CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 3895 Of 2012

[Arising out of OIO No. 14-15/Commr./PKL/2012-13 dated 31.08.2012 passed by the Commissioner of Central Excise, Panchkula]

Schneider Electric India Pvt. Ltd. **: Assessee (s)**
9th Floor, DLF Building No. 10, Tower C,
Dlf Cyber city, Phase-ii, Gurgaon, Haryana, 122002

Vs

Commissioner of Service Tax, Delhi **: Revenue (s)**
Room No. 109, Central Revenue Building
IP Estate, New Delhi-110002

With

Service Tax Appeal No. 55525 Of 2013

[Arising out of OIO No. 14-15/Commr./PKL/2012-13 dated 31.08.2012 passed by the Commissioner of Central Excise, Panchkula]

Commissioner of Service Tax, Delhi **: Revenue (s)**
Room No. 109, Central Revenue Building
IP Estate, New Delhi-110002

Vs

Schneider Electric India Pvt. Ltd. **: Assessee (s)**
9th Floor, DLF Building No. 10, Tower C,
Dlf Cyber city, Phase-ii, Gurgaon, Haryana, 122002

APPEARANCE:
Ms. Priyanka Rathi, Ashwani Chandrasekharn and Sh. Vikrant Kackria, Advocates for the Assessee
Shri Rajeev Gupta, Ms. Swati Chopra, Authorised Representatives for the Revenue

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

ORDER No. A/60170-60171/2023

Date of Hearing:03.03.2023

Date of Decision:28.06.2023
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Per : S. S. GARG

These two appeals, one filed by the Assessee in Appeal No. ST/3895/2012 and another Appeal No. ST/55525/2013 filed by the Revenue are arising from the impugned order-in-original No. 14-15/Commr./PKL/2012-13 dated 31.08.2012 passed by the Commissioner of Central Excise, Panchkula whereby the Ld. Commissioner adjudicated two show cause notices having identical issues but for different periods. Vide the impugned order, the Ld. Commissioner has granted cum-tax benefit to the appellant-assessee and has also set-aside the demand prior to 18.04.2006 but has confirmed the total demand of Rs. 5,33,80,931/- for both the periods which are shown as under:-

SCN	Period	Demand proposed in SCN	Demand confirmed in Order
SCN dated 13.07.2010	2005-06 to 2009-10	3,12,68,932	2,53,99,399
SCN dated 13.04.2012	2010-11 to Sep'11	3,08,63,630	2,79,81,532

Since, both the appeals are arising from the same impugned order-in-original dated 31.08.2012, hence, both the appeals are taken up together for the purpose of discussion and decision.

2. Briefly the facts of the case are that the appellant-assessee M/s Schneider Electric India Pvt. Ltd. is engaged in the manufacture of electrical articles, namely, air circuit breaker, molded case circuit breaker, auto source changeover and integrated machinery process and factory control system and they are also registered with the service tax department. On the basis of the audit conducted by the officers of the Directorate General of Audit, two show cause notices were issued for non-payment of service tax under Section 66A of the

Finance Act, 1994 on royalty amount paid to France based company (service provider) for transfer of technical know-how falling under Intellectual Property Rights Service. Show cause notice dated 13.07.2010 was issued invoking extended period of limitation for demand of service tax including cess for Rs. 3,12,68,932/- , Show Cause Notice dated 13.04.2012 for Rs. 3,08,63,630/- and provisions of interest & penalty also invoked. The appellant-assessee filed detailed reply to the show cause notices and also cited various decisions in support of their submissions.

3. After following due process, the Ld. Commissioner of Central Excise confirmed total demand of Rs. 5,33,80,931/- for both the periods as shown in the table above, but granted cum-tax benefit to the appellant-assessee for which the department has filed Appeal No. ST/55525/2013.

4. Heard both the parties and carefully perused the case records.

5. Ld. Counsel for the assessee submitted that the impugned order is not sustainable in law as the same has been passed without properly considering the facts and the law and the binding judicial precedents on identical issues. She further submitted that the impugned order is not sustainable in as much as the law to this regard is now well settled that the acquisition of know-how is not liable to service tax under Intellectual Property Rights (IPR) Service. She further referred to the definition of Intellectual Property Rights as provided under Section 65 (55a) and submitted that there is no law governing know-how in India, because the know-how is not an IPR within the meaning of service tax law and its transfer is not liable to service tax.

6. The Ld. Counsel also referred to the Circular No. 80/10/2004-ST dated 17.09.2004, which explained the scope of taxable entry with regard to the transfer of technology and levy of service tax on it. Ld. Counsel further submitted that this issue has been considered by various benches of Tribunal and has consistently held in favour of the assessee. She further submitted that this issue is no more *res-integra* and has been settled in favour of the assessee in the following decisions:-

i. ***Lurgi India International Services Pvt. Ltd. v. Commissioner)*** **2020 (34) G.S.T.L. 507** ***(Tri. - Hyd.)***
ii. ***Munjal Showa Ltd. v. CCE 2017 (5) G.S.T.L. 145 (Tri. - Chan.)***
iii. ***SICPA India v CST 2018 (15) G.S.T.L. 375 (Tri. - Kolkata)***
iv. ***Technova Imaging System Pvt. Ltd. v. CCE 2018 VIL 1090 CESTAT Mum ST***
v. ***Reliance Industries Ltd. v. CCE 2016-VIL-444 (CESTAT)***
vi. ***Asea Brown Bovery Ltd. v. CCE*** **2016-VIL-480 (CESTAT)**
vii. ***Chambal Fertilizers & Chemicals Ltd. v. CCE*** **2016-VIL-527 (CESTAT)**
viii. ***Tata Consultancy Services Ltd. v. CST*** **2016 (41) STR 121 (Tribunal)**
ix. ***Indian Farmers Fertilizer Co-op Ltd. v. CCE*** **2007 (5) STR 281 (Tribunal)**

7. Ld. Counsel further submitted that the abatement / deduction is available under Notification No. 17/2004-ST dated 10.09.2004 which grants exemption from payment of service tax to the extent Research and Development ('R&D') cess is paid. She has also referred to the details of R&D Cess payment which are on page 55 of the appeal memorandum and the Challans evidencing payment of such R&D Cess which are shown at pages 200-208 of the appeal memorandum.

8. She further submitted that in the impugned order it has been held that deduction under Notification No. 17/2004-ST dated 10.09.2004 is available only to service tax paid under Section 66 and

not as reverse charge under Section 66A. She further submitted that this finding is contrary to the decision of the Tribunal in the case of **M/s Rochem Separation Systems (India) P. Ltd. v. CST 2015 (39) STR 112 (T)** wherein it has been *inter alia* observed as under:-

> *"10. The Commissioner has rejected the benefit of Notification No. 17/2004 for the reason that the notification applies only to Section 66 and not to Section 66A in which the appellant is required to pay service tax on the import of services or reverse charge basis. The Commissioner's further reasoning is that the appellant is only a deemed provider of service under Section 66A(1)(b) and cannot be treated as one who provided the service. This reasoning is flawed Section 66A was introduced by Finance Act, 2006 w.e.f. 18-4-2006 whereas the Notification No 17/2004 was issued on 10-9-2004. It appears that the law makers slipped on bringing an amendment to the notification because the intention of the notification is very clear, that is, not to levy service tax on cess paid towards the import of technology. Careful reading of the notification indicates that what is exempted is "taxable service provided by the holder of the Intellectual Property Right to any person……" Service Tax Rule 2(r) defines "Provider of Taxable Service" to include a person liable for paying service tax. Therefore, this rule read with Notification No. 17/2004 can be interpreted only to mean that the appellant being the person liable to pay service tax under Section 66A will also be eligible for exemption. It must not be forgotten that the charge of service tax on Intellectual Property Right under Section 65(105)(zzr) is actually made under Section 66. What Section 66A does is only to fasten the liability to the receiver of services in India while receiving services from abroad. In the present case the charge of service tax is under Section 66 but the appellant being the receiver is liable to pay under Section 66A. The Commissioner's reasoning is not correct and is rejected. The appellants are eligible to benefit from Notification No. 17/2004."*

She further submitted that similar position has been laid down in the case of **CCE vs Cummins Technology India Ltd. 2017 7 GSTL 69 (Tri-Del)**

9. The Ld. Counsel further submitted that invoking extended period of limitation and imposing penalty is not sustainable because the ingredients for invoking the extended period of limitation is not present in the instant case. She relied upon the decisions of the Tribunal wherein it has been held that the demand cannot be sustained on limitation as the entire proceedings are revenue neutral as held in the following cases:-

i. ***Munjal Showa Ltd. v. CCE 2017 (5) G.S.T.L. 145 (Tri. - Chan.)***

ii. ***Rochem Separation Systems (India) P. Ltd. v. CST*** **2015 (39) STR 112 (T) affirmed by *Bombay High Court in 2019 366 ELT 103*.**

iii. ***ABB Ltd. v. CCE 2019 (24) G.S.T.L. 55 (Tri. - Bang.)***

10. She further submitted that information regarding non-payment of service tax was known to the Department as early as in November 2008 when the audit objection was raised on this count to the Appellant-Assessee whereas the first SCN was issued on July 2010. Hence, there was a delay in issuance of show cause notice and substantial demand is barred by time. Further, the department has not produced any material on record to show that there was suppression on the part of the appellant-assessee with intent to evade payment of service tax. For this submission, she relied on the following decisions:-

(i) ***Anand Nishikawa Co. Ltd. v. CCE*** **2005 (188) ELT 149 (SC)**

(ii) ***Padmini Products v. CCE*** **1989 (43) ELT 195 (SC)**

11. She also submits that the entire proceedings are revenue neutral as undoubtedly the appellant is entitled to credit of any such service tax payable under Section 66A of the Act. For this submission, she relied on the following decisions:-

i. ***Nirlon Ltd. v. CCE*** **2015 (320) ELT 22 (SC)**

ii. ***CCE v. Tenneco RC India Pvt. Ltd.*** **2015 (323) ELT 299 (Mad)**

iii. ***CCE v. Gujarat Glass Pvt. Ltd.*** **2013 (290) ELT 538 (Guj)**

12. She further submitted that the appellant had bonafide belief that no service tax is payable on acquisition of know-how and has also

acted on the basis of a legal opinion that no service tax was payable on the amount paid by it.

13. She further submitted that the extended period cannot be invoked and penalty cannot be imposed when *bonafide* belief exists and interpretation issues are involved. For this submission, she relied upon the following decisions:-

(i) ***CCE v. Kolety Gum Industries*** **2016 (335) ELT 581 (SC)**

(ii) ***Jayant Juneja v. CCE*** **2015 (326) ELT 634 (SC)**

(iii) ***CC v. Reliance Industries Ltd.*** **2015 (325) ELT 223 (SC)**

14. With regard to the appeal filed by the Department wherein the department has challenged the cum-tax benefit given by the Commissioner to the appellant-assessee, she submitted that the law on this issue is well settled *inter alia* in terms of DHL Express (I) Pvt. Ltd. vs. CST-2015-VIL-686 holding that even in reverse charge scenario cum-tax benefit is applicable observing as under:-

> *"2.14.1 The appellants argued that Service tax demand under reverse charge, even if applicable, would be revenue neutral. The appellants have claimed the benefit of cum-tax price. They have claimed that if the consideration received form DHLI is indeed treated as consideration for services provided by them to DHLI then that amount may be treated as Cum tax amount. They relied on the decision of CCE vs Advance Media Consultants 2008 TIOL 548 CESTAT wherein it has been held that the service tax being an indirect tax the consideration needs to be considered as Cum Tax consideration. The said decision has been maintained by the Hon'ble Apex Court 2009 (14) STR J49 (SC). The argument of the appellants have force. The amount received by them is an all inclusive cost plus consideration in which everything is included. Thus it has to be treated as Cum tax amount and the demand needs to be quantified accordingly.*

15. On the other hand, the Ld. AR raised the preliminary objection and submitted that all those decisions which have been decided in favour of the assessee relied upon by the appellant-assessee has been

challenged by the department before the Hon'ble Apex Court and the appeals have been admitted by the Hon'ble Apex Court.

16. Ld. AR further submitted that in view of the decision of the Hon'ble Apex Court in the case of **UOI vs. West Coast Paper Mills Ltd. – 2004 (164) ELT 375 (S.C.),** the present case should be kept in abeyance till the matter is decided by the Hon'ble Apex Court. Ld. AR also stated that under similar circumstances, the Division Bench of this Tribunal in the case of **B.E. Office Automation Products Pvt. Ltd.** and in the case of **M/s DLF Home Developers Ltd.** adjourned the matter till the decision of the Hon'ble Apex Court.

17. Ld. AR further reiterated the findings in the impugned order and submitted that as per the agreement enter into between the parties, appellant-assessee is liable to pay service tax.

18. After carefully considered the rival submissions of both the parties and after perusal of the decisions relied upon by both the parties, we find that admittedly Intellectual Property Rights (IPR) such as potents, copyrights, trademarks and designs have not been registered in India under Indian Law. Hence a question arises whether the royalty paid by the appellant-assessee under the agreement is liable to service tax under IPR Service or not. Before, we answer this question, it is pertinent to reproduce the relevant definition of IPR which is as under:-

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

(55) (a) "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;

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

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

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

(105) "taxable service" means any service provided or to be provided-

(zzr) to any person, by the holder of intellectually property right, in relation to intellectual property service.

19. On going through the provisions of the Finance Act, 1994, we find that in order to tax IPR under service tax, such IPR should be registered under Indian Law whereas in the present case, the same is admittedly not registered under Indian Law. However, CBEC Circular dated 17.09.2004 relied upon by the Ld. AR does not help the Revenue as in the said circular it has been clarified that the taxable service include only such IPR except copyrights 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 IPR covered under Indian Law in force alone are chargeable to service tax and IPR like integrated circuits or undisclosed information would not cover under the taxable services. The only issue involved in the present case relates to levy of service tax on payment of royalty/fee on transfer of technical know-how and the same has been considered by the Tribunal in various cases and has consistently held that know-how is not an IPR within the meaning of service tax law and consequently its transfer is not liable to service tax. Further, Circular No. 80/10/2004-ST dated 17.09.2004 cited (supra) have clarified the scope of taxable entry. In this regard, ratios of few decisions of the Tribunal settling the legal position are cited herein below;-

(i) Lurgi India International Services Pvt. Ltd. v. Commissioner) **2020 (34) G.S.T.L. 507** ***(Tri. - Hyd.)***

"7. As regards post 18-4-2006, we find that the demand has been raised under the category of Intellectual Property Rights services under the Finance

Act, 1994, by recording that the said technical know-how which has been given by the Foreign Company is their proprietary interest, and though it is not registered under Patents Act, 1970, the service tax liability arises on interpretation of definition of intellectual property services.

8. We find that the issue is no more res integra as the Tribunal in the case of Reliance Industries Ltd. (supra) (wherein one of us Shri M.V. Ravindran was a Member) in paragraph Nos. 2 to 12 was considering the very same issue and held that in order to fasten the service tax liability, the person providing the technical know-how has to be registered with the Patents Authority in India. If the IPR is registered in any foreign country but is not registered in India, the same will not attract the service tax, demand under reverse charge mechanism, is the ratio. We find that the said ratio is squarely applicable in these appeals post 18-4-2006. The same view has been expressed by the Tribunal in the case of Chambal Fertilizers and Chemicals Ltd. and Munjal Showa Ltd. (supra). Since the issue is no more res integra, we hold that the impugned orders are unsustainable and liable to be set aside and we do so."

(ii) Munjal Showa Ltd. v. CCE 2017 (5) G.S.T.L. 145 (Tri. - Chan.)

"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"

(iii) Modi Mundi Pharma Beauty Products v. CST 2020-VIL-256-CESTAT-DEL-ST

"50. It is, therefore, morethan apparent that the grant of exclusive right to theAppellant by Mauritius Revlon to use the 'know how' in any plant in accordancewiththe processes, specifications and recipes thereof in connection with themanufacture, marketing, sale and distribution of Revlon Products would not fallinthe definition of 'intellectual property right' so as to make it taxableunder section65(105) (zzr) of the Finance Act."

(iv) SICPA India v CST 2018 (15) G.S.T.L. 375 (Tri. - Kolkata)

(v) Technova Imaging System Pvt. Ltd. v. CCE 2018 VIL 1090 CESTAT Mum ST

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 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.

(vi) Reliance Industries Ltd. v. CCE 2016-VIL-444 (CESTAT)

> *It was further clarified that IPR's like integrated circuits or undisclosed information, which was not recognised under Indian laws would not be covered under the said taxable services of IPR. We are in complete agreement with this clarification issued by the C.B.E. & C. and do not find any reason to disagree with the same. In view of the above, there can be no liability to tax under the head of IPR services in respect of an Intellectual Property Right that is not recognised by the law in India.*

20. After taking into consideration, the ratios of various decisions cited (supra) and also the Circular dated 17.09.2004, we hold that the appellant assessee is not liable to pay service tax under IPR service, under Section 65 (105) (zzr) of the Finance Act, 1994.

21. Further, we find that the findings in the impugned order holding that deduction under Notification No. 17/2004-ST dated 10.09.2004 is available only to service tax paid under Section 66 and not as reverse charge under Section 66A is also contrary to the decision of the Tribunal in the case of **Rochem Separation Systems (india) Pvt. Ltd.** cited (supra).

22. Further, in these circumstances, extended period cannot be invoked as the appellant-assessee has a bonafide belief that they are not liable to pay service tax on acquisition of know-how. Moreover, the issue relates to interpretation and hence intention to evade tax cannot be inferred as held in various decisions cited (supra). Further, the extended period cannot be invoked as the entire proceedings are revenue neutral as held by the Tribunal in the cases cited (supra).

23. Further, considering preliminary objection raised by the Revenue that the present appeal may be kept in abeyance till the decision of the Hon'ble Apex Court, we do not find any force in this preliminary submission in view of the various decisions cited by the appellant-assessee wherein it has been held that mere filing of appeal is not a

ground for not following the orders passed by the High Court and the Tribunal on identical issue. In this regard, the Tribunal in the case of **Century Enka Ltd. vs. Collector of Central Excise & Customs, Pune – 1994 (69) ELT 44 (Tribunal)** has considered identical objection raised by the Revenue and has held in Para 6 as under:-

> *"6. Considering the submissions made, and taking up first, the request of the Ld. SDR to defer the decision on the issue till the outcome of the similar issue pending before the Supreme Court, it may be observed that, going by the decisions cited, even the Supreme Court had some occasions to consider the issue and give their considered view on the same, and the law as laid down by the Supreme Court, would so far as the same is not over-ruled or reversed, remains a good law. Further, it is also not clear as to whether the said court has at all decided to review their own decisions earlier given. Merely because some appeals, involving the same point has been accepted for hearing, cannot by itself, be a ground to suspend or postpone decision of any identical issue raised before any subordinate judicial or quasi-judicial authority, sine die. That could result into a situation where majority of the litigation could come to a standstill. Further, the Supreme Court has in Union of India v. Kamlakshi Finance Corporation - 1991 (55) E.L.T. 433 (SC) in relation to implementation of the order appealed against, observed that mere filing of the appeal is no ground for not following the order passed and the Madras High Court has in two of their judgments, Mahendra Engineering Works v. Collector -1992 (60) E.L.T. 194 (Mad.) and M.B. Ambaresan Factory v. Assistant Collector - 1992 (60) E.L.T. 195 (Mad.) categorically held that mere filing of appeals before the Supreme Court, without obtaining stay, is not sufficient ground for the department to retain the duty amount. If this is the view held by the Supreme Court and the Madras High Court, in relation to filing of the appeals in the very same proceedings, there could hardly be any justifiable ground to postpone the hearing of an appeal only because some identical issue is taken to the Supreme Court. On an identical prayer, the Special Bench 'C' of this Tribunal, has in Pidilite Industries Pvt. Ltd. v. Collector - 1990 (50) E.L.T. 577, held that appeal should not be kept in abeyance pending Supreme Court decision on a similar issue. In these circumstances, the prayer of the Ld. SDR, to keep the appeal pending, cannot be conceded to."*

Other decisions relied upon by the appellant-assessee on this issue are cited herein below:-

(i) R. K. Texcon vs. Union of India-2005 (192) ELT 47 (Raj.)

(ii) National Aluminium Company Ltd. vs. Commissioner of Customs (Preventive) -2019 (23) GSTL 161 (S.C.).

24. Further, as far as the appeal filed by the Revenue is concerned wherein the department has only challenged the cum-tax benefit given by the Ld. Commissioner to the appellant-assessee, we find that

this issue is well settled by the decision of the Tribunal in the case of DHL Express (I) Pvt. Ltd. cited (supra) holding that even in reverse charge scenario cum-tax benefit is available to the assessee by observing as under:-

> *"2.14.1 The appellants argued that Service tax demand under reverse charge, even if applicable, would be revenue neutral. The appellants have claimed the benefit of cum-tax price. They have claimed that if the consideration received form DHLI is indeed treated as consideration for services provided by them to DHLI then that amount may be treated as Cum tax amount. They relied on the decision of CCE vs Advance Media Consultants 2008 TIOL 548 CESTAT wherein it has been held that the service tax being an indirect tax the consideration needs to be considered as Cum Tax consideration. The said decision has been maintained by the Hon'ble Apex Court 2009 (14) STR J49 (SC). The argument of the appellants have force. The amount received by them is an all inclusive cost plus consideration in which everything is included. Thus it has to be treated as Cum tax amount and the demand needs to be quantified accordingly.*

25. In view of our discussion above, we allow the appeal of the assessee and dismiss the appeal of the Revenue.

(Pronounced on 28.06.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

G.Y.