

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.2**

APPEAL No.ST/87683/2016

(Arising out of Order-in-Original No.52 to 58/Commr(RS)/LTU-M/CX/2016-2017 dated 15/09/2016 passed by the Commissioner of Central Excise (LTU), Mumbai)

Technova Imaging Systems Pvt. Ltd. : Appellant

VS

CCE, Mumbai : Respondent

Appearance

Shri.Bharat Raichandani, Advocate for Appellant
Shri. M.P. Damle, Asst. Comm. (A.R) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 15/11/2018
Date of decision : 15/11/2018

ORDER NO.

Per : P Anjani Kumar

1. This appeal is directed against Order-in-Original No.52 to 58/Commr(RS)/LTU-M/CX/2016-2017 dated 15/09/2016 passed by the Commissioner of Central Excise (LTU), Mumbai.

2. Briefly stated that the facts of the case are that the appellants are manufacturers of excisable goods, i.e., plates, chemicals and films required for printing industry. The appellants entered into an agreement with M/s.Agfa-Gevert NV, Belgium (Agfa in short) and Hydro Dynamics Products, UK for supply of technical know-how and they have paid royalty to the foreign entities in consideration thereof. The department opined that the appellants are liable to pay service tax on the aforesaid royalties under the taxable head of "Intellectual Property" service as defined under the Finance Act, 1994. Accordingly, periodical show-cause notices were issued proposing demand of service tax along with interest and imposed penalty. Demands were confirmed by the learned Commissioner and appeal filed by the appellants. This bench vide order No.A/1698-1701/13/CSTB/C-I dated 27/06/2013 has remanded the matter back to the learned Commissioner for fresh adjudication. Commissioner Central Excise had passed the impugned order No.52 to 58/Commr(RS)/LTU-M/CX/2016-2017 dated 15/09/2016.

3. Learned Counsel for the appellant submits that as per the agreement entered into the foreign collaborators have agreed to provide coating formulations of the final product; to provide technical and engineering data, calculations and information, design data, specifications, drawings and sketches, details of layout of the works, raw materials specifications and design in making of jigs, tools, dies, patterns and moulds. The foreign collaborators have physically delivered the aforesaid data, drawings and designs in the form of booklets. Chapter 49 of Section X of Schedule I to the Customs Tariff

Act, 1975 covers printed books, newspapers, pictures and other products of the printing industry; manuscripts; typescripts and plans under Chapter Heading 4906 of the Customs Tariff Act, 1975 specifically covers plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purpose, being originals drawn by hand; hand written texts, photographic reproductions on sensitized paper and carbon copies of the foregoing. General exemption Notification No.21/2002-Cus dated 01/03/2002 exempts all goods falling under Chapter 4906. The learned Counsel therefore, contended that the drawings, etc. received by them are "goods". No service tax can be demanded on supply of goods. Even though it is argued that foreign collaborators are providing intellectual property right services from outside India to the appellant, which ultimately gets subsumed in the drawings, manuals, etc. Therefore, the service tax cannot be demanded on them. There is no dispute or allegations by the department to the contrary that drawings, etc. have been supplied by the foreign collaborators in physical form. Hence, in result of the activity undertaken by the foreign collaborator is nothing but goods. The Hon'ble Supreme Court decision in the case of Associated Cement Companies Ltd. Vs. CC – 2001 (128) ELT 21 (SC) has held the same. The view was also affirmed by the Larger Bench of the Supreme Court in Tata Consultancy Services Vs. State of Andhra Pradesh – 2004 (178) ET 22 (SC).

3.1 Learned Counsel contended that Section 65 (55b) defines the term "intellectual property service". Section 65 (105) (zzr) defines the 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. The scope of the provisions have been amply clarified by CBEC vide Circular No.80/2004-ST dated 17/09/2004, wherein it was specifically held that the service provider must have a right to an intangible property, viz., trademarks, designs, patents or any other similar intangible property but excluding copyright and that the right over intangible property must be recognized under any Indian law for the time being in force. Intellectual property rights not recognized under Indian law are not taxable as IPR service. There is no evidence or even any allegation that the technical information supplied by their collaborators has been patented. It is not patented in India. There is no evidence on record to show that the same is patented outside India. Even if the same is patented outside India, it is not recognized by Indian law till the same is patented in India. Their contention is supported by the following decisions of the Tribunal:

- i) Rochem Separation Systems (India) Pvt. Ltd. – 2015 (39) STR 112*
- ii) Tata Consultancy Services Ltd. – 2016 (41) STR 121*
- iii) Tata Teleservices Ltd. – 2017 (47) STR 179*
- iv) Reliance Industries – 2016 (44) STR 82*
- v) Chambal Fertilizers & Chemicals Ltd. – 2016 (45) STR 118*

3.2 Learned Counsel further submitted that even assuming that the said technology is patented in India no service tax can be demanded on such transfer of right to use such intellectual property. Section 65 (55a) shows that the words used are “any right to intangible propertyunder any law for the time being in force”. Thus, it is submitted that it is not the intangible property, which should be recognized in India for levy of service tax on transfer of such right to use intellectual

property. As the agreement has been entered prior to 10/09/2004, the same cannot be charged as intellectual property right service which introduced only on 10/09/2004. They relied upon the decision in the case of CCE Vs. Schoot Glass India Pvt. Ltd. – 2009 (92) ELT 71 and CCE Vs. Reliance Industries – 2010 (19) STR 807 (Guj). He further submitted that the appellants are manufactures of final products and are paying Central Excise duty on the final products manufactured by them. If at all they pay service tax and the royalty, technical know-how, etc. provided by their foreign collaborators they would have been available as credit of service tax paid by them. This fact has been accepted by them. This fact has been accepted in the impugned order as the Commissioner has dropped the show-cause notice proposing to deny the said credit. Therefore, the case is revenue neutral. They also supported that the issuance of show-cause notice is badly time barred.

4. Learned AR for the department has reiterated the findings given in the Order-in-original.

5. Heard both sides and perused the records of the case.

5.1 On perusal of the records of the case, we find that no evidence has been adduced by the department to show that such trademarks, know-hw, etc. supplied by their foreign collaborators have been registered in India. Therefore, in view of the clarifications issued by CBEC vide circular cited above services received by the appellants

cannot be held to be intellectual property right service. It has been categorically clarified in para 9 of the circular as follows:

"9.1 Intellectual property emerges from application of intellect, which may 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 India 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-ST dated 10/09/2004)

In view of the above clarifications, we find that the appellants are not liable to pay service tax.

5.2 We also find that the Tribunal in the case of Rochem Separation Systems (India) P. Ltd. Vs. CST, Mumbai-I – 2015 (39) STR 112 (Tri-Mumbai) has held that;

5. The Id. counsel appearing on behalf of the appellant stated that the Intellectual Property Right Service is defined under Section 65(55b) as below :

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

(a) transferring, [temporarily; or

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

His contention is that the technology is defined under the Technology Transfer and License Agreement to mean technical knowledge, know-how, standard calculation data and information developed or generally used by Rochem AG Switzerland pertaining to the assembly, use and sale of the products manufactured by them. He argued that payment of royalty for transfer of technology (technical know-how) will not fall under the category of Intellectual Property Right Service as is apparent from the definition. He also stated that the Share Purchase Agreement never came into force and, therefore, it cannot be relied upon to say that royalty has been paid by the appellants to Rochem AG Switzerland for the use of the trademarks. In any case, according to him, the service in relation to Intellectual Property Right Service under Section 65(105)(zzr) can only be applied to Intellectual Property Right registered in India. The Ld. Counsel also contended that neither the show cause notice nor the impugned order set out the basis on which the services are sought to be classified under Intellectual Property Right Service and Revenue has mainly relied upon some clauses of the agreements.

5.3 We also find that the Tribunal decision in the case of Tata Consultancy Services Ltd. Vs. CST, Mumbai- 2016 (41) STR 121 (Tri-Mumbai) has held that:

4.2 We may further go on to add that the Intellectual Property Right should be a right under the Indian law. Intellectual Property Right not covered by the Indian laws would not be covered under taxable service in the category of Intellectual Property Right Services. We are fortified in our view by Board Circular F. No. 80/10/2004-S.T., dated 17-9-2004 which clarified that "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.

6. In view of the above, we find that the issue is no longer *res integra* being covered by various decisions. As the said IPRs supplied by the foreign collaborators of the appellant are not

registered in India, we are we are convinced that the technical know-how , etc. supplied by the foreign collaborators to the appellants do not fall under the category of "Intellectual Property Right" service thereby liable to pay service tax under Intellectual Property Right service in terms of Finance Act, 1994.

7. In view of the above, the appeal is allowed.

(Pronounced and dictated in court)

(S K Mohanty)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

PJ