

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 50482 OF 2017

(Arising out of Order-in-Original No. OIO-DLI-SVTAX-002-COM-039-16-17 dated 23/12/2016 passed by Commissioner of Service Tax-DELHI-II)

M/s Modi-Mundipharma Beauty Products Pvt. Ltd.
(Formerly Known as Modi Revlon Pvt. Ltd.) **Appellant**
(1400, Modi Tower, 98, Nehru Place,
New Delhi-110019)

VERSUS

Commissioner of Service Tax, Delhi-II **Respondent**
5th Floor, 14-15, Farm Bhawan, Nehru Place,
New Delhi-110019

APPEARANCE:

Shri A.K. Sood, Ms. Jyoti Yadav, Advocate for the Appellant
Shri Vivek Pandey, Authorized Representative of the Department

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50683/2020

DATE OF HEARING: 11 November, 2019
DATE OF DECISION: 08 June, 2020

JUSTICE DILIP GUPTA

This appeal has been filed by **M/s Modi Mundipharma Beauty Products Pvt. Ltd.**¹, formerly known as Modi Revlon Pvt. Ltd., to assail the order dated 23 December, 2016 passed by the Commissioner, Service Tax, Delhi-II² on the two show cause

1. the Appellant

2 the Commissioner

notices issued to the Appellant. In regard to the first show cause notice dated 26 December, 2012, the Commissioner has confirmed the demand of service tax amounting to Rs. 5,06,62,452/- for the period 2007-08 to March, 2012 under section 65(105)(zzr) of the Finance Act, 1994³. The remaining demand under "goods transport agency" service has been dropped. In regard to the second show cause notice dated 17 April 2014, the Commissioner has confirmed the demand amounting to Rs. 26,91,973/- under section 65 (105) (zzr) of the Finance Act for the period April, 2012 to June, 2012 but the demand under 'goods transport agency' service has been dropped.

2. The Appellant is engaged in manufacture of cosmetics and skin care products. It has its corporate office at New Delhi but its factory is situated at Ghaziabad. Two agreements, both dated 27 July, 1994, were entered into by the Appellant with **Revlon Mauritius Limited**⁴ at Mauritius and **Freya Holdings Limited**⁵ at British Virgin Island. Under the former agreement⁶, Revlon Mauritius granted to the Appellant the exclusive right to use the "know how" in any plant approved by Revlon Mauritius in accordance with the processes, specifications and recipes thereof in connection with the manufacture, marketing, sale and distribution of Revlon products in the territory. 'Know how' has been defined to mean formulae, processes, recipes, product specifications, technical and manufacturing data, information, equipment

3 the Finance Act
4 Revlon Mauritius
5 Freya Holdings
6 the First Agreement

specification of raw materials, and other technical information and data necessary to manufacture Revlon products. In consideration of the grant of license rights to the Appellant, the Appellant was required to pay to Revlon Mauritius, a royalty of 5 per cent of its net sales per annum. This Agreement, executed on 27 July, 1994 was initially up to August, 2002 but was extended from time to time and the last extension was to expire in March, 2012.

3. The latter agreement dated 27 July, 1994⁷ was executed between the Appellant and Freya Holdings under which Freya Holdings granted to the Appellant an exclusive license to use the Licensed Marks as trademarks and all other intangible rights and the exclusive right to import, make, have made and sell Revlon Products subject to the terms and conditions of the agreement. Freya Holdings granted a further right to the Appellant to use the name 'Revlon' in its corporate name. The agreement further provided that Freya Holdings shall not grant any rights to manufacture or sell cosmetics, toiletry, beauty treatment, fragrance or skin care product to any third party without first offering such a product to the Appellant.

4. A show cause notice dated 26 December, 2012 was, however, issued to the Appellant for the period 2007-08 to March 2012 mentioning therein that a letter dated 30 August, 2012 had been received from the office of the Deputy Commissioner at Ghaziabad to inform the Department that the Appellant was receiving 'inward freight' and 'intellectual property right' service

⁷ the Second Agreement

from a provider situated outside India but was not paying service tax on the gross value paid for receiving the said services. The Appellant was, therefore, asked to provide details of taxable/non-taxable receipts. On scrutiny of the documents provided by the Appellant, it transpired that the Appellant had made technical collaboration with foreign companies for which royalty was paid to the foreign collaborators. It was further stated that the Appellant had on the sales made by it, paid royalty to Revlon Mauritius for use of their trademark/name in India and made payment to Revlon Australia for use of their printing and stationery. The department, therefore, formed an opinion that the said activities related to 'intellectual property right' service, which were taxable under section 65(105) (zzr) of the Finance Act. The show cause notice also made reference to short payment of service tax on the GTA service rendered by the Appellant.

5. A second show cause notice dated 17 April, 2014 was also issued to the Appellant for the period April 2012 to June 2012 for payment of service tax under 'intellectual property right' service and for short payment of service tax under GTA service.

6. The Appellant filed a reply to both the show cause notices stating therein that the Appellant had not entered into any agreement with Revlon Mauritius for use of trademark license since the agreement with Revlon Mauritius was only for providing 'know how'. It was also pointed out that the agreement for use of trademark was with Freya Holdings, for which no consideration was paid by the Appellant. It was also stated that the Appellant had not

entered into any agreement with Revlon Australia or Revlon South Africa and did not also procure any services from them. It was specifically stated that 'know how' was not covered in the definition of 'intellectual property right' service. It was also pointed out that courier charges could not have been included in the GTA service and the Appellant had correctly discharged the service tax liability under GTA since the amount spent on freight was within the exemption limit.

7. The Commissioner did not accept the contentions advanced by the Appellant in regard to the service tax to be paid on 'intellectual property right' service but accepted the contention regarding GTA service. Accordingly, the demand made for payment of service tax under 'intellectual property right' service was confirmed but the demand made for GTA service was dropped.

8. This Appeal has, accordingly, been filed to assail the order dated 23 December, 2016 passed by the Commissioner to the extent it confirms the demand made under 'intellectual property right'.

9. Shri A.K. Sood, learned Counsel appearing for the Appellant submitted:-

- (i) The Commissioner completely misread the First Agreement dated 27 July, 1994 entered into between the Appellant and Revlon Mauritius and wrongly concluded that 'know how' received by the Appellant from Revlon Mauritius would fall within the taxable category of 'intellectual property right' service;

- (ii)** The dominant nature of the First Agreement entered into between the Appellant and Revlon Mauritius is only for transfer of 'know how' and 'know how' is not covered under the definition of 'intellectual property right' services. In support of this contention, learned Counsel placed reliance upon decisions to which reference shall be made at the appropriate stage;
- (iii)** Benefits from the service procured at the time when the First Agreement was executed in 1994 were not subjected to levy of service tax and when the said agreement was renewed in 2003, there was no change in the clauses of the agreement. The entire payment made and likely to be made in future under the First Agreement relates to services received much before the introduction of service tax on 'intellectual property right' with effect from 10 September, 2004;
- (iv)** The arrangement between the appellant and Revlon Australia is on cost sharing basis and there is complete absence of any service element between the Appellant and Revlon Australia;
- (v)** The order has confirmed the demand on a ground not mentioned in the show cause notice and, therefore, the order deserves to be set aside for this reason alone;
- (vi)** The demand for a substantial period that has been confirmed is barred by limitation; and
- (vii)** Penalty nor interest could have been imposed.

10. Shri Vivek Pandey, learned Authorized Representative of the Department has, however, supported the impugned order and submitted that:-

- (i)** The First Agreement dated 27 July, 1994 between the Appellant and Revlon Mauritius provides for payment of royalty as a consideration for the grant of license rights and as per clause 2 of the agreement, license grants covers not only 'know how' but also patent licenses, improvements and maximization of sales;
- (ii)** Clause 2.02 of the First Agreement stipulates that the Appellant has been granted the exclusive right to use the patents in the manufacture, distribution and sale of Revlon products in the territory. Thus, it is not correct for the Appellant to urge that the First Agreement is only for 'technical know how' as the consideration includes all the four elements, namely know how, patents, improvements and maximization of sales; and
- (iii)** As per clause 1.07 of the First Agreement, the meaning of 'know how' includes 'processes', which is covered by the term 'process' contained in section 2(l)(j) of The Patents Act, 1970. Hence, 'know how' is covered by the Patents Act and is, therefore, an 'intellectual property right' under the Finance Act.

11. The contentions advanced by the learned counsel for the Appellant and the learned Authorized Representative of the Department have been considered.

12. In order to appreciate the contentions, it would be useful to reproduce the relevant clauses of the First Agreement dated 27 August, 1994 entered into between the Appellant and Revlon Mauritius. They are as follows:

FIRST AGREEMENT

(Between the Appellant and Revlon Mauritius)

THIS AGREEMENT dated as of July 27,1994 between **REVLON MAURITIUS LIMITED**, a Mauritius corporation ("Licensor") and MODI-REVLON PRIVATE LIMITED, an Indian corporation ("Licensee")

WITNESSETH

WHEREAS, Licensor possesses technical Know How, information, data, processes, formulae, experience and skill required for the manufacture, distribution and sale of Revlon Products (hereafter defined); and

WHEREAS, Licensee desires to obtain from Licensor such technical Know How, information, data, processes, formulae, experience and skill;

Now, THEREFORE, in consideration of these premises and the terms and conditions hereinafter set forth, Licensor and Licensee hereby agree as follows:

1. DEFINITIONS.

For the purpose of this Agreement, the following expressions used herein shall have the meaning hereinafter assigned to them.

1.07 "**Know How**" shall mean formulae, processes, recipes, product specifications, technical and manufacturing data, information, equipment specification, specification of raw materials, and other technical information and data necessary to manufacture Revlon Products.

1.10 "**Patents**" shall mean all patents and such other industrial property rights relating to the manufacture of the Revlon Products which are owned by or licensed to or are licensed hereafter to Licensor with right to sublicense including without limitation those listed on Exhibit A hereto.

1.12 **"Revlon Products"** shall mean (i) all cosmetic, toiletry, beauty treatment, skin care and fragrance products and lines of such products now or hereafter sold by Licensor or its Affiliates in any country of the world under the brand names identified in Exhibit B ("Category I Products"); (ii) all cosmetic toiletry, beauty treatment, skin care or fragrance products hereafter acquired by Licensor or its Affiliates ("Acquired Products") or any cosmetic, toiletry, beauty treatment, skin care or fragrance products incorporating new technologies hereafter developed or owned by Licensor or its Affiliates or to which Licensor or its Affiliates hereafter obtain rights ("New Technology Products"), *****

1.13 **"Technical Services"** shall mean the technical services to be performed by Licensor under this Agreement, including training of personnel of the Licensee, and other related activities in accordance with the provision of this Agreement.

2 LICENSE GRANTS.

2.01 **Know How License.** Subject to the provisions of this Agreement from the Effective Date, Licensor hereby grants to Licensee the exclusive right to use the Know How, in any Plant approved by Licensor, in accordance with the processes, specifications and recipes thereof in connection with the manufacture, marketing, sale and distribution of Revlon products in the Territory.

2.02 **Patent License.** Subject to the provisions of this Agreement from the Effective Date, Licensor hereby grants to Licensee the exclusive right to use the Patents in the manufacture, distribution and sale of Revlon Products in the Territory.

2.03 **Improvements.** Licensor shall provide Licensee, free to cost, all modifications and improvements made by it to the Know How, and Licensee agrees that any right to register and obtain patents in any respect of such modifications and improvements vests exclusively in Licensor, and Licensee undertakes to sign and furnish all such waivers, acknowledgments and other writings as may be required in connection therewith. Any improvement relating to Revlon Products discovered by Licensee or by a Contract Manufacturer all belong to and be the property of Licensor. Any improvement or beneficial modification in process, design or otherwise related to the manufacture of Revlon Products, whether discovered by Licensee or otherwise, shall be considered part of the "Know How" licensed hereunder except that Licensor gives no representation, warranty or indemnity with respect to any such improvement or modification originating from Licensee or its Affiliates or a Contract Manufacturer.

2.04 **Maximize Sales.** Licensee accepts the grant set forth in Sections 2.01 and 2.02 and shall use its best efforts to exploit the rights granted herein including, without limitation, selling the maximum quantity of Revlon Products consistent with the terms of this Agreement.

6 PATENTS

6.01 **No Infringement.** Licensor declares that to the best of its knowledge no patents or other similar industrial property rights of

third parties in the Territory shall be infringed by the use of the Know How by Licensee pursuant to this Agreement.

6.02 Notices. Licensee shall notify Licensor in writing of any claims, demands, actions, suits and proceedings made on or against it for infringement of any patent or industrial property rights by reason of Licensee's use in the Territory of the Know How. Licensor shall have the sole right and responsibility for the defense thereof, and Licensee shall assist Licensor in such defense as Licensor may reasonably require.

7. CONSIDERATION AND TAXES.

7.01 Royalty. In consideration of the grant of license rights to it hereunder, Licensee shall pay to Licensor during the subsistence of this Agreement a royalty of 5% net of taxes, of its Net Sales per annum (the "Royalty").

13. The relevant clauses of the Second Agreement executed between the Appellant and Freya Holdings are as follows:

SECOND AGREEMENT

(Between the Appellant and Freya Holdings)

AGREEMENT, dated as of December 30, 1993 between "FREYA HOLDINGS LTD.," a British Virgin Islands corporation ("Licensor") and MODI-REVLON PRIVATE LIMITED, an Indian corporation ("Licensee").

WITNESSETH

WHEREAS, Licensor has obtained the right to license to Licensee the Licensed Marks (as defined below) for Revlon Products (as defined below); and

WHEREAS, Licensee desires to obtain a license to use the Licensed Marks in connection with the importation, manufacture, merchandising, marketing, promotion, advertising, sale and distribution of Revlon Products, and Licensor is willing to grant such license subject to all the terms of this Agreement;

NOW, THEREFORE, in consideration of these premises and the terms and conditions hereinafter set forth, Licensor and Licensee hereby agree as follows:

1. Definitions.

The following definitions shall be applicable throughout the Agreement:

1.03 "Licensed Marks" shall mean the trademark "Revlon," such other trademarks as are used on the Revlon Products as set forth in Exhibit A hereto, and any trademark hereafter registered in the Territory for use in connection with Revlon Products and with respect to which Licensor obtains the right to license Licensee hereunder.

1.06 **"Revlon Products"** shall mean the cosmetic, toiletry, beauty treatment, skin care and fragrance products and lines of such products now or hereafter sold in any country of the world under the brand names identified in Exhibit B utilized by Revlon Consumer Products Corporation, a Delaware corporation and its Affiliates (collectively, "RML") and all cosmetic, toiletry, beauty treatment, skin care and fragrance products and lines of such products with respect to which Licensor hereafter obtains the right to license Licensee in the Territory.

2. **License Grant.**

2.01 **Grant.** Licensor hereby grants to Licensee an exclusive license throughout the Territory during the Term to use the Licensed Marks as trademarks and all other intangible rights referred to in Section 8.06 in connection with the Business, and the exclusive right to import, make, have made and sell Revlon Products in the Territory subject to all the terms and conditions of this Agreement. Licensor further grants to Licensee the right, during the Term, and only so long as it is engaged in the Business, to use the name "Revlon" in its corporate name, "Modi-Revlon Private Limited," subject to the limitations on use set forth in this Agreement, including Section 8.02 and 8.08 hereof. Upon execution of this Agreement, Licensee shall deliver to Licensor or such party as may be designated by Licensor a duly executed irrevocable Power of Attorney of the Licensee in the form attached as Exhibit C ("Power of Attorney") and such other document as would enable Licensor or such designated party to take all such steps as may be required by law to enable it immediately to amend the corporate charter of Licensee to change its name in accordance with the provisions of Section 8.02 hereof. Licensor shall not grant any rights to manufacture or sell any cosmetic, toiletry, beauty treatment, fragrance or skin care product to which Licensor obtains rights to any third party with respect to the Territory without first offering such product to Licensee under this Agreement.

8 **Trademarks.**

8.01 **Limited Use.** (a) Licensee will use the Licensed Marks only in such form and manner as is specifically permitted hereby or otherwise approved for use by Licensor. Licensee shall use the Licensed Marks strictly in accordance with any and all applicable trademark and other laws and shall use such legends, markings or notices in connection therewith as are required by law or otherwise as may be reasonably required to protect rights thereto.***

8.03 **All Rights in RML.** Licensee acknowledges that the Licensed Marks (including the name "Revlon") have acquired valuable goodwill with the public and that any products bearing the Licensed Marks have acquired a reputation of high quality, prestige and style. Licensee acknowledges that Revlon Manufacturing, Ltd ("RML") is the owner of all right, title and interest in and to the Licensed Marks, and of the goodwill attached to the Licensed Marks including that which arises from the sale of Revlon Products hereunder. All use by Licensee of the Licensed Marks shall be deemed to have been made by and for the benefit of RML, and all uses of the Licensed Marks by Licensee, or by any permitted sublicensee or assignee, and any goodwill arising therefrom, shall inure to the sole and exclusive benefit of RMI.

8.04 **Warranty.** It has been represented and warranted to Licensor and Licensor derivately represents and warrants to Licensee that, to its knowledge and except as described in Exhibit E. (i) RML, in the Territory, has good title to the Licensed Marks free and clear of encumbrances of any nature or kind whatsoever, defects of title or rights of others; (ii) there are no material claims, or any material basis for such a claim, of any other person pertaining to the Licensed Marks, and no proceedings have been instituted or challenged which threaten the rights of RML in respect of the Licensed Marks; (iii) none of the Licensed Marks is being infringed by others; (iv) none of the Licensed Marks is dependent upon a foreign registration which has not been made or is subject to any outstanding or threatened order, decree, judgment or stipulation; (v) the Licensed Marks are in full force and effect and have been duly registered, filed or issued in the name of the RML by the relevant India trademark registry, and have been where required, properly renewed, and all fees and taxes with respect thereto have been paid in accordance with all applicable provisions of law and administrative regulations; (vi) no proceedings charging RML with infringement of any adversely held trade name, trade mark, service mark or service name is pending or threatened to be filed; (vii) use of the Licensed Marks does not infringe the rights of third parties; and (viii) no consent of third parties is necessary for Licensee to use the Licensed marks or, if any such consent is necessary, such consent has been obtained by RML.

14. It clearly transpires from the **First Agreement** executed between Revlon Mauritius and the Appellant that Revlon Mauritius possessed **technical know how**, information, data, processes, formulae, experience and skill required for the manufacture, distribution and sale of Revlon Products and the Appellant desired to obtain the aforesaid. The Agreement sets out the terms and conditions. The **know how** has been described in clause 1.07 of the Agreement to mean formulae, processes, recipes, product specifications, technical and manufacturing data, information, equipment specification, specification of raw materials, and other technical information and data necessary for manufacture of Revlon Products. **Revlon Products** have been defined in Clause 1.12 of the Agreement. Clause 2 deals with **License Grants**. Under clause 2.01, Revlon Mauritius granted to the Appellant the

exclusive right to use 'know how' in any plant approved by Mauritius Revlon in connection with the manufacture, marketing, sale and distribution of Revlon Products in the Territory. Clause 7 deals with **Consideration**. Clause 7.01 provides that in consideration of the grant of license rights by Revlon Mauritius, the Appellant shall pay to Revlon Mauritius a royalty of 5 per cent of its net sales per annum.

15. It is the **Second Agreement** entered into between Freya Holdings and the Appellant that grants the Appellant an exclusive license throughout the Territory to use the Licensed Marks as trademarks and all other intangible rights referred to in clause 8.06 in connection with the business, and the exclusive right to import, make, have made and sell Revlon Products in the Territory. '**Licensed Marks**' have been defined in clause 1.03 to mean the trademark 'Revlon' and such or other trademarks as are used on the Revlon Products.

16. It is in the light of the aforesaid provisions of the two Agreements that the contents of the first show cause notice dated 26 December, 2012 have to be examined. This show cause notice mentions that a letter dated 30 August, 2012 was sent by the office of the Deputy Commissioner at Ghaziabad (RUD-I) to the Appellant to the Delhi office to inform that the Appellant was receiving 'inward freight' and 'intellectual property right' service from a service provider situated outside India but was not paying service tax on the gross value paid for receiving the said service. The show cause notice then refers to a letter dated 19 September,

2012 (RUD-II) sent by the Range Office at Delhi to the Appellant to provide a copy of ST-2 certificate, copy of ST-3 returns for the period 2007-08 to 2011-12 and other documents. It further mentions that these documents were submitted by the Appellant on 28 September, 2012 (RUD-IV).

17. Paragraph 4 of the show cause notice proceeds to state that on scrutiny of the financial reports/details submitted by the Appellant on 26 September, 2012 (should be 28 September, 2012) and those received from the office of the Deputy Commissioner at Ghaziabad as well, it transpired that the Appellant had made foreign technical collaborations with various foreign companies for which royalty was paid to foreign collaborators. The foreign collaborators provided technical advice, drawings, designs etc. The Appellant had paid royalty to Revlon Mauritius for use of their trademarks/ name in India and also paid certain amount to Revlon Australia for use of their printing and stationery. The said activities related to 'intellectual property right' service which was taxable under section 65(105)(zzr) of the Finance Act.

18. It then states;

"Whereas M/s Modi Revlon Pvt. Ltd. have made foreign technical collaboration to various foreign companies for which royalty was paid to foreign collaborators. **The foreign collaborators provide technical advice, drawings, designs etc. M/s Modi Revlon Pvt. Ltd. has paid royalty on sale to M/s Revlon Mauritius Limited for use of their trade mark/name in India and paid to Revlon Australia Pvt. Ltd. for use of their printing & Stationer.** The said party also paid for design development of M/s Revlon South Africa Pvt. Ltd. for the year 2007-08 to 2011-12. **The said activities were related to intellectual property service and were taxable under section 65(105)(zzr) of the Finance Act, 1994** read with section 66A of the Finance Act, 1994 but they did not pay service tax on said service as service recipient. "

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Whereas it appears that the assessee failed to pay Service Tax including Education Cess and Secondary & Higher Secondary Education Cess amounting to Rs. 5,06,64,186/- on the taxable services under category of intellectual Property Right Services with value amounting to Rs. 46,07,84.847/- and short paid Service Tax including Education Cess and Secondary & Higher Secondary Education Cess amounting to Rs. 6,91,204/- on the taxable services under category of Goods Transport operator service with value amounting to Rs. 4,15,79,523/- during the financial year 2007-08 to 2011-12 as per details given above. The same, totaling to Rs. 5,13,55,390/- (Rs. 5,06,64,186/- + Rs. 6,91,204/-) is recoverable from the party under section 73 of the Finance Act, 1994.

(emphasis supplied)

19. The contention of the learned Counsel for the Appellant is that the Appellant had not paid any royalty to Revlon Mauritius for the use of trademark /name and in fact the Appellant had paid royalty to Revlon Mauritius for the license rights granted to it under clause 2.01 of the First Agreement executed between Revlon Mauritius and the Appellant for use of 'know how' in connection with manufacture, marketing, sale and distribution of Revlon Products. The submission is that the exclusive license to use the Licensed Marks as trademarks was granted to the Appellant under the Second Agreement executed between Freya Holdings and the Appellant. The show cause notice, therefore, has failed to distinguish between 'License Grants' under clause 2.01 of the First Agreement executed between Revlon Mauritius and the Appellant and the right to use Licensed Marks as trademarks under the Second Agreement.

20. To appreciate the aforesaid contention advanced by the learned Counsel for the Appellant, it would be necessary to analyse

the specific allegations made against the Appellant in the first show cause notice.

21. A perusal of the first show cause notice clearly shows that it makes no reference to the Agreement executed between Revlon Mauritius and the Appellant, or the Agreement executed between Freya Holdings and the Appellant, though it does make reference to payment of royalty to Revlon Mauritius for the use of the trademark/ name in India. It is, therefore, clear that the two Agreements have been mixed up. The First Agreement between Revlon Mauritius and the Appellant, as noticed above, conferred upon the Appellant the exclusive right to use 'know how' in any plant approved by Revlon Mauritius in connection with the manufacture, marketing, sale and distribution of Revlon products. Royalty under the First Agreement, it needs to be noted, was not paid for use of trademark/name of Revlon Mauritius in India, but the show cause notice mentions that royalty was paid to Revlon Mauritius for use of trademark/name. It is under the Second Agreement executed between Freya Holdings and the Appellant that the Freya Holdings had granted the exclusive license to the Appellant to use the trademarks and all other intangible rights. However, it does not provide for payment of any consideration for this purpose. It also needs to be noted that the term 'trademark' has not been used in Clause 2 of the First Agreement and the term 'know how' has not been used in Clause 2 of the Second Agreement. The first show cause notice, therefore, proceeds on an absolutely wrong footing.

22. A show cause notice is the foundation on the basis of which any demand can be confirmed and it is trite to state that no demand can be confirmed on the basis of an allegation not made in the show cause notice.

23. In this connection it would be pertinent to refer to the decisions of the Supreme Court in **Collector of Central Excise v/s H.M.M. Limited⁸**, **Kaur & Singh v/s Collector of Central Excise, New Delhi⁹** and **Amrit Foods v/s Commissioner of Central Excise, U.P.¹⁰** The Supreme Court repeatedly held that the party to whom a show cause notice is issued must be made aware of the allegations made against it since this is a requirement of the principles of natural justice. The reason being that unless the party is put to such notice, it would have no opportunity to meet the case made out against it.

24. The said proposition was reiterated by the Supreme Court in **Commissioner of Customs, Mumbai v/s Toyo Engineering India Limited¹¹**. The Supreme Court held that the Department cannot travel beyond the show cause notice.

25. In **Precision Rubber Industries (P) Ltd. v/s Commissioner of Central Excise, Mumbai.¹²** The Supreme Court again, after relying upon its two earlier decisions, held that a show cause notice is the foundation in the matter of levy and the relevant portion of the judgment is reproduced below:-

8. 1995 (76) ELT 497 (S.C.)

9. 1997 (64) ELT 289 (S.C.)

10. 2005 (190) ELT 433 (S.C.)

11. 2006 (201) E.L.T. 513 (S.C.)

12. 2016 (334) E.L.T. 577 (S.C.)

"10. Our attention has also been drawn to **Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd. 2007 (215) E.L.T. 489 (S.C.)**] wherein this Court held in Para 21 that it is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. This view was reiterated in **Commissioner of Central Excise v. Gas Authority of India Ltd. 2008 (232) ELT. 7 (S.C.)**] in Para 7 of the order.

11. In so far as the present appeal is concerned, it is the case of the Revenue in the show cause notices that the goods are classifiable under Chapter Heading 4016.99. Therefore, no new case could have been set up or decided contrary to the show cause notices that the goods fall under Chapter Heading 8448.00 without issuing a fresh show cause notice to the assessee in this regard. "

26. Thus, the entire demand made under the impugned order cannot be sustained for this reason alone.

27. It has also been submitted by learned Counsel for the Appellant that both the Agreements were available with the Authority issuing the show cause notice, but the Authority deliberately in order to fasten tax liability upon the Appellant did not make a mention of the Agreements in the show cause notice.

28. A perusal of the first show cause notice indicates that it was the letter dated 30 August, 2012 that was sent by the Deputy Commissioner of Central Excise at Ghaziabad to the Commissioner at Delhi that led to the issuance of the show cause notice. This letter dated 30 August, 2012, though mentioned as (RUD-1) is not on the record of the Appeal and it has been stated by learned Counsel for the Appellant that it was not provided to the Appellant with the show cause notice. It is for this reason that when the Appeal was heard on 20 September, 2019, learned Authorized Representative of the Department sought time to place the entire records available with the Department that led to the issuance of the show cause notice, including the letter dated 30 August, 2012.

On 15 October, 2012, learned Authorized Representative of the Department sought further time to trace out the files and place the letter. Learned Counsel for the Appellant, however, placed the letter submitted by the Appellant to the Deputy Commissioner at Ghaziabad demanding a copy of the letter dated 30 August, 2012 and stated that despite the request, a copy of this letter was not provided. Time was, accordingly, granted to the Authorized Representative of the Department up to 23 October, 2019 to place all the records and it was also made clear that no further time shall be granted and that if the records were not produced, an inference will be drawn from the facts already available on the records. On 23 October, 2019 one week further time was sought by the Department and the matter was adjourned to 30 October, 2019.

29. Learned Authorized Representative of the Department only placed certain letters sent by his office for making available the files and has stated that the Department, in response, has expressed its inability to place the files or the letter dated 30 August, 2012 as the Department has not been able to trace them.

30. It is not understood as to why the Department should not maintain all the files relating to this Adjudication. The Tribunal would, therefore, be justified in drawing an inference from the facts as available on record.

31. Shri A.K. Sood, learned Counsel appearing for the Appellant made a categorical statement that both the Agreements had been made available to the Department. In this connection learned Counsel placed the communication dated 27 June, 2011

sent by the Department to the Appellant seeking certain information, including a copy of the Agreement between the Appellant and Revlon Mauritius as also between the Appellant and Revlon Australia. The Appellant sent a reply dated 13 July, 2012 enclosing a copy of the Agreement executed between Revlon Mauritius and the Appellant and also stated that no Agreement had been executed with Revlon Australia. It is, therefore, clear that the letter dated 30 August, 2012 sent by the Deputy Commissioner at Ghaziabad contained the Agreement dated 27 July, 1994 executed between Revlon Mauritius and the Appellant and that is why the Superintendent at Delhi, in the communication dated 19 September, 2012, did not require the Appellant to submit any of the Agreements, though many documents were required to be submitted by the Appellant. The show cause also uses term 'trademark' which is mentioned in the Second Agreement.

32. Thus, the irresistible conclusion that can be drawn from the aforesaid discussion is that the First Agreement and the Second Agreement were available with the Authority issuing the show cause notice, but for reasons best known to the Authority, they have not been referred to in the show cause notice.

33. Learned Authorized Representative of the Department has, however, made an attempt to justify the demand by referring to certain clauses of the First Agreement and has pointed out that the license grants under clause 2 of the First Agreement is in connection with not only 'know how' license, but 'patent license',

'improvements' and 'maximize sales' as contained in clause 2.01, 2.02, 2.03 and 2.04 of the Agreement.

34. It is not possible to accept this contention of learned Authorized Representative of the Department. In the first instance, the show cause notice does not make reference to either the 'patent license', 'improvements' or 'maximize sales' as referred to clauses 2.02, 2.03 and 2.04 of the First Agreement nor does the impugned order proceed on this basis. This apart, trademark is not mentioned in Clause 2.0 of the First Agreement. The impugned order and the submissions have to be examined only in the light of the allegations contained in the show cause notice and not beyond it.

35. A perusal of the first show cause notice indicates that the demand made has been made under 'intellectual property rights' service from 2007 up to March, 2012, while a perusal of the second show cause notice indicates that the demand has been under 'intellectual property rights' from April, 2012 to June, 2012. Thus, the entire period for which the demand has been made under 'intellectual property rights' in the two show cause notices is prior to the introduction of the negative list with effect from 1 July, 2012.

36. Section 65 (55a) of the Finance Act that was inserted with effect from 16 May, 2008, defines 'intellectual property right' 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;

37. 'Intellectual property service' has been defined under section 55(b) of the Finance Act as follows:-

65 (55b) "intellectual property service" means,-

- (a) Transferring, temporarily; or
- (b) Permitting the use or enjoyment of, any intellectual property right;

38. The taxable service under section 65(105)(zzr) of the Finance Act is as follows:-

65(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.

39. It would, therefore, be seen that '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, but does not include copyright. The First Agreement executed between the Revlon Mauritius and the Appellant is for grant of exclusive right to use 'know how', which has been defined to mean formulae processes , recipes, products specifications, technical and manufacturing data, information, equipment specifications of raw materials, and other technical information and data necessary to manufacture Revlon Products. 'Know how', is not specifically mentioned in the definition of "intellectual property right". The issue that has to be examined is whether 'know how' would be included in any other similar intangible property under any law for the time being in force. Such an intangible property has to be similar to 'trade marks', 'design' or 'patents' for it to be covered under "any other similar intangible property under any law for the time being in force".

40. It is the submission of the learned counsel for the Appellant that the phrase 'law for the time being in force' would mean such laws as are applicable in India and in this connection reliance has been placed upon the Service Tax Circular / Trade Notice dated 17 September, 2004. This Circular provides as follows:-

"9.1 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.

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)."

41. It is seen from a perusal of the order dated 23 December, 2016 passed by the Commissioner that this aspect has been considered at length by the Commissioner. The Commissioner has examined the meaning of the word 'know how' and has observed that the expression 'any other similar tangible property' used in the definition of 'intellectual property right' will include '**technical Know How**', inventions, innovation, secret formulae where the right is granted under the Indian law which is in force and in this connection reliance has also been placed on the Circular dated 17

September, 2004. The Commissioner has observed that the Circular dated 17 September, 2004 clarifies that intellectual property emerges from application of intellect, which may be in the form of invention, design, product, process, technology, book and goodwill and, therefore, '**technical Know How**' would be an intellectual property under 'intellectual property service'. The relevant paragraph of the impugned order is reproduced below:-

"28.6 Similarly, the expression "any other similar intangible property' used in the said definition of intellectual property right under section 65(55a) will include technical know-how, inventions, innovations, secret formula etc where the right is granted under Indian law which is in force. The CBEC in the said circular dated 17.09.2004 also clarified that the Intellectual property emerges from application of intellect, which may be in the form of an invention, design , product, process, technology, book, goodwill etc. Therefore, technical Know How is an intellectual property under the Intellectual Property Service. It is a well established canon that to manufacturer any product, whether it be a 'pin' or an 'air-craft', requires utmost precision and dexterity by the specialized personnel in their respect fields. Any product cannot come to the stage of processing and manufacturing unless it is conceptualized and designed etc. Further, before being manufactured and marketing of the product, the intellectual property holder may seek in India the protection under various extant laws such as Design Act, 2000; Patent Act, 1970 and Trade & Merchandise Act, 1958 etc."

42. Thereafter, the Commissioner examined the First Agreement between Revlon Mauritius and the Appellant and concluded that '**technical Know How**' received for production of Revlon Products has the protection and is registered under the Indian law that is The Patents Act, 1970 for the reason that the Appellant had applied under the Patents Act, 1970 for patenting the process for forming a fatty acid diester, cosmetic composition, containers and bottles. It is for this reason that the Commissioner concluded that the 'know how' received would squarely fall within the four corners of the taxable category 'intellectual property service'. Paragraph 28.07 of

the order of the Commissioner dealing with this aspect is reproduced below:-

"28.7 On carefully sifting through the said agreement including the supplementary agreement, I find that Revlon Mauritius Ltd, the overseas licensor, has granted the Noticee the license of exclusive right to use their knowhow in accordance with the processes, specifications and recipes in connection with the manufacture, marketing, sale and distribution of Revlon Products in the territory of India, Nepal and Bhutan. The knowhow has to be used by the Noticee either in any of their plants or in the plant of contract manufacturer(s) duly approved by the licensor for production of revlon products. Besides, the licensor has also granted the Noticee the license of exclusive right to use the Patents in manufacture, distribution and sale of Revlon Products in the said territories. The licensor is bound to provide the technical services including training to the personnel of the Noticee. The Revlon products to be manufactured by the Noticee shall invariably have the brand name of the overseas company as per Exhibit-B. I further observe from EXHIBIT-A to the aforesaid agreement dated 27.02.1994 that the Noticee has applied under The Patents Act, 1970 for patenting the process for forming a fatty acid diester, cosmetic composition, containers and bottles. Therefore, technical knowhow received for production of Revlon products has protection and is registered under the Indian law i.e. The Patents Act, 1970. Not only this, I also observe that the Noticee has been using the brand name of the overseas company on the Revlon products vide EXHIBIT-B which has protection in India under Trade & Merchandise Act, 1958 or Design Act, 2000. Undoubtedly the overseas company has not only transferred intellectual property rights temporarily to intangible properties viz technical knowhow, brand/trade mark etc to the Noticee but also permitted them to use or enjoy such intellectual property rights as to enable them not only to manufacture the relevant Revlon products but also market, sale and distribution such products in the designated territories. Such activities clearly fall under the taxable category of Intellectual Property Services. Thus, I am of the considered view that the knowhow received squarely falls within the four corners of the taxable category of Intellectual Property Service. In this context, I find that in the case of **M/s Switzer Instruments Ltd. Vs. CST Chennai, (2009 (9) TMI 98 – CESTAT, CHENNAI) = 2010 – TIOL-68-CESTAT – MAD**, the Hon'ble CESTAT has held that payment of Royalty is liable to be taxed under Intellectual Property Services only from 10-09-2004. Therefore, the contention of the Noticee that Section 65(a) of the Act does not include the knowhow and there is no law for the time being in force in India governing Knowhow having no force stands rejected."

43. All that was required to be examined by the Commissioner was whether 'know how' is any right to intangible property under any law for the time being in force in India for it to fall within the definition of 'intellectual property right' and, accordingly, be

taxable. The show cause notice, as discussed above, does not make any reference to 'patent' and only makes reference to 'trade marks'. The Commissioner was, therefore, not required to examine the matter in the light of 'patent' or The Patent Act, 1970.

44. The contention of learned Counsel for the Appellant is that there is no law in India for the time being in force which protects 'know how' as an intangible property right and, therefore, the grant of exclusive right to use the 'know how' would not include such a right in the definition of 'intellectual property right'.

45. Learned Authorized Representative of the Department does not dispute this position but what he contends is that since the items mentioned in the definition of 'know how' are covered by the term 'process' contained in section 2 (l) (j) of the Patents Act 1970, '**technical Know How**' would be covered by the Patents Act, 1970 and, therefore, would be 'intellectual property right'.

46. It is not possible to accept this contention advanced by learned Authorized Representative of the Department. There should be an independent law for the time being in force in India that protects 'know how', if 'know how' is to be included in the residuary clause 'or any other similar intangible property' in the definition of 'intellectual property right'.

47. This issue was also examined at length by a Bench of the Tribunal at Bangalore in **ABB Ltd. Versus Commissioner of C.EX & S.T., LTU, Bangalore**¹³ and it was observed that since 'know

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how' is not recognized as 'intellectual property right' under Indian law, no 'intellectual property right' service can be said to be provided. The relevant portion of the order is reproduced below:-

7.1 After considering the submissions of both the parties and perusal of the material on record, we find that the appellants have paid the royalty/license fee to M/s. ABB Technology Ltd., Zurich, Switzerland towards the receipt of technical know-how and as per the licence agreement, the foreign companies are making available to appellant knowledge by means of data, experience, for the purpose of manufacture, sale and use of the contract product and providing of know-how is not a service which is taxable under the category of Intellectual Property Right Service. Further in order to find whether the service rendered by the foreign companies to the appellant falling under the definition of Intellectual Property Right service, we would like to refer to the definition of Intellectual Property Right and the corresponding taxable service concerning Intellectual Property viz. Intellectual Property service as defined in the Finance Act, 1994.

7.2 If we examine the definition of Intellectual Property service as given in Section 65(55a) & (55b) and also see the circular issued by the Board, then we will find that for a service to be a taxable service under the Intellectual Property Service following conditions need to be fulfilled:-

- Such service provider must have a right to any intangible property namely trademarks, designs, patents or any other similar intangible property, excluding copyright.
- Such right over intangible property must be recognized under any India law for the time being in force.
- Intellectual property rights which are not covered by India law like integrated circuits or undisclosed information would therefore not be covered under the taxable services.
- Service provider must do one of the following:
 - (a) Transfer of intangible property to another person.
 - (b) Permit the use or enjoyment of the intellectual right.

7.3 Further we find that know-how is not recognized as Intellectual Property law by any Indian Law for the time being in force. In fact know-how is the undisclosed information cited by the Department clarification dated 10-9-2004 as example of intellectual property right not covered by any Indian law. The transaction in the present case was for know-how which is in the nature of property, no service was provided by the foreign companies. This issue has been considered by the Tribunal in the appellant's own case which is reported in 2017 (49) S.T.R. 209 and it was held by the Division Bench that the right to know-how does not fall in the definition or intellectual Property Right as given in Section 65(55a) of the Finance Act and Service Tax is not leviable on the same under the Finance Act. Further we find that the Division Bench in another case of the appellant vide Final Order No. 20183/2016, dated 2-2-2016 allowed the appeal of the appellant for the period

prior to 18-4-2006 by relying on the decision in the case of Indian National Ship Owners Association cited supra and remanded the matter to the adjudicating authority for passing an order with respect to the demand for the period after 18-4-2006 on the issue of taxability of technical know-how under Intellectual Property Rights service and the Commissioner of Central Tax, Bangalore vide de novo Order-in-Original No. 3/2017-18, dated 29-12-2017, dropped the demand on the technical know-how services even for the period after 18-4-2000 as the same does not fall under the service viz. Intellectual Property Right service. Further we find that in various decisions relied upon by the appellant cited supra, this issue is no more res integra and has been settled by various decisions of the Tribunal that there cannot be any Service Tax on technical know-how.

(emphasis supplied)

48. The demand, in the aforesaid decision, was confirmed under 'intellectual property right' service as the Appellant had paid royalty/ license fee to **ABB Ltd.** towards the receipt of '**technical Know How**', which was quantified as a percentage of the net sales turnover of the goods. The Tribunal examined the definition of 'intellectual property right', 'intellectual property service' and the taxable service as also the Circular dated 10 September, 2004 issued by the Department and concluded that 'know how' is not recognized as 'intellectual property right' by any Indian law for the time being in force. In this connection reliance was also placed upon the earlier decisions of the Tribunal. The decision of the Tribunal in **ABB Ltd.** was subsequently followed by the Tribunal in **M/s LM Wind Power Blades India Pvt. Ltd. v/s Commissioner of Service Tax**¹⁴.

49. A similar view was taken by the Mumbai Bench of the Tribunal in **Tata Teleservices Ltd. V/s Commissioner of**

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Service Tax., Mumbai-I¹⁵. The relevant paragraphs are reproduced below:-

"4.1 Short question to be decided is whether the transfer of technical 'Know How' received by the Appellant is a service which may be categorized under "Intellectual Property Right Services". We find that the definition of Intellectual Property Right must be satisfied to term the services received by the appellant as Intellectual Property Right Services. We find no clue at all in the records as to which type of Intellectual Property Right is being assigned to the "Technical Know-How" received by the Appellant. It is obvious from the definition of Intellectual Property Right that the right has to be a specific Right under a specific Law. Examples are given under the definition such as the Trade Mark which is a right provided under "Trade Marks Act". Similarly the right mentioned as 'design' in the definition is a right under the "Designs Act". **Therefore we find that the technical Know-How received by the appellant and the royalty payment made by the appellant to Unisys is nowhere established to result from the use of any Intellectual Property Right.**

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-ST., dated 17.09.2004 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, copyright, 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."

[emphasis supplied]

50. It is, therefore, more than apparent that the grant of exclusive right to the Appellant by Mauritius Revlon to use the 'know how' in any plant in accordance with the processes, specifications and recipes thereof in connection with the manufacture, marketing, sale and distribution of Revlon Products

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would not fall in the definition of 'intellectual property right' so as to make it taxable under section 65(105) (zr) of the Finance Act.

51. The order dated 23 December, 2016 passed by the Commissioner, therefore, cannot be sustained. It is, accordingly, set aside and the Appeal is allowed.

(Pronounced in the open Court on 8 June, 2020)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(C.L. MAHAR)
MEMBER (TECHNICAL)**

Rekha