

Service Tax Appeals No. 158-161of 2010 and 525-526, 505 of 2011

[Arising out of the Order-in-Original No. 01-04/ST/COMMR/2010 dated 27/01/2010 passed by The Commissioner of Central Excise and Service Tax, Jamshedpur.]

M/s Timken India Limited Appellant

Versus

CCE, Jamshedpur Respondent

Appearance

S/Shri Harish Bindumadharan, Advocate and Hemant Jajodia, C.A. – for the appellant.

Shri A. Roy, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri P.K. Choudhary, Member (Judicial)**
Hon'ble Shri C.L. Mahar, Member (Technical)

Final Order No. FO/A/76855-76861/2018

Per. C.L. Mahar :-

The brief facts of the matter are that the appellant had entered into a Technology License and Technical Assistance Agreement dated 10/09/1998 (hereinafter "the new contract") with the Timken, USA which in fact an expansion of an earlier Technology License agreement dated March 20, 1990 (hereinafter "the old contract") entered between the same two parties. As per agreement appellant desires to acquire license to manufacture products manufactured with the use of Timken (USA)'s proprietary technical information and to service the products by using Timken (USA)'s proprietary technical information. In the new contract appellant intends to expand the part number ranges over the original 50 part numbers envisaged in the old contract. The terms in the new contract and also in the old contract are more or less same. As per contract, appellant agrees to pay to Timken (USA) compensation for license of technical information.

2. In all seven show cause notices were issued (both for extended period as well as within the normal period of limitation) during the period from 2003-2004 to 2010-2011 March, 2011 to September, 2012. Department alleged the appellant is receiving "Franchisee service" and they are liable to pay service tax under reverse charge mechanism. The orders-in-originals passed in respect of the said show cause notices, the learned Adjudicating Authority held that the contract agreed upon between the appellant and Timken (USA) is a 'franchisee contract', and the appellant is a franchisee of Timken (USA). The Adjudicating Authority has confirmed the demand of service tax demanded under the show cause notice and penalty under Section 78 of Finance Act, 1994 has also been imposed.

3. It has been contended by the learned Advocate that the learned Commissioner grossly erred by classifying the services received by the appellant under the Technology License and

Technical Assistance Agreement under the taxable category of Franchise Services and demanding service tax on the royalty remitted outside India in as much as the services received under this Agreement are not in relation to a 'franchise' as defined in Section 65 (47) of the Finance Act, 1994.

4. For the period 1st July, 2003 to 15th June, 2005 to qualify as a franchise, the following four conditions had to be cumulatively fulfilled.

(i) franchise is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;

(ii) the franchisor provides concepts of business operation to franchisee, including knowhow, method of operation, managerial expertise, marketing technique or training and standards of quality control except passing on the ownership of all knowhow to franchisee;

(iii) the franchisee is required to pay to the franchisor, directly or indirectly, a fee; and

(iv) the franchisee is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person

For that the Technology License and Technical Assistance Agreement entered into by the appellant with Timken, USA does not fulfill above conditions in as much as the appellant is not granted the representational right to sell or manufacture goods or to provide service or undertake any process indentified with the Timken, USA and that the appellant is engaged in providing various services which are not identified with Timken, USA such as those of maintenance and repair services, erection, installation and commissioning services and technical inspection and certification services, which would clearly establish that the appellant is not a franchisee unit of Timken, USA and accordingly no service tax stands payable under the category of Franchise Service.

5. It has further been argued that the learned Commissioner has grossly erred by holding that grant of permission to use trade mark is covered under the category of Franchise Services in as much as in terms of the Technology License and Technical Assistance Agreement entered into by the appellant with Timken, USA it would be observed that trade mark has been defined as intellectual property and that would mean that the limited right to its use has been given to the appellant by way of a licence and that would be taxable under the category of Intellectual Property Right Services.

6. The learned Commissioner failed to appreciate the fact that definition of "franchise" states that there must be a grant of representational right to sell or manufacture goods or to provide service or to undertake any process indentified with franchisor and the same may or may not involve a trade mark, which would mean that usage of trade mark *per se* is not covered but the right to represent franchisor whether or not by way of a trade

mark, service mark or any such symbol is covered under the taxable category of franchise service. In the appellant's case there is no such right granted to the appellant to represent Timken, USA and thus the usage of trade mark will not be taxable under the heading Franchise Service but will be taxable under the category of Intellectual Property Right Services.

7. We have also heard the learned Departmental Representative who has reiterated the findings of the order-in-original.

8. Having hard both the sides before proceeding further to analyse the issue it will be appropriate have a look at the relevant definitions given in the Finance Act, 1994. The definition under Section 65 (47) for the Franchise Services (w.e.f. 16/05/2005) has been prescribed as under :-

> "Franchise" means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved".

While the definition for the Intellectual Property Rights, as provided under Section 65 (55a) and (55b) are as follows :-

> 65 (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'
departmental audit party has made an audit found that the

65 (55b)

"intellectual property service" means, -

(a) transferring, temporarily; or

(b) permitting the use or enjoyment of,

any intellectual property right.

9. In view of the above definitions, for the proper classification of the service availed by the recipient in this particular case it is relevant that the conditions of the contract agreed between the appellant and M/s Timken (USA Ltd.) need to be analysed on the yardstick of the above definitions of the Franchise Service and Intellectual Property Right Service. The key features of the contract which has given the legal right to the appellant for manufacture the products with the brand name of Timken are as follows :-

"• The products manufactured and sold by the appellant are identified with Timken, USA . The services provided are also identified with Timken, USA since those are provided with the use of Timken, USA's proprietary technical information.
• Products are known in the market as "TIMKEN" brand product, not by the name of manufacturer, i.e., the appellant.
  ° The style of presentation of goods and services and any applications for protection thereof are also

included under Intellectual property transferred to the appellant. Therefore, sale and marketing of the products are guided by Timken (USA) ;

- ° Timken (USA) has the authority to reject the products manufactured by the appellant ;

- ° Exports of the products and procurement of export contract are under direct control of Timken (USA). The products manufactured by the appellant are strictly to be in accordance with Timken (USA)'s International quality standards.

- ° The appellant has no right to enter independently into any contract for manufacture of any material for his customers. The terms of contract shall be determined subject to satisfaction of Timken (USA).

- Further, upon termination of agreement, the appellant will have no right over the goods already manufactured with the use of Technical Information supplied by Timken (USA) since the appellant shall have to cease not only manufacture but also sale of the goods already manufactured.

10. A plain reading of the above contract makes it clear that the agreement between the appellant and the Timken (USA) is not limited to use Timken's Intellectual Property i.e. proprietary technical information, knowhow etc. for manufacture of products and for service of the main products as is defined in the intellectual property service. Rather the various terms of the contract as given above indicate that the appellant has to represent the Timken (USA) to their various customers in such a

way that the appellant looses its own individual identity and would perhaps be known only by the identity of Timken (USA).

11. In view of the above ingredients which are there in the contract, we find that the services availed by the appellant are more akin to franchise services rather than intellectual property right service. While holding the above view, we also refer to the Hon'ble Delhi High Court judgment in the case of **Delhi International Airport P. Ltd. vs. Union of India – 2017 (50) S.T.R. 275 (Del.)**. The relevant extract of this judgment is reproduced below :-

> "57. The term "representational right" would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.
>
> 58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor".

We feel that above decisions squarely covers the situation as present in the case at hand and we feel that the services received by the appellant are correctly classifiable under 'Franchise service'. Thus we don't find any reason to interfere with the impugned order on this issue.

12. On the issue of limitation we feel that the appellant being an old assessee were very well aware about the provisions of service tax act we feel that if they had any doubt regarding the classification of the services availed by them, in that case they should have approached the department for necessary clarification on the issue. As the assessee is working in the era of self-assessment and therefore the responsibility lies with them to classify the service availed/provided by them correctly and if any confusion or difficulty they are certainly free to approach the revenue authorities for necessary clarifications. We feel that the appellant has not come clear on this aspect and therefore we feel that the extended time proviso for demanding service tax has rightly been involved in their case.

13. In view of above, we hold that the services availed by the appellant are franchise services and they need to pay service tax as applicable on the same.

14. In view of above, we do not find any infirmity in the order-in-original. Same is upheld. The appeals, as above, filed by the appellant are dismissed as being without any merit.

(Order pronounced in open court on 24/10/2018.)

(P.K. Choudhary)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

PK