

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

SERVICE TAX Appeal No. 11966 of 2016-DB

SERVICE TAX (Misc) Application No. 10343 of 2023

[Arising out of Order-in-Original/Appeal No VAD--EXCUS-003-APP-127-2016-17 dated 27.05.2016 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Crest Speciality Resins Pvt Ltd

...Appellant

Survey No.609,Vill; Shetra,
Taluka; Kheda
Kheda,
Gujarat

VERSUS

C.C.E. & C.-Anand

...Respondent

Office Of The Commissioner, Central Excise,
Customs & Service Tax,
Central Excise Building,
Nr. Juna Dadar, Behind Old Bus Depot Anand
Gujarat-388001

APPEARANCE:

Shri P P Jadeja, Consultant for the Appellant

Shri. Anoop Kumar Mudvel, Superintendent (Authorized Representative) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

FINAL ORDER NO.A / 12424 /2023

DATE OF HEARING:25.10.2023
DATE OF DECISION:02.11.2023

RAMESH NAIR

The issue involved in this case is to decide whether in case of import of the Technical know how, lump sum fees and Royalty paid to the foreign service provider attracts Service Tax or otherwise in respect of "Intellectual Property Service" under reverse charge mechanism in terms of Section 66A of the Finance Act, 1944.

2. Brief facts of the case are that Appellant is a manufacturer of Unsaturated/saturated Polyester Resins and other excisable goods and also

holder of PAN based Central Excise and Service Tax Registrations with Central Excise division at Nadiad in the state of Gujarat. Appellant by Agreement dt. 31-03-2010 entered with Benasedo Spa, Italy has received the Technical know how on payment of lump sum fees of Rs.2,94,00,000/-. After making such payment to overseas supplier, as pointed out by their Bank i.e. Oriental Bank of Commerce, Appellant paid Rs. 14,70,000/- as Cess @ 5 % under section 3 of Research and Development Cess Act, 1986 in relation to all payments made for the import of Technology and intimated with copy of Challan of payment to the Bank. Appellant also paid Royalty of Rs 61,96,434/- to Benasedo Spa, Italy as per their Agreement dt. 31-03-2010. The Revenue is of view that the Total Rs.2,94,00,000/- + Rs 61,96,434/- = Rs 3,55,96,434/- paid for receipt of Technical know how Fees & Royalty paid is liable to payment of Service Tax under category "Intellectual Property Service" under Finance Act 1994. Transaction of Rs.2,94,00,000/- for payment to M/s Benasedo Spa, Italy, total Service Tax liability was worth Rs. 30,28,200/-. However, as Appellant had paid the R&D Cess for Rs. 14,70,000/-, exemption of Service Tax for Rs. 14,70,000/- in terms of Service Tax Notification No. 17/2004-ST as amended, was available to Appellant which exempted taxable service in relation to Intellectual Property Service, from so much of service tax leviable thereon under section 66 of Finance Act 1994, as is equivalent to amount of CESS paid towards import of Technology under section 3 of Research and Development Cess Act, 1986 in relation to such intellectual property service. Appellant had also discharged Service Tax liability of total Rs. 21,96,432/- from Cenvat Credit Account. However, total amount of Rs 3,55,96,434/- paid to M/s Benasedo Spa, Italy by Appellant for Transfer of Technical know how and Royalty is treated as "Taxable Value" for Intellectual Property Service, attracting Service Tax of Rs. 21,96,432/- payable by cash in GAR-7 challan, which is demanded vide Show Cause Notice No. V.ST/15-33/OFF/OA/2013 dated 05.09.2014. Appellant objected SCN on various grounds contending that service tax amount paid from Cenvat Credit Account was in accordance with law, but, SCN dt. 05-09-2014 resulted in confirmation of Service Tax demand with interest and penalty by the O-I-O No. AND/ST/11/JC/2015 dated 27-11-2015 and the O-I-A No. VAD-EXCUS-003-APP-127-2016-17 dated 27-05-2016 issued by the Commissioner (Appeals), Vadodara. Therefore, this Appeal has been filed by the Appellant. The appellant also filed miscellaneous application for change of name of appellant Company.

3. Shri P. P. Jadeja, Learned Counsel, appearing for the Appellant submits that demand confirmed with interest and penalty by O-I-O/O-I-A against Appellant is not sustainable. He submits that during relevant period, The Appellant has already debited Service Tax in question for Rs.15,58,200/- + Rs. 6,38,232/- in this case, from Cenvat Credit and intimated such payment of service tax to jurisdictional officers and reflected in periodical ER-1/ ST-3 Returns filed for the relevant period. However, the Audit and Excise Authorities continued undue pressure to deposit the amount of Service Tax by GAR-7 Challan, in terms of Rule 5 of "Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. He submits that Appellant had deposited Rs. 21,96,432/- by GAR-7 Challan also which is reflected in Table-1 and Table-2 of SCN/O-I-O. Thereafter, Appellant filed refund claim of such payment Rs. 21,96,432/- on 19-04-2013 after payment made by GAR-7 Challan, when Rs. 21,96,432/- was debited from Cenvat Credit. However, on litigation by both sides, amount of Rs. 21,96,432/- was released to Appellant after O-I-A No. AHM-EXCUS-003-APP-099-14-15 dated 18-11-2014 by Commissioner (Appeals), Central Excise, Ahmedabad-I holding that recipient of Service can pay tax from Cenvat Credit Account as reflected in O-I-A. Department's Appeal against the said O-I-A dated 18-11-2014 stand dismissed vide the CESTAT Ahmedabad's Final Order No. A/13142/2017 dated 04-10-2017 against which there is no further Appeal by department.

3.1 He also submits that the issues to be decided here are whether (i) Service Tax on "Intellectual Property service" as defined u/s 66(55b) of Finance Act, Appellant is required to pay service tax and (ii) whether it can be discharged from Cenvat Credit Account or not. Regarding discharging Service Tax from Cenvat Credit Account, Appellant has submitted that there was no restriction for Payment of Service Tax from Cenvat Credit under Reverse Charge in terms of Rule 3(4) of Cenvat Credit Rules 2004. Explanation was inserted in Rule 3(4) of Cenvat Credit Rules, 2004 by Notification No. 28/2012-CE(NT) dt. 20-06-2012, w.e.f. 01-07-2012, which provided restrictions that Cenvat credit cannot be used for payment of Service Tax for services, where person liable to pay tax is service recipient. This is covered in Appellant's own case vide this Hon'ble CESTAT's Order No. A/13142/2017 dt. 04-10-2017 considering decision in Kansara Modler Ltd vs. CCE, Jaipur - 2013 (32) S.T.R. 209 (Tri.-Del.) and other decisions. Appellant placed reliance on Order NO. A/10005-10007/2023 dtd 04.01.2023 in M/s Black Box Ltd [Appeal No. E/631/2012-DB] by this Hon'ble CESTAT, Ahmedabad.

3.2 He submits that the entire demand of Service Tax confirmed with interest and penalty deserves to be set aside. Intellectual Property Right of overseas supplier is not Registered in India under any Law. Therefore, Appellant is not liable to pay Service Tax on IPR Service in India. He submits that it is settled law by the following decisions of the Hon'ble Tribunal, wherein it has been held that to levy Service Tax under IPR, such right should have been registered with trade mark/patent authority in India. In present case, there is no evidence adduced on record by Revenue to show that such right is registered in India. As such, there can be no levy of Service Tax in relation to provision of IPR service for charging Service Tax on Appellant. He emphasised that the amount of Service Tax deposited from Cenvat Credit Account is without the authority of law and requires to be allowed as the consequential benefits to Appellant in this case. He has relied upon the following decisions for this submission :-

- 2016 (44) S.T.R. 82 (Tri. - Mumbai) - Reliance Industries Ltd vs CST-LTU-Mumbai
- 2016 (45) S.T.R. 118 (Tri. - Del.) - Chambal Fertilizers & Chemicals Ltd vs CCE, Jaipur-I
- 2017 (48) S.T.R. 94 (Tri. - Mumbai) -Catapro Technologies vs CCE, Nashik
- 2017 (49) S.T.R. 209 (Tri. - Bang.) - ASEA BROWN BOVERI LTD vs CCE, Bangalore
- 2017 (5) G.S.T.L. 332 (Tri. - Mumbai) - ASK Chemicals Foundry Solutions (India) Pvt. Ltd
- 2018 (15) G.S.T.L. 375 (Tri. - Kolkata)- SICPA INDIA PVT. LTD vs CCE&ST, SILIGURI
- 2019 (31) G.S.T.L. 472 (Tri. - Mumbai) - Technova Imaging Systems Pvt. Ltd vs CCE
- 2019 (24) G.S.T.L. 55 (Tri. - Bang.) - ABB Ltd vs CCE&ST, LTU, Bangalore

3.3 He submit that the SCN dated 05.09.2014 demanding Service Tax is hit by time limitation of "one year", as SCN for payments made in 2010-11 were known to department and since Appellant has not suppressed any fact with intent to evade any service tax, such SCN for demand issued on

05.09.2014 is not sustainable on time limitation. The Ingredients i.e. "fraud, collusion or willful mis-statement or suppression of facts, with intent to evade of Service Tax" do not exist in facts of this case. He submits that various Decisions relied upon on Time Limitation are applicable.

3.4 He also submits that Show Cause Notice and demand against Appellant would not be justified if Appellant himself was entitled to avail Cenvat Credit of Service Tax paid under RCM and assessee was in a position to utilize Cenvat Credit for final outward transactions. It is also a settled legal position that Revenue cannot invoke larger period of limitation in cases involving Revenue Neutral Situation, because an assessee could never have any intent to evade payment of tax in revenue neutral situation. He has relied upon plethora of case laws in support of claim of Revenue Neutrality :-

4. Shri Anoop Kumar Mudvel, Superintendent (Authorized Representative) appearing on behalf of Revenue, reiterates the finding of impugned orders and submits that as Service Tax was payable in cash under RCM and to reject the Appeal filed by Appellant.

5. We have carefully considered the submissions made by both sides and perused relevant records. The issue is to decide whether Service Tax on "Intellectual Property service" is payable in the facts of this case. There is no dispute on the facts that the amount of Rs 3,55,96,434/- paid by the appellant to M/s Benasedo Spa, Italy for Transfer of Technical know how and Royalty as per their Agreement dated 31-03-2010 has been treated as "Taxable Value" under "Intellectual Property Service" by Revenue, attracting total Service Tax of Rs. 21,96,432/- which is in dispute in this case. However, relevant provisions under the Finance Act 1994 governing the levy are as under :-

"Section 65(55a) of the Act defines "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"

*Section 65 (55b) "intellectual property service" means, —
(a) transferring, [temporarily]; or (b) permitting the use or enjoyment of, any intellectual property right;]*

Section 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;

We also find that while imposing levy of the Service tax, CBEC has also clarified vide Circular No. 80/10/2004-S.T. dated 17-9-2004 in its para 9 as under :-

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

From the above provisions regarding levy of service tax on IPR it is mandatory that the Intellectual Property Right is registered or governed by law in India. In the fact of the present case the service provider being not located in India, its Intellectual Property Right is not registered under any law in India, therefore for this reason itself the service received by the appellant is clearly not taxable under the reverse charge mechanism in the hands of the appellant.

We find that the decisions relied upon by the appellant are clearly applicable in this case. Thus, on issue about Appellant's liability to pay Service Tax on "Intellectual Property service" as defined u/s 66(55b) of Finance Act, 1944 or otherwise, we find force in the submissions of Appellant supported by following decisions of Tribunal, wherein it has been held that to levy the Service Tax under IPR, such right should have been registered with trade mark/patent authority in India. However, in the present case, admittedly, there is no evidence adduced on record by the Revenue to show that such IPR is Registered in Indian Law. As such, there can be no levy of Service Tax in provision of IPR service for recovery of Service Tax from the Appellant. Following decisions relied upon by Appellant support their case :-

- 2016 (44) S.T.R. 82 (Tri. - Mumbai) - Reliance Industries Ltd vs CST-LTU-Mumbai
- 2016 (45) S.T.R. 118 (Tri. - Del.) - Chambal Fertilizers & Chemicals Ltd vs CCE, Jaipur-I
- 2017 (48) S.T.R. 94 (Tri. - Mumbai) -Catapro Technologies vs CCE, Nashik
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- 2017 (5) G.S.T.L. 332 (Tri. - Mumbai) - ASK Chemicals Foundry Solutions (India) Pvt. Ltd
- 2018 (15) G.S.T.L. 375 (Tri. - Kolkata)- SICPA INDIA PVT. LTD vs CCE&ST, SILIGURI
- 2019 (31) G.S.T.L. 472 (Tri. - Mumbai) - Technova Imaging Systems Pvt. Ltd vs CCE
- 2019 (24) G.S.T.L. 55 (Tri. - Bang.) - ABB Ltd vs CCE&ST, LTU, Bangalore

5.2 We find that Fees and Royalty paid by the appellant is towards Intellectual Property Right which is owned by company of Italy and the same is not registered under any law in India in terms of the definition of Intellectual

Property Right is given in Section 65(55a) of Finance Act 1994. As per the facts of the present case, since the Intellectual Property Right which is used by the appellant belongs to the overseas supplier and that Intellectual Property Right is not governed by any law in India, therefore levy is not covered under the definition of Intellectual Property Right. Accordingly, the same is not taxable. The decision of *Reliance Inds. Ltd.* cited by the Id. Counsel squarely applies in the present case. We are, therefore of considered view that in the facts of the present case, service of Intellectual Property Right is not covered for levy under the definition of Intellectual Property Right service given in Finance Act, 1994. Therefore, the transactions of payment of Fees and Royalty are not taxable.

5.1 Without prejudice to the above, we find force in the appellant's submission that the Appellant has debited Service Tax in question for Rs.15,58,200/- + Rs. 6,38,232/-, from their Cenvat Credit and intimated such payment of Service Tax to the jurisdictional officers and reflected in periodical ER-1 and ST-3 Returns filed for the relevant period. The issue about Cenvat Credit can be used for payment of Service Tax in respect of services, where person liable to pay the Service Tax is service recipient is covered in Appellant's own case vide this Tribunal's Order No. A/13142/2017 dated 04-10-2017 considering decision in *Kansara Modler Ltd vs. CCE-2013 (32) S.T.R. 209 (Tri.-Del)* and other decisions.

We are also of the view that the amounts debited from Cenvat Credit Account can not be retained by the Government without any authority of law and the same deserves to be returned to the Appellant in accordance with the law.

5.3 Since we have decided the matter on its merits, we are not inclined to deal with the other issues raised by the counsel regarding the revenue neutrality and time limitations for SCN etc against such demand of Service Tax, in this case.

6. As per our above discussions and findings the impugned order confirming demand of Service Tax with interest and Penalty is not sustainable against the Appellant. As a result the impugned order is set aside. The Appeal of Appellant is allowed, with consequential relief, as per the law.

7. As regard miscellaneous application, on consideration of the submission of the learned Counsel and perusal of certificate dated 03.02.2020 issued by ROC, Ahmedabad, the name of the applicant is changed from "Crest Composites and Plastic Limited" to "Crest Speciality Resins Pvt Ltd.". Accordingly the miscellaneous application is allowed.

(Pronounced in the open Court on 02.11.2023)

**RAMESH NAIR
MEMBER (JUDICIAL)**

**(RAJU)
MEMBER (TECHNICAL)**

PALAK