IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.75844 of 2016

(Arising out of Order-in-Original No.78/COMMR/DGP/ST/15-16 Dated 26.02.2016 passed by Commissioner of Central Excise, Service Tax & Customs, Durgapur.)

M/s Graphite India Ltd.
(Sagarbhanga, Durgapur-713211, Dist.-Burdwan, West Bench)

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Durgapur
(Satyajit Roy Sarani, City Centre, Durgapur 713216, Dist, Burdwan (W.B.)

Respondent

APPERANCE:
Shri Arvind Baheti, Chartered Accountant for the Appellant
Shri R.K.Agarwal, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.77769/2025

DATE OF HEARING : 30 OCTOBER 2025
DATE OF DECISION : 30 OCTOBER 2025

Per Ashok Jindal :

This is an appeal against the impugned order wherein the demand of service tax was confirmed along with interest against the appellant and penalties were also imposed on the appellant.

2. The facts of the case are that the appellant is a public limited company engaged in manufacture of graphite electrode and nipple of all sorts and miscellaneous graphite products at various manufacturing facilities located in east and west spanning across India, with their corporate office being at Kolkata. The instant proceedings are against one such factory of the Company located at Sagarbhanga, Durgapur, having Central Excise Registration No.AAACC0457CXM006 and Service Tax Registration No. AAACC0457CST005.

2.1 The entire proceedings are a fall out of the audit conducted at the premises of the appellant for the period 2008-09 and 2009-10 during the year 2011. Pursuant thereto, Show Cause Notice dated 11 October 2012 was issued to the appellant invoking extended period of limitation, wherein merely on the basis of the figures appearing in the Trial Balance and consolidated Balance Sheet of the Appellant prepared by its corporate office located at Kolkata, service tax to the tune of Rs.10,47,49,041/- was demanded from the Appellant for the period 2007-08 to 2011-12 on the following counts :

(i) Tax on commission received on ocean freight under the category business auxiliary services on forward charge basis;

(ii) Tax on 'Royalty income' appearing in the Balance Sheet under the category 'Intellectual Property Service' on forward charge basis; and

(iii) Tax under reverse charge on expenses incurred in foreign currency towards travelling expenses (Tour Operator Service), professional fees (Technical Consultancy Service), and export sales expenses (Business Auxiliary Service).

2.2 The Appellant duly replied to the show-cause notice vide its letter dated 14 December 2012 vehemently disputing the allegations contained therein and categorically stating that the royalty income appearing in the consolidated Balance Sheet is earned by its Corporate Office at Kolkata having a separate Service Tax registration and not by the Appellant itself.

2.3 The Commissioner of Central Excise & Service Tax, Bolpur Commissionerate adjudicated the Notice vide Order-in-Original No. 09/COMMR/BOL/14 dated 30 January 2014, wherein demand with respect to item no. (i) commission on ocean freight was dropped in its entirety, while demand under (iii) was partly dropped in so far as it pertained to travelling expenses and professional fees. Accordingly, demand to the tune of Rs.10,35,29,570/-was confirmed (Rs.10,08,94,700/- towards 'royalty income' and Rs.26,34,870/- towards 'export sales expenses').

2.4 Aggrieved by the Order-in-Original dated 30.01.2014, the Appellant filed an appeal along with a stay application and miscellaneous application for inclusion of an additional ground before the Tribunal. The Tribunal was pleased to dispose of the said matter vide Final Order dated 5th December 2014 by way of remand for consideration of all the issues afresh, subject to payment of pre-deposit of Rs.35,00,000/-.

2.5 Pursuant to the order of the Tribunal, the Appellant deposited the amount of Rs.35,00,000/- by debiting cenvat credit account on 19th February 2015. However, at the insistence of the Ld. Commissioner, Durgapur Commissionerate, the Appellant deposited the same in cash on 18th Februrary 2016 and claimed re-credit of the amount deposited earlier.

2.6 Thereafter, the Ld. Adjudicating Authority vide Order-in-Original No.78/COMMR/DGP/ST/15-16 dated 26 February 2016 adjudicated all the allegations contained in the Notice dated 11.10.2012 and dropped the demand of Rs.7,72,16,113/- pertaining to royalty income on account of computational infirmity, along with other demands as dropped under OIO dated 30.01.2014.Consequently, demand amounting to Rs.2,63,13,458/- along with interest and equivalent penalty was confirmed under the impugned Order in respect of the following issues:

(i) Royalty Income under the category 'Intellectual Property Service' - Rs.2,36,78,588/-

(ii) Export Sales Expenses under the category BAS – Rs.26,34,870/-

2.7 The Ld. Adjudicating Authority has also confirmed penalty under Section 76 for the period 01.04.2007 to 09.05.2008 along with a general penalty of Rs.5000/- under Section 77 of the said Act against the appellant.

2.8 Being aggrieved with the said order, the appellant is in appeal before us.

3. At the outset, the ld.Counsel for the Appellant submits that the demand on account of royalty income has been computed merely on the basis of the figures appearing in Schedule 25 of the consolidated Balance Sheet of Graphite India Limited.It is submitted thatthe Corporate Office of the Appellant had entered into a Know How Licensing Agreement dated 09 Sept 2004 with Graphite COVA GmBH ('Licensee'),whereby the Licensee was permitted to use the technical know-how owned by the Company for consideration as specified in Annexure 2 to the said agreement. The invoices for the said know-how transfer were raised by the Corporate Office on a quarterly basis, and

the corresponding royalty amounts were remitted directly by the Licensee into the bank account of the Corporate Office.

3.1 He further submits that the Company, Graphite India Limited, of which the Appellant is one of the manufacturing units, has a pan-India presence with multiple manufacturing facilities and administrative offices situated across various locations. Since all such units form part of a single legal entity, the Company prepares a consolidated set of financial statements incorporating the figures of all factories and offices. In this regard, it is pertinent to note that the "royalty income" figures relied upon by the Department from the consolidated Balance Sheet (Schedule 25) of the Company pertain to the Corporate Office of the Appellant, which is a separate unit under Service Tax registered under the Kolkata Commissionerate. The said income does not belong to the Appellant's unit falling within the jurisdiction of the Ld.Adjudicating Authority.

3.2 In support of its contention, the Appellant has also obtained a certificate from a Chartered Accountant confirming that the royalty income received from Graphite COVA GmbH was duly credited to the books of the Corporate Office and not in the books of the Appellant's unit.In the said circumstances, the demand raised by the Durgapur Commissionerate (previously Bolpur Commissionerate) for the income received by the assessee registered under the Kolkata Commissionerate is without jurisdiction and ex-facie bad in law. Hence, the demand to the tune of Rs.2,36,78,588/- is liable to be set aside on this short ground alone. Reference in this regard is invited to the following judgements:

i. M/s. Narayan Kumar vs. Commr. of CGST, BolpurCommissionerate [2025 (8) TMI 91 - CESTAT KOLKATA] (Para 8, 8.1)
ii. CCE, Kolhapur vs. Helios Food Additives Pvt. Ltd.[2011 (24) STR 721 (Tri. – Mumbai)] (Para 6)

3.3 Without prejudice to the submissions made hereinabove, and in any event, it is a settled law that licensing of know-how under the Know How Licensing Agreement cannot be taxed under the category of 'Intellectual Property Services'.

3.4 Without prejudice to the submissions made hereinabove, he submits that the licensing of know-how cannot be subjected to service tax as the definition of 'intellectual property services' under Section 65(55b) of the Finance Act, means (a) transferring temporarily; or (b) permitting the use or enjoyment of any intellectual property right. Further, as per Section 65(55a) of the Act, 'intellectual property right' means any right to intangible property, namely, trademarks, designs, patents or any other similar intangible property under any law for the time being in force except copyright. Thus, it implies that only those intellectual property rights which are covered under any Indian law in force shall be chargeable to service tax. The said position has also been fortified by the Board Circular No. 80/10/2004-ST dated 17/9/2004(Pg. 18/C) which categorically clarifies that the definition of taxable service includes only such IPRs (except copyright) that are prescribed under law for the time being in force.

3.5 It is further submitted that 'Know-how' is a parcel of closely held information relating to industrial technology, sometimes also referred to as trade secret which enables its user to derive commercial benefit from it. The Appellant submits that 'know-how' or 'trade secret' are not covered by any Indian legislation and hence fees received for know-how under the Know How Licensing Agreement is not exigible to service tax under the taxable category "Intellectual Property Services". Reference in this regard is invited to the following judgements wherein Hon'ble Tribunal has time and again consistently held that fees paid for technical know-how is not subjected to service tax.

(i) Commissioner of Service Tax, Kolkata Versus M/s. McLeod Russel (India) Limited [2023 (3) TMI 739 - CESTAT KOLKATA] *;*

(ii) Munjal Showa Ltd. vs. Commissioner of C. Ex. & S.T., Delhi (Gurgaon) [2017 (5) G.S.T.L. 145 (Tri. - Chan.) - *Paras 6 to 8*] [Affirmed in SC in (2023) 8 Centax 153 (S.C.)] ;

(iii) SICPA India Pvt. Ltd Versus Commissioner of C. Ex., Cus. & S.T., Siliguri [2018 (15) G.S.T.L. 375 (Tri. - Kolkata)] ;

(iv) Tata Consultancy Services Ltd. vs. Commissioner of S.T. Mumbai [2016 (41) S.T.R. 121 (Tri. - Mumbai)] *;*

(v) Chambal Fertilizers & Chemicals Ltd. vs. Commr. of C. Ex., Jaipur-I [2016 (45) S.T.R. 118 (Tri. - Del.)] *;*

(vi) Reliance Industries Ltd. vs. Commr. Of C. Ex. & S.T., LTU, Mumbai [2016 (44) S.T.R. 82 (Tri. - Mumbai)].

3.6 It is further submitted that without prejudice to the submissions made hereinabove, even assuming without admitting, that such services are covered under the category "intellectual property services", the same would not be liable to service tax as it would qualify as export of services in terms of Rule 3(1)(iii) of the Export of Service Rules, 2005.

3.7 Without prejudice to the submissions made hereinabove, the ld.Counsel submits that even assuming but not admitting that such services are covered under the category "intellectual property services", the 'royalty income' received by the Company in convertible foreign exchange would not be liable to service tax, as the same would qualify as export of services in terms of Rule 3(1)(iii) of the Export of Service Rules, 2005. The said contention of the Appellant was rejected by the Ld. Commissioner in first round vide the OIO dated 30.01.2014 on the purported ground that the Appellant had not furnished any evidence to the effect that the order of the provision of such services was placed by an establishment located outside India in light of the 1st proviso to Rule 3(1)(iii) of the said Rules. The Appellant in the de novo proceedings had adduced not only the agreement copy but also the invoices raised for provision of such services and the foreign exchange inward remittance certificate to corroborate the test laid down in the 1st proviso to Rule 3(1)(iii) of the said Rules.

3.8 It is his further contention that the Ld. Adjudicating Authority in the second round of litigation rendered a superfluous finding as regards the non-applicability of Rule 3(1)(ii) of the said Rules for denying the benefit of export, when the same was never the case of the Appellant. The specific contention of the Appellant that such services qualified as exports under Rule 3(1)(iii) of the said Rules has not even been dealt with when that was always the case of the Appellant.

3.9 He further submits that since, the services are provided to a recipient located outside India and the benefit of such technical know-how service accrues outside India, the said services would qualify as export of services in terms of Rule 3(1)(iii) of the said Rules. Reference in this regard is invited to the following judgements:

(i) M/s. Regent Machine & Servicing Versus Commissioner of Service Tax, Kolkata [2024 (11) TMI 1134 - CESTAT KOLKATA];

(ii) Gap International Sourcing (India) Pvt. Ltd. Versus Commr. of S.T., Delhi [2015 (37) S.T.R. 757 (Tri. - Del.)].

3.10 He further submitted that the demand raised in respect of export sales expenses is liable to be set aside in toto in so far as the Department has failed to specify the sub-clause of the Business Auxiliary Service under which the said expenses are sought to be taxable.

3.11 It is submitted that the demand raised under the category of "Business Auxiliary Service" (BAS) on reverse charge basis, in respect of export sales expenses, is wholly unsustainable and liable to be set aside in toto, inasmuch as the Department has failed to specify the precise sub-clause of Section 65(19) of the Finance Act, 1994 under which the impugned services are sought to be classified.

3.12 It is submitted that the instant demand has been mechanically computed merely on the basis of the figures of expenses incurred in foreign currency as appearing in the Trial Balance, without any effort on part of the Department to ascertain the true nature, character, and purpose of such expenses or to demonstrate as to how such expenses qualify as taxable services under BAS.

3.13 He further submits that it is a settled principle of law that the burden of proving taxability of service squarely rests upon the Department. It is incumbent upon the Department to clearly identify the taxable service, the specific sub-clause under which the activity falls, and the manner in which the ingredients of such service are satisfied. The Hon'ble Tribunals have consistently held thatit is the responsibility of the Department to identify the sub-clause under which it seeks to classify a service and demand tax under BAS, in the absence of which the demand is void ab initio and liable to be set aside. Reference in this regard is invited to the following judgements:

(i) M/s. Williamson Magor & Co. Limited Versus Commissioner of Service Tax, Kolkata [2024 (3) TMI 404 - CESTAT KOLKATA] ;

(ii) TKM Global Logistics Ltd. Versus Commissioner of Service Tax, Kolkata [(2024) 17 Centax 35 (Tri.-Cal)] ;

(iii) M/s. GEM Software Solutions Limited vs. The Commissioner of GST & Central Excise, Chennai [2025 (7) TMI 347 - CESTAT CHENNAI].

3.14 He submitted that n the instant case, the Department has not discharged the burden of classification. No correlation has been drawn between the nature of export-related expenses and any activity envisaged under BAS, nor has any evidence been adduced to show that the Appellant had received a service falling within the statutory definition of BAS. Hence, the entire demand under the category BAS is liable to set aside in toto on this short ground alone.

3.15 He further submits that without prejudice to the submissions made hereinabove and, in any event, the said expenses cannot be made taxable under the category BAS on reverse charge.

3.16 Without prejudice to the submissions made hereinabove and, in any event, he submits that the said expenses are not liable to service tax under reverse charge, in as much as they predominantly pertain to activities such as storage charges, demurrage, detention, quality claim-related expenses (including supply of free-of-cost material, tarpaulin repair, etc.), and other ancillary charges. He submits that expense of such nature does not fall within any of the sub-clauses of the Business Auxiliary services as defined under Section 65(19) of the Finance Act, 1994. These activities do not involve promotion or marketing of goods, procurement of inputs, or any service rendered on behalf of a client, which are the essential elements of BAS. Accordingly, demand of tax on such expenses under BAS is misplaced and liable to be set aside.

3.17 He further submits that a portion such expenses also includes the payment made to service providers located within India. In this regard, it is respectfully submitted that no liability of service tax can arise under reverse charge basis in respect of such payments, since the provisions of Section 66A of the Finance Act, 1994 apply only where the service provider is situated outside India and the recipient is located within India.In support of its contentions, the Appellant has also obtained a certificate from a qualified Chartered Accountant certifying the nature of all such expenses incurred by the Appellant along with the bill-wise statement of such expenses.

3.18 In view of the submissions made hereinabove, the ld.Counsel for the appellant respectfully submits that the demand confirmed towards “export sales expenses” under BAS on reverse charge basis is wholly unsustainable both in law and on facts and is therefore liable to be set aside in its entirety.

3.19 It is his further contention that the extended period of limitation cannot be invoked when the entire demand has been raised merely on the basis of the information/figures taken from the financial statements which are publicly available documents.

3.20 It is submitted that the entire demand has been raised on the basis of the figures taken from the financial statements/balance sheet of the Appellant. Since, the entire demand has been raised by picking up figures and information available in the financial statements of the Appellant, which are public documents, the grounds for material suppression of facts cannot be taken by the Department and hence extended period of limitation cannot be invoked. Reliance in this regard is placed on the following judgements:

(i) M/s. Saraf Services Private Limited Vs. Commissioner of Service Tax, Kolkata [2024 (12) TMI 795 - CESTAT KOLKATA] *;*

(ii) M/s. T & I Global Limited Versus Commissioner of Service Tax, Kolkata [2024 (11) TMI 925 - CESTAT KOLKATA] *;*

(iii) Mega Trends Advertising Limited Vs. Commissioner of Central Excise and Service Tax, Lucknow [2020 (38) G.S.T.L. 57] *.*

Hence, the demand pertaining to period April 2007 to September 2010 is hit by limitation and hence liable to be set aside.

2.21 He, therefore, submits that the imposition of penalty under both Section 76 and 78 is ex-facie illegal as the provisions of Section 76 and 78 are mutually exclusive.

2.22 He further submits that the Adjudicating Authority has grossly erred in confirming penalty under both Section 76 and 78 of the Finance Act, 1994 in as much as the fifth proviso to Section 78 expressly provides that the provisions of Section 76 shall not apply if penalty is payable under Section 78. Hence, the two provisions are mutually exclusive and penalty under Section 76 is liable to be set aside. Reference in this regard is invited to the judgement of Commr. of C.Ex.

vs. First Flight Courier Ltd. [2011 (22) S.T.R. 622 (P & H)]. Therefore, no interest and penalty is imposable when the duty demand itself is unsustainable.

2.23 It is further submitted that when the duty demand is itself unsustainable, no interest and penalty under Section 77 and/or 78 can be demanded from the appellant. Reference in this regard is invited to the judgement of Pratibha Processors vs. Union of India [1996 (88) E.L.T. 12 (S.C.)].

3. The ld.Authorised Representative for the Revenue has justified the impugned order.

4. Heard both the parties and considered the submissions.

5. On going through the arguments advanced by both the parties and the records placed before us, two issue arises :

(a) Whether the appellant is liable to pay service tax on "Royalty Income" earned by the Corporate Office of the appellant, which is having a separate registration, or not ?

(b) Whether the appellant is liable to pay service tax under the category of "Intellectual Property Services" for licensing of know-how under the Know-How Licensing Agreement, or not ?

Issue (a)

Whether the appellant is liable to pay service tax on "Royalty Income" earned by the Corporate Office of the appellant, which is having a separate registration, or not ?

6. It is admitted fact that the Corporate Office of the appellant had entered into a Know How Licensing Agreement dated 09.09.2004 with Graphite Cova GmBH, whereby the Licensee were permitted to use the

technical know-how owned by the Company for consideration as specified in Annexure 2 of the said Agreement. Accordingly, the Royalty amounts were remitted by their Corporate Office and the appellant is one of the manufacturing unit of the Corporate Office, which is having multiple manufacturing facilities and administrative offices situated across the various locations and all such units are part of a single legal entity i.e. Corporate Office and the figure of royalty has been shown a consolidated balance sheet of the Corporate Office. In that circumstances, if the service tax is payable on that royalty is to be paid by the Corporate Office not by the appellant. The appellant is not required to pay service tax, as is having a separate service tax registration. Therefore, the demand of service tax on account of royalty income is not sustainable against the appellant as held by this Tribunal in the case of M/s Narayan Kumar Vs. Commissioner of CGST & Central Excise, Bolpur reported in 2025 (8) TMI 91-CESTAT Kolkata wherein this Tribunal has held as under :

> *"8. At the out set, we find that the appellant has questioned the jurisdiction of Bolpur Commissionerate to issue the Notice to demand service tax. It is a fact on record that the appellant has separate registrations having registration No. AEAPK6185QSD005 at Kolkata and Registration No. AEAPK6185QSD001 at Bolpur. We observe that on receipt of the data from the Income Tax department, officers of Bolpur Commissionerate sought various details from the appellant and recorded statements. Shri. Rounak Kumar Jain authorised representative of the appellant, in his statement dated 24.11.2020 has categorically stated that they have not rendered any service within the jurisdiction of Bolpur Commissionerate and hence they have not filed any returns with respect to the Registration No. AEAPK6185QSD001. Regarding the*

reasons for the difference in the value declared in the ST-3 returns filed by them in the Service Tax Commissionerate under Service Tax registration No. AEAPK6185QSD005, he has explained that they have rendered various services such as Road Construction, construction of historical monuments, construction of buildings meant predominantly for use other than for commerce and industry which were exempted from payment of service tax in terms of Sl no 12, 12A, 13 and 29(h) of the Exemption Notification No 25/2012 dated 20.06.2012. We find that inspite of their categorical submission that no taxable service was rendered with respect to the Registration No. AEAPK6185QSD001, the officers of Bolpur Commissionerate proceeded to issue the show cause notice to demand service tax.

8.1. We find that the territorial jurisdiction of Principal Commissioner, CGST & Central Excise, Bolpur extends only to the Districts of Murshidabad, Birbhum, Purulia, Purba Bardhman, Paschim Bardhman and Bankura in the State of West Bengal vide notification No. 13/2017-CE (N.T.), dated 09.06.2017. Thus, we observe that the Principal Commissioner at Bolpur does not have territorial jurisdiction on Service Tax matters over the city of Kolkata. Further, the appellant has a separate registration and filing returns with respect to the registration at kolkata. Thus, we find merit in the submission of the appellant that the show cause notice issued by the commissioner, Bolpur is without jurisdiction and hence it is void ab initio.

8.2. We find that the Ld. adjudicating authority has given his findings on this issue in para 2.4 (f) of the impugned order, which reads as under: -

> *"(f) Therefore it cannot be ascertained that the Noticee have discharged their due service tax liability on the gross amount of receipts in their P & L Accounts and 26AS Statement. So, they failed to clarify with relevant supporting documentsthat the entire amount of receipts shown in their P & L Accounts or 26AS Statement is solely related to Service Tax Registration No. -*

AEAPK6185QSD005 and no service tax was provided against Service Tax Registration No. – AEAPK6185QSD001 during the period 2015-16, 2016-17 and 2017-18 (up to June,17). Thus it appears reasonable to assume that the entire differential amount of service charges was received by them by providing taxable services from their registered premises at Chatterjee Niwas, Jamuria Nandi Road, Jamuria Hut, Jamuria, Distt. – Paschim Burdwan, West Bengal-713336 for which ST registration bearing no. AEAPK6185QSD001 was received by them."

8.3. We do not agree with the above referred averments made in the impugned order. When all the facts were within the knowledge of the Department, there was no scope for assuming that the Appellant had rendered services chargeable to service tax at Jamuria. We find that the said assumption is unfounded and not based on facts. Even otherwise, the jurisdiction is conferred by law and it cannot be assumed to issue a demand notice. Thus, we hold that the Notice issued was without jurisdiction and hence it is void ab initio . Accordingly, we hold that the demands confirmed on the basis of such void ab initio notice is not sustainable under law."

7. In view of the observations made by this Tribunal, we hold that as the appellant is having a separate service tax registration, in that circumstances, the demand confirmed on the basis of data recovered from the records of the Corporate Office are not sustainable. Accordingly, the demand of royalty income confirmed against the appellant is set aside.

Issue (b)

Whether the appellant is liable to pay service tax under the category of "Intellectual Property Services" for licensing of know-how under the Know-How Licensing Agreement, or not ?

8. The said issue has been dealt with by this Tribunal in the case of Munjal Showa Limited Vs. Commissioner of Central Excise & Service Tax, Delhi (Gurgaon) reported in 2017 (5) GSTL 145 (Tri.-Chan.), wherein this Tribunal has observed as under :

*"**6.**On careful consideration of the submissions of both sides, we find that the Design, Trademark, Symbol, Brand Service have not been registered in India. Therefore, whether the royalty paid by the appellant-assessee under Industrial Property Right agreement is liable to service tax under Intellectual Property Rights service or not. For better appreciation of Intellectual Property Right, the definition of the same is reproduced :-*

***Section 65. Definition.** - In this Chapter, unless the context otherwise requires, -*

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

***"intellectual property (55)(b) service"** means, -*

(a) transferring, {temporarily} whether permanently or otherwise; or

(b) permitting the use or enjoyment of, any intellectual property right.

***(105)(zzr)"taxable service"** means any service provided or to be provided to any person, by the holder of intellectual property right, in relation to intellectual property service.*

***7.**On going through the said provisions of the Act, we find that, to tax under service tax, under Intellectual Property Rights, such rights should be registered with Trademark/Patent authorities. It* *is a fact on record that such trade mark is not registered in India. Moreover, the C.B.E. & C. Circular dated 17-9-2004 relied upon by the ld. AR is having no help to the Revenue as it has been clarified that the taxable service include only such Intellectual Property Rights except Copyright that are prescribed under the law for the time being in force, as the term 'time being in force' implies that, as are applicable in India, and Intellectual Propertyrights covered under Indian law in force alone are chargeable to service tax and Intellectual Property Rights like Integrated Circuits or Undisclosed Information would not cover under the taxable services. Admittedly, Trade Mark rights which have been used by the appellant-assessee are not registered in India, therefore, the same are not liable to tax under IPR service, in the light of the decision in the case of Chambal Fertilizers & Chemicals Limited (supra), wherein this Tribunal has observed as under :-*

We have heard both sides and examined the "5. appeal records. The only point for decision is that whether or not the appellant received taxable service under the category of 'Intellectual Property Right service' during the relevant period. The admitted facts of the case are that the technical know-how, engineering design licence involved in these agreements with foreign service providers are not registered in India under Indian law. However, the original authority held that registration of IPR under Indian law is only for obtaining protection from its infringement. He observed that the levy of tax is not dependent on the fact of such registration. We find that such conclusion is not legally tenable and is beyond the scope of taxable service as defined in Finance Act, 1994 :

"Section 65(105)(zzr) of the Act defines in the taxable IPR service tax as under :

"Taxable service" means any service provided or to be provided to any person by the holder of intellectual property right, in relation to intellectual property service;

Section 65(55a) of the Act defines 'Intellectual Property Right' to mean as under :

"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"

6. The IPR as defined should be a right under any law for the time being in force. The legal position on this issue has been examined by various decisions of the Tribunal which are as under :

(a) Rochem Separation Systems (India) Private Limited v. Commissioner of Service Tax, Mumbai I - 2015 (39) S.T.R. 112 (Tri.-Mum.) [para 8];

(b) Whirlpool of India Limited v. C.C.E & S.T., Delhi - 2016-VIL-57-CESTAT-DEL-ST [para 7];

(c) Tata Consultancy Services Limited v. C.S.T., Mumbai - 2015-TIOL-2370-CESTAT-MUM = 2016 (41) S.T.R. 121 (Tri.) [para 4.1];

(d) Asea Brown Boveri Ltd. v. C.C.E & S.T., Bangalore - 2016-VIL-480-CESTAT-BLR-ST [para 6.7.1];

(e) Reliance Industries Ltd. v. C.C.E. & S. Tax, Mumbai - 2016-TIOL-1654-CESTAT-MUM = 2016 (44) S.T.R. 82 (Tri.) [para 2].

It has been held that to be categorized for service tax purpose 7. under IPR, such right should have been registered with trade mark/patent authority. In the present case, admittedly, there is no right recognized as IPR under any law for the time being in *force in India. As such, there can be no provision of IPR service for tax liability on reverse charge basis."*

Therefore, we hold that services received by the appellant-assessee are not covered under Intellectual Property Rights services, under Section 65(105)(zzr) of the Finance Act, 1994, therefore, no service tax is payable by the appellant-assessee.

8.*In that circumstance, we hold that services received by the appellant-assessee are not covered under IPR service, under Section 65(105)(zzr) of the Finance Act, 1994. Therefore, no service tax is payable by the appellant-assessee."*

9. In view of the decision of this Tribunal in the case of Munjal Showa Ltd. (supra), which has been affirmed by the Hon'ble Apex Court, we hold that the service received by the appellant is not covered under the 'Intellectual Property Royalty Services', therefore, no service tax is payable by the appellant under reverse charge mechanism. Therefore, the said demand is also set aside.

10. Another issue has been raised by the ld.Counsel for the appellant that in respect of export sales expenses, the demand of service tax is not sustainable as no sub-clause on Business Auxiliary Sevice has been specified in the show-cause notice to demand service tax.

11. We find that the demand of service tax under Business Auxiliary Service on reverse charge mechanism in respect of export sales expenses is not sustainable as no specific clause under Section 65 (19) of the Finance Act, 1994 has been invoked to demand service tax from the appellant. Therefore, the demand on export sales expenses under reverse charge mechanism under the category of Business Auxiliary

Service is not sustainable. Accordingly, the demand of service tax is set aside under Business Auxiliary Service.

12. In view of the above observations, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Operative part of the order was pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(Rajeev Tandon)
Member (Technical)

mm