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

Service Tax Appeal No. 56241 Of 2013

[Arising out of OIO No.40-41/Commr./PKL/2012 dated 15.12.2012 passed by the Commissioner of Central Excise, Panchkula]

M/s Reebok India Company : Appellant (s)
7th Floor, Unitech Commercial,
Tower-II, Block-B, Greenwood City,
Sector-45, Gurgaon, Haryana-122003

Vs

The Commissioner of Central Excise
And ServiceTax, Panchkula : Respondent (s)
SCO 407-408, Sector 8, Panchkula-134119

With

Service TaxAppeal No. 57195 Of 2013

[Arising out of OIO No.3-4/ST/PKJ/CCE/ADJ/2013 dated 11.01.2013 passed by the Commissioner (Adjudication) of Central Excise, New Delhi]

M/s Reebok India Company : Appellant (s)
7th Floor, Unitech Commercial,
Tower-II, Block-B, Greenwood City,
Sector-45, Gurgaon, Haryana-122003

Vs

The Commissioner of Service
Tax, Delhi : Respondent (s)
17-B.I.A.E.A. House, M.G. Road,
I.P. Estate, New Delhi-110002

APPEARANCE:
Shri B.L.Narsimhan, Ms. Krati Singh and Shri Aman Garg, Advocates
for the Appellant
Shri Rajeev Gupta, Shri Siddharth Jaiswal and
Shri Harish Kapoor, Authorised Representatives for the Respondent

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

FINAL ORDER Nos.60287-60288/2023
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Date of Hearing:02.08.2023

Date of Decision:2508.2023

Per: P. ANJANI KUMAR

M/s Refop India Company, or say RIC (formerly known as Reebok India Company), the appellants have entered into a technology licence agreement dated 01.03.1995 which was renewed on 01.10.2002 with Reebok International Ltd. UK; under the agreement with RIC UK, RIC India were granted non-exclusive and non-transferable right to utilise the technology in manufacture and distribution of products in India; the rights granted comprised of data, documentation, drawings, specifications relating to inventions, designs, formulae, processes and similar property rights, commonly known as technical know-how; RIC India was required to pay a royalty of 5% of net sales as per the agreement to the overseas entity. An investigation was initiated against the appellants and on conclusion of the same show cause notices dated 23.10.2009 and 11.10.2009, covering the period September 2004 to March 2010, demanding service tax of Rs. 9,82,97,954/-; show cause notices dated 13.09.2011 and29.02.2012, demanding Service tax of Rs.2,83,92,002/- were issued to the appellants. The show cause notices were confirmed by Orders-In-Original No.3-4/ST/PKJ/CCE/ADJ/2013 dated 17.01.2013 and OIO no. 40-41/Commr/PKL/2012 dated 05/12/2012, along with interest and penalties as mentioned therein. The contention of the department was that the appellants are required to pay Service Tax under the head "Business Auxiliary Service'', on the amount of royalty paid, to their

overseas entity and the commission received from Greg Norman Division for identifying and negotiating with Indian exporters, under Reverse charge mechanism. The demand was also on account of consideration received from Matrix Clothing Pvt. Ltd, Super Fashion and Paragon Apparel for importing assistance with respect to exports under the head "TICS". Hence, these two appeals ST/56241/2013and ST/57195/2013.

2. Shri B.L. Narsimhan, assisted by Ms. Krati Singh and Shri Aman Garg, learned counsels for the appellants, submits that the transfer of technical know-how does not qualify as "IPR Services"; transfer of technical know-how in the impugned case is in pursuance of technology transfer agreement which encompasses limited rights of data documentation, drawings, specifications related to inventions, designs, formulae, processes in respect of products to be manufactured; by no stretch of imagination, the same can be classified under the definition of IPR service under Section 65 (55B) and Section 65(55A) of the Finance Act 1994; the technical know-how in question in the present case is not recognised as an IPR; it is not protected under any Indian law for the time being in force; Therefore, it is not taxable in view of the clarification given by Circular No. 80/10/2004-ST dated 17.09.2004.He relies on the following cases:

- ASEA BROWN BOVERI LTD- 2017 (49) S.T.R. 209 (Tri. - Bang.)
- ABB LTD.- 2019 (24) G.S.T.L. 55 (Tri. - Bang.).
- SCHNEIDER ELECTRIC INDIA PVT. LTD.- FINAL ORDER NO. A/60170-60171/2023 DATED 28.06.2023 (TRI. CHANDIGARH).
- CHAMBAL FERTILIZERS & CHEMICALS LTD.- 2016 (45) S.T.R. 118 (Tri. - Del.).

- SICPA INDIA PVT. LTD.-2018 (15) G.S.T.L. 375 (Tri. - Kolkata)
- TATA CONSULTANCY SERVICES LTD.- 2016 (41) S.T.R. 121 (Tri. - Mumbai)
- HINDUSTAN AERONAUTICS LTD.- 2020 (38) G.S.T.L. 75 (Tri. - Bang.)

3. Learned counsel for the appellants submits that in the instant case the taxable event i.e, entering into the agreement with RIC, UK for transfer of know-how has occurred in 1995 well before the levy of Service tax on IPR Services which was introduced with effect from 10.09.2004 vide Finance Act,2004; payment as royalty subsequent to the entering into agreement does not get determine the taxability of the transaction. He relies on the following cases.

- MODI-MUNDIPHARMA PVT. LTD.- 2009 (15) S.T.R. 713 (Tri. - Del.)
- BISWANATH HOSIERY MILLS LTD.- 2020-TIOL-1384-CESTAT-KOL.
- HAMDARD NATIONAL FOUNDATION (INDIA)- 2018-TIOL-805-CESTAT-DEL.
- MUNJAL SHOWA LTD.- 2017 (5) G.S.T.L. 145 (Tri. - Chan.)
- RELIANCE INDUSTRIES LTD.-2016 (44) S.T.R. 82 (Tri. - Mumbai)

4. Learned counsel further submits that demand of Service tax calculated on the basis of accrual of royalty in the books of accounts is liable to be set aside; liability to discharge Service tax of book adjustment became taxable with effect from 16.05.2008; for a period prior to 16.05.2008 accrued royalty cannot be taxed.

He relies on the following cases:

- GECAS SERVICES INDIA PVT. LTD- 2014 (36) S.T.R. 556 (Tri. - Del.)
- SEMPERTRANS NIRLON (P) LTD- 2019 (20) G.S.T.L. 560 (Tri. - Mumbai)

5. Coming to the demand in respect of commission received from M/s Greg Norman Division for identifying and negotiating with Indian exporters under "Business Auxiliary Service", learned Counsel submits that the subject services are provided by the appellant and payment was received in convertible foreign exchange and services are used outside India; even though the services are undertaken in India the finding of such activity is communicated to the foreign entity for a decision making; and thus services are being used outside India; in view of the Circular No. 111/05/2009-ST dated 24.02.2009 as the benefit of the service accrued outside India, the same needs to be treated as exporter service as held in the following cases:

- ARCELOR MITAL STAINLESS (I) P. LTD- INTERIM ORDER NO.26/2023 IN ST/88483/2014 (TRI. LB)
- IBM INDIA PVT. LTD.- 2020 (34) G.S.T.L. 436 (Tri. - Bang.)

6. He submits that the impugned services cannot be classified under clause (iv) of Section 65(19) of the Finance Act 1994 as the goods which have been procured by the appellant for the overseas entity are not inputs and are not intended for use as inputs by their overseas client

7. Coming to the demand in respect of consideration received from Matrix Clothing Pvt Ltd, Super Fashion and Paragon Apparel, Learned Counsel submits that in terms of sample MOU dated 1.04.2003 with M/s Matrix, the overseas client does not have the expertise to standardise the administrative and qualitative standards for enabling exports; therefore the appellant agreed to prove such assistance to

facilitate their exports; there is no mention of any certification or technical inspection services provided the appellant; the appellant is neither engaged in the business nor possess any such skill to provide technical services; services provided by an agency qualified to provide technical services alone can be qualified as providers of "TICS". He relies on the following cases:

- HINDUSTAN PETROCHEMICAL CORPN. LTD.- 2019 (26) G.S.T.L. 81 (Tri. - Bang.)
- BIRDY EXPORTS PVT. LTD.- 2019 (28) G.S.T.L. 481 (Tri. - Bang.)

8. Learned counsel submits that the royalty amount paid by the appellant should be treated as cum-duty price; Notification no. 17/2004-ST dated 10.09.2004 exempts the taxable service provided by the holder of Intellectual Property Right to any person in relation to Intellectual Property Services, to the Research and Development Cess paid as per Section 3 ofthe Research and Development Cess Act, 1986.Learned counsel further submits that extended period is not invokable in the instant case as the department failed to establish any fraud, collusion,wilful mis-statement or suppression of facts or contravention of any law with intent to invade payment of duty. He relies on International Merchandising Company 2022(67)GSTL129 (SC) and submits that the extended period cannot be invoked for interpretational issues.

9. Shri Sidharth Jaiswal, Joint Commissioner, assisted by Shri Harish Kapoor Superintendent, Authorised Representative for the Departmentreiterates the findings of OIO. He takes us through the

definition of Intellectual Property Rights(IPR) Service and Notification No.18/2004 dated 10.09.2004 and submits that from 18.04.2006, it shall be treated like the appellant is a service provider and as such leviable to Service tax. He further submits that though the appellant contend that the taxable event occurred much before the imposition of levy, it is clear from Para-5 and a statement of Shri Vishnu Bhagath, Director of the appellant that the facility of continuous use was made as part of the renewal of the agreement which was in force upto 2012; he submits that in view of point of Taxation Rules 2011, the service shall be treated as having been provided each time when a payment in respect of such use or benefit is received by the provider in respect thereof, or an invoice is issued by the provider, whichever is earlier. He submits that though the Rules came into effect in 2011, they can throw a light incase of disparity/confusion in the previous period. He submits that the appellant's contention that transfer of technical know-how does not qualify as IPR service is incorrect in view of the following cases:

- L.G. BALAKRISHNAN & BROTHERS LTD.- 2015 (40) S.T.R. 193 (Tri. - Chennai)
- SHORE TO SHORE MIS PRIVATE LIMITED- 2007 (5) S.T.R. 109 (Tri. - Chennai)
- HERO HONDA MOTORS LTD.- 2012 (27) S.T.R. 409 (Tri. - Del.)

10. In respect of the services rendered to Greg Norman Division in identification of Indian suppliers, he takes us through Rule 3 of Export of Service Rules 2005 and submits that services were not ordered from the office located outside India, thus the same were not eligible

for exception in terms of Sub-rule (2) of Rule 3 of Export of Service Rules, 2005; they are taxable with effect from 19.04.2006

11. On the issue of demand on technical inspection services, he submits that the appellant was required to examine that the exporter followed the administrative and qualitative standards of IRC; the appellants inspect the merchandise to ensure quality and standards and issue a certificate to the effect that "these goods have been inspected for quality by Reebok India Company and the same have been found in order". He submits that, therefore, the technical service rendered by the appellant is taxable.

12. Heard both sides and perused the records of the case. There are two issues involved in the instant case. First one is about the taxability of the royalty received by the appellants from their masters for the technical know-how received from them under an Agreement; Department seeks to levy service tax on the royalty under "Intellectual Property Rights" under Reverse Charge Mechanism. The second one being the consideration received by the appellants for the services rendered by them to the Indian exporters which the Department alleges that amount to "Business Auxiliary Service" and "Technical Inspection and Certification Service".

13. Coming to the first issue in the discussion, the arguments of the appellants is two-fold; they claim that the technical know-how cannot be equated to "Intellectual Property Rights" and moreover, the technical know-how is not registered in India and that even if the

transfer of technical know-how is accepted as IPR, the taxable event occurred much before the levy was imposed on the said service. It is the argument of the Department that technical know-how, even as per the submissions of the appellants, encompasses patented/ patentable drawings, designs etc. and therefore, it cannot be held that as the technical know-how is not registered in India, it cannot be taxable under IPR; Department also argues that though the Agreement was before the imposition of levy, the payment continued periodically and in terms of Point of Taxation Rules, 2011; each time the payment is made, the service is considered to have been rendered.

14. We find that it will be beneficial to gothrough the agreement in understanding the nature of the service. We find that the contract dated 1st March, 1995 has, *inter alia*, the following clauses:

> 1. Subject to the terms and conditions herein contained, the LICENSOR shall provide to the LICENSEE: data, documentation, drawings and specifications relating to inventions, designs, formulae, processes and similar property (hereinafter referred to as "KNOWHOW").
> 2. The LICENSOR hereby grants to the LICENSEE, subject to limitations and restrictions contained herein, the non-exclusive, non-transferable right to utilise the technology in the manufacture and distribution of the PRODUCTS in India.
> ---
> 5. Each Party shall, during and for the life of this Agreement provide to the other on a continuing basis, developments and improvements effected by it upon the KNOWHOW provided by the LICENSOR to the LICENSEE in terms hereof. It is agreed, however, that if any such development or improvement is of a major nature or is patentable, the other Party shall be entitled to the same only upon payment of such, remuneration as may be agreed upon between the Parties.

14.1. Here are a few clauses of the contract dated 1st October, 2002:

> 1. Subject to the terms and conditions herein contained, the LICENSOR shall provide to LICENSEE: data, documentation, drawings and specifications relating to inventions, designs, formulae, processes and similar property (hereinafter referred to as "KNOWHOW").

15. Ongoing through the contract, we find that there is no mention of any patent of any design etc. being registered in India. Also, there is no mention of any separate payment for the different constituents forming part of the know-how. We find that the taxability of technical know-how, at the hands of Indian companies receiving the same from overseas entities, was subject matter of various judgments of the Tribunal. Tribunal has been taken a consistent stand that transferring of technical know-how cannot be equated to transfer of Intellectual Property Right and that as long as the said Intellectual Property Rightis not registered or patented in India; the same would not qualify to be IPR taxable in India in terms of Section 65 (55a) of Finance Act, 1994. The Tribunal in the case of ABB Limited (supra) observed that:

> **6.6.2** The question now arises that what has been transferred under the respective agreements between the foreign group company and the appellant can be termed as right to intangible property which is either a trademark or design(s) or patent(s) or any other similar intangible property recognized as such under any existing Indian law (and when it is not a 'copyright' under Indian Copyright Law); and then only such a right would be covered under the definition of 'Intellectual Property Right' as defined in Section 65(55a) of the Finance Act, 1994. From the documents on record which are various licensing agreements and submissions of the letters written on behalf of General Manager of the foreign company to the appellant concerning these respective license agreements, which are on record, we find that they do not anywhere say that they are the trademarks, designs, patents or other similar intangible property which are covered by any Indian law on the subject. However, it is clear that under these transfer

agreements the appellants have been given the right to assemble or manufacture various contracted products and the right to use or otherwise dispose of such products which is evident from the Clause 2.1 of the respective agreement(s). The contents of the Clause 2.1 of the License Agreement between ABB Sace S.p.A. Milano-Italy (Licensor) and the appellants (Licensee), are being reproduced below for making the scope of the subject agreement(s) more clear: -

"CLAUSE 2 - LICENCES

2.1. Scope

Licensor grants Licensee under Information and Intellectual Property Rights (if any) :

(a) a non-exclusive right to assemble or manufacture the Contract Products in the Assembling or Manufacturing Territory;

(b) a non-exclusive right to use, sell or otherwise dispose of the Contract Products assembled/manufactured under this Agreement in the Sales Territory.

Export of Contract Products by Licensee to countries outside the Sales Territory is subject to the prior written approval of Licensor, always provided that Licensor's decision shall comply with applicable compulsory legislation."

6.6.3 Important point here is whatever is under transfer by the foreign companies under the respective licenses, - 'is the said subject matter a right to an intangible property and is 'the said intangible property' a trademark or design or a patent or any other similar intangible property under an Indian law? Here we do not find any evidence to categorically hold that the technical information or technical know-how or the designs or patents or the documents, etc. which are the said subject matters, have been transferred are covered under any of the Indian laws namely Indian Trade Marks Act or under Trade and Merchandise Marks Act or under Indian Patent Act, 1970 or Designs Act, 2000 or any such related law.

6.7 Our attention has been drawn to the C.B.E. & C. Circular F. No. B2/8/2004-TRU, dated 10-9-2004 which was issued when the individual service namely intellectual property service (other than copyrights) was

introduced by the Finance (No. 2) Bill, 2004, which was enacted on 10-9-2004. In respect of 'Intellectual Property Service" the said C.B.E. & C. Circular in its Para 9 says as below:

"9. Intellectual property services (other than copyrights) :

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 copy-right) 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).*

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-S.T., dated 10-9-2004)."*

6.7.1 From the contents of above Para 9 of C.B.E. & C. Circular dated 10-9-2004 it is clear that the wordings "under any law for the time being in force" means the laws as applicable in India. It clarifies that IPRs covered under *Indian Law in force alone* are chargeable to Service Tax. It further says that IPRs like integrated circuits or *undisclosed information (not covered by Indian law)* would not be covered under taxable services of 'Intellectual Property Services'. Revenue has not been able to prove in any manner that right to any of the intangible properties (by whatever name they call the same i.e. either documents or designs, instructions, catalogues, drawings, product software, testing

specification, symbol numbering system, technical know-how, pictures and so on) is covered as IPR(s) under any of the relevant Indian law. In case of undisclosed information this C.B.E. & C. circular itself says that *an Indian law does not cover such undisclosed information*. In other words, there is no evidence before us to categorically hold that any of the intangible properties, which are the subject matter(s) of the respective agreement(s), which have been transferred by foreign group companies to the appellant company have been registered or covered by any of the Indian law concerning intellectual property and which can be covered under the definition of 'Intellectual Property Right' as given in Section 65(55a) of Finance Act, 1994. The appellants have mentioned in their submissions that by way of these agreements the technologies are being transferred by the foreign companies which were developed by them and are the exclusive property of the respective companies. The appellants state that these foreign companies transferred licensed use of their technical information, know-how and trade secrets which are not registered under any Indian law for time being in force. The appellants further state that foreign companies did not grant license to them any patent, copyright, design or any other similar intellectual property rights. The conclusive point here is that the subject facts and the conditions do not fulfil the ingredients of the definition of 'Intellectual Property Right' as given in the Section 65(55a) of Finance Act, 1994.

7. During the hearing of the case the learned AR appearing for the Revenue has given certain technical literature on Patents, IPRs, Trade Secrets and Technical Know-How, etc. but we find that the contents of the said technical literature do not help the case of the Revenue when the subject matter(s) of respective agreement(s) do not fulfil the criteria and conditions of the definition of 'Intellectual Property Right' of Section 65(55a) of the Finance Act, 1994.

7.1 Revenue has also cited the case laws in the case of *Indian Farmers Fertilizer Co-op. Ltd.* v. *CCE* (supra) and *Suolificio Chennai* v. *CST, Chennai* (supra). We find that CESTAT, Delhi in the case of *Indian Farmers Fertilizer Co-op. Ltd.* (supra) mainly discussed the Consulting Engineer Services though it says that technical know-how as intellectual property is transferable and it also mentions that know-how as intellectual property can be referred as trade secret. It further says that trade secrets are not protected by law in the same manner as

trademarks or patents. It states that trade secret is protected without disclosure of secret. But we do not find any support to the Revenue from this decision [*IFFCO* v. *CCE, Bareilly* (supra)] of CESTAT, Delhi. Revenue has also referred to CESTAT, Chennai's decision in the case of *Suolificio Chennai* (supra) where it has been held that transfer of trademarks and drawings, *prima facie* covered under 'Intellectual Property Service'. Again we do not find any assistance to the Revenue from this decision because firstly it is on the subject of Consulting Engineer Service and secondly we do find that the subject matter(s) of the agreement(s) between the foreign companies and the appellants in the present case are not covered under any Indian law concerning Intellectual Property Rights, which is the basic ingredient of the definition of 'Intellectual Property Right' in Section 65(55a) of Finance Act. We again state that whatever is being transferred even if it is the design or drawings or other document or technical know-how, this has to be first covered under an Indian law on the subject of intellectual property right for declaring it an 'Intellectual Property Right' for the purpose of inclusion of the transfer of said subject matters/documents, etc. under corresponding taxable service namely 'Intellectual Property Service' which has been further defined in Section 65(55b) of the Finance Act, 1994.

7.2 Further we refer to CESTAT, Mumbai's decision in the case of *RochemSeperation Systems* (supra). CESTAT, Mumbai has *inter alia* observed in the paras of the said decision as under :

"8 …. However, the Commissioner failed to analyze the Agreements in detail and came to a hasty conclusion that the entire amount of royalty is towards transfer of Intellectual Property Right. The definition of intellectual property right such as trademark, patent etc. have, to be construed in the same sense as in the Intellectual Property Right Acts such as the Patent Act and the Trademark Act. Only rights which are registered with the trademark/patent authorities are considered as Intellectual Property Right. The Commissioner has failed to go into these aspects in detail and has clubbed the entire service as Intellectual Property Right service."

7.2.1 *RochemSeperation Systems* (supra) is the case that though discusses the issue of 'Intellectual Property Right' it concluded there that "the demand is time-barred, we are deciding the matter only on the basis of limitation." Further we refer to CESTAT, Mumbai's decision in case of *Tata Consultancy Services*

Ltd.(supra), where it held that intellectual property right not covered by Indian laws would not be covered under the taxable service in the category of IPR services. In this regard we are reproducing below Paras 4, 4.1, 4.2 and 4.3 to make the position more clear :

"4. The taxable service under consideration is defined under Section 65(105)(zzr) to mean any service provided or to be provided to any person, by the holder of Intellectual Property Right, in relation to Intellectual Property Service. Intellectual Property Service is defined under Section 65(55b) to mean (a) transferring (temporarily) or (b) permitting the use or enjoyment of, any intellectual property right. And Intellectual Property Right as defined under Section 65(55a) 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.

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 "Design 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-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, trade marks 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".

4.3 We are fortified in our view by the Tribunal decision in the case of *Rochem Separation Systems (India) P. Ltd.* v. *Commr. of S.T., Mumbai-I* - 2015 (39) S.T.R. 112 (Tri.-Mumbai) = 2015-TIOL-120-CESTAT-MUM in which it was held that mere transfer of technology is certainly not related to service provided in relation to Intellectual Property Right service which involves the transfer or use of any Intellectual Property Rights."

7.3 We also refer to CESTAT, Mumbai's decision in the case of *Thermax Ltd.* (supra). CESTAT, Mumbai in the said decision has observed that the subject transaction has to satisfy the requirement of Section 65(55b) of the Finance Act, 1994 so as to cover the same under the service concerning Intellectual Property Right. We reproduce Para 5.5 of the said decision which says that for any transaction to be covered under IPR services has to be first covered under the category of an IPR under an Indian law. CESTAT, Mumbai in the said decision in Para 5.5 has observed as below :

"5.5 From the above circular, it becomes very clear that to come under the category of IPR, there should be a law in India, Governing such IPR and only IPR covered under the Indian law in force are chargeable to Service Tax. It is well known that there is no law governing trade secrets/confidential information in India and therefore, the rights obtained by the appellant does not constitute intellectual property right as defined in law. Secondly, it is also very clear from the said Circular that a permanent transfer of intellectual property right does not amount to rendering of service. In the present case, the appellant has become a co-owner of the intellectual property which would mean that the transfer is permanent. Therefore, the transaction does not come under the purview of Section 65(55b) of the Finance Act, 1994."

16. The Tribunal in the case of Lurgi International Services Pvt. Ltd. 2020 (34) GSTL 507 (Tri. Hyderabad) held as follows:

> **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.

17. We further find that this Bench in the case of Schneider Electric India Pvt. Ltd. vide Final Order No. A/60170-60171/2023 dated 28.06.2023 considered all the earlier judgments of the Tribunal and came to a considered conclusion that technical know-how is not taxable unless the same is shown to have been registered in India. In the instant case too, we find that the Department did not produce any evidence to show that the technical know-how or any constituent items therein have been registered in India. This being the case, we have no reason to differ with our own finding given in the case of

Schneider Electric and in the case of ABB Ltd.- 2019 (24) GSTL 55 (Tri. Bang.). We hold that no case has been made by the Department to recover service tax from the appellants in the impugned case.

18. We find that the appellants have also contended that the taxable event having taken place much earlier to the levy of service tax on Intellectual Property Rights, no service tax can be levied on the same in the instant case as the Agreement was made in 1995 and was renewed in 2002. We find that in the case of Modi-MundipharmaPvt. Ltd (supra), Tribunal has held that:

> **6.** We have carefully considered the submissions from both sides. We also perused the agreement and the show cause notice. In the show cause notice it is alleged that the appellant was granted exclusive right to manufacture, use and sell within the territory, the preparation utilizing the know-how and scientific and technical information and the teachings of the patents on payment of royalty. It is also alleged in the show cause notice that the appellant was receiving know-how during the disputed period. However, from the agreement it is noticed that there is no evidence of continuous providing of information, know-how in relation to the manufacture. Further, it is not disputed that the appellant was manufacturing and selling products in the brand names, Pyricontin, Diacontin, Fecontin, Metocontin, Morcontin, Nitrocontin, and Unicontin which are claimed to be registered brand names of the appellant-company. In other words, they are not using the brand name of Mundipharma A.G. Switzerland. Receipt of know-how appears to be a one time affair. There is no evidence that their know-how is supplemented by Mundipharma A.G. Switzerland. Therefore, we are in agreement with the submissions on behalf of the appellant that royalty payment in the form of deferred payment for know-how received in 1990. Whether payment for such services rendered is made in one lump sum or made in instalments or based on quantum of sale by the appellant on an annual basis is not relevant to consider as to when the services were actually rendered. From the available evidences on record, we accept the submission of the learned Sr.

> Advocate that the service were rendered in 1990 and for the said services payments were being made periodically as provided in the agreement.
>
> **7.** Therefore, we hold that no services were being rendered and received during the disputed period. In view of the above, order of the Commissioner cannot be sustained and the same is set aside and the appeal is allowed with consequential relief. Since we are allowing the appeal on this short ground, we are not going into other issues raised by both sides.

19. We find that the appellant submits that it was incorrect to tax the commission, received by them from Greg Norman Division for identifying and negotiating with Indian exporters, under "Business Auxiliary Service"; they submit that the services are used outside India; they submit that in terms of Circular No.111/05/2009-ST dated 24.02.2009, service used outside India is to be treated as 'Export'. We find that the Larger Bench in the case of Arcelor Mittal Stainless (India) Pvt. Ltd. (supra) held that: *concept that service tax is a destination-based consumption tax is also in conformity with international practice in respect of vale added taxes. Thus, in a destination-based consumption tax, the tax is levied only at the place where the consumption takes place. It is for this reason that exports are not taxed and imports are taxed on same basis as domestic supplies.* We further find that the Tribunal in the case of IBM India Pvt. Ltd. (supra) has given a similar finding. In view of the same, we find that the Revenue cannot tax the services rendered by the appellants to Greg Norman Division.

20. Revenue seeks to tax the services rendered by the appellants to companies, like Matrix Clothing Pvt. Ltd., Super Fashion and Paragon

Apparel, in inspecting and certifying their exports under Technical Inspection and Certification Services. The appellants claim that they are not an agency involved in certification and inspection so as to render the services provided by them to their clients. Though, they are inspecting the goods of the exporters as per the standards of M/s Reebok and certifying that the product confirms to the standards of M/s Reebok, they cannot be called an agency involved in certification. We find that as per the definition of "Technical Inspection and Certification Services". We find that Tribunal in the case of Hindustan Petrochemical Corporation Limited (supra) held that:

> **2.** The appellant submitted that for an activity to be classifiable under the category of "Technical Inspection and Certification Service", the ingredients provided under Section 65(108), (109) of the Finance Act, 1994 read with Section 65(105)(zzi) of the Finance Act, 1994 which reads as follows needs to be satisfied.
>
> **Section 65(108)**: "technical inspection and certification" means inspection or examination of goods or process or material or information technology software or any immovable property to certify that such goods or process or material or immovable property qualifies or maintains the specified standards, including functionality or utility or quality or safety or any other characteristic or parameters, but does not include any service in relation to inspection and certification of pollution levels";
>
> **Section 65(109)**: "technical inspection and certification agency" means any agency or person engaged in providing service in relation to technical inspection and certification";
>
> **65(105)(zzi)** to any person, by a technical inspection and certification agency, in relation to technical inspection and certification;
>
> From the above, it is clear that the taxability will depend on the conditions that such services are provided by an agency; such agency should involve in inspection or examination and on completion of such

inspection or examination; a certificate is issued stating to meet any of the criteria like quality, maintenance of standards, functionality or utility, safety or any other characteristics. The appellants contend that they are not an agency involved in the service of technical inspection and certification. The activity of degassing and purging does not involve inspection or examination of any goods but it is an activity by itself. The activity of degassing of LPG tankers is required to be completed before sending the trucks for mandatory testing of safety valves/repairs, etc. Similarly purging is done only after completion of any repairs to ensure that there will not be any loss during further loading of the tanker with LPG. The appellant submitted that mere activity of checking functionality, quality, utility or certifying the same will not fall in the ambit of "Technical Inspection and Certification Service". They placed reliance on the following case laws.

•*Antony Garages Pvt. Ltd.* v. *CCE* :2015 (38) S.T.R. 49 (Tri.-Mum.)
•*Harshita Handling* v. *CCE* :2010 (19) S.T.R. 596 (Tri.-Del.)
•*M/s. Pressure Vessels and Equipments Testing Enterprises* v. *CCE* : 2013-TIOL-142-CESTAT-MAD.
•*Sri Ayyappan Cylinders* v. *CCE* : 2017-TIOL-3604-CESTAT-MAD.
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5. From the records made available and argument proposed, it comes out that the appellants though are performing certain activities in relation to the maintenance and safety of the tank trucks and are issuing a certificate to the effect that the tanks are purged/degased, the same cannot be considered to be a service within the scope of "Technical Inspection and Certification Service". It is to be understood that the appellants are not basically an agency involved with the testing and certification. In fact, it is abundantly clear that they are performing certain activities which make the truck tanks fit to be filled with LPG for further transportation. This is to be construed only as an activity related to the safety and maintenance of the tank truck. We are inclined to come to a conclusion that M/s. HPCL have not fulfilled the conditions so as to impart the activity of purging and degassing tank trucks as "Technical Inspection and Certification Service". Therefore, the appeal is allowed with consequential relief, if any.

21. In view of the above, we find that in respect of all the issues raised in the show-cause notice, Revenue did not make out any case for levy of service tax on the appellants. The impugned orders, thus, cannot be sustained and are liable to be set aside. We do so and allow both the appeals.

(Pronounced on 25/08/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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