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Dear Professional Colleague,

Merely making entry in books of account did not amount to provision of service

We are sharing with you an important judgement of the Hon'ble CESTAT-Chennai in the case of **M/s FUTURA POLYESTER LTD. versus COMMISSIONER OF CENTRAL EXCISE. CHENNAI-I [2013 (1) TMI 658 - CESTAT CHENNAI]** on the issue:

Issue:

Whether merely making entry in books of account amount to provision of service?

Facts:

M/s Futura Polyester ltd. ("**the Appellants**") entered into an agreement with M/s. Futura Polymers Ltd., a 100% EOU Division for transfer of technical know-how. As per the agreement, the appellants agreed to transfer technical know-how in future and M/s. Futura Polymers Ltd, were at liberty to avail the advice of the appellants. A consideration was fixed in the agreement but M/s. Futura Polymers Ltd., never sought the advice of the appellants and the appellants never rendered any service of transfer of technical know-how to M/s. Futura Polymers Ltd. But the appellants made a debit entry in their books of accounts for the services to be provided in future. Consequently, the Revenue was of the view that the appellants are liable to service tax under the category of *"Consulting Engineering Service"* as per the agreement entered into between them and their client - M/s. Futura Polymers Ltd. Therefore, a show-cause notice was issued and adjudication took place and demand of service tax along with penalties was confirmed against the appellants. Thereafter, the appellants filed an appeal before the Hon'ble CESTAT-Chennai.

The contention of the appellants was that neither service has been provided by them nor any consideration for providing the service have been received by them, therefore, they are not liable to pay service tax. Further, it was submitted that the supply of technical know-how cannot be taxed under the category of *"Consulting Engineering Service".*

Held:

It was held that ***merely making entry in the books of accounts does not render that the appellants have provided any service. The Appellants have never provided any service and no consideration for the service have been received during the period***. In the instant case, no service has been provided by the Appellants and only agreement to provide the service has been entered into, the service tax was not payable for the 'service to be provided', as the demand is for the period prior to 16.06.2005. It was held by the Tribunal in the case of *CCE* v. *Mastermind Classes (P.) Ltd.* [2010] 24 STT 55 (New Delhi – CESTAT) the demand of tax for an earlier period prior to levy of service tax is not sustainable.

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Section 65 (105) of the Finance Act, 1994 defined the term "taxable service" in respect of various taxable services. Till 16/6/2005, the relevant part of the said Section read as *"Taxable service means any service provided by....to...."* ***Therefore, the present case is covered by this analogy that no service tax will be leviable on those services where no service has actually been provided.***

Further, it has also been held by the Hon'ble Supreme Court in the case of *Association of Leasing & Financial Service Companies* v. *Union of India* [2010] 29 STT 316 (SC) & *Union of India* v. *Martin Lottery Agencies Ltd.* [2009] 20 STT 203 (SC) that ***"when no service has been rendered, service tax cannot be levied".***

With respect to the issue of debit entry passed by the Appellants in their books for service to be provided in future, it was also held that ***the Notification No.19/2008 cannot be said to have retrospective effect***, wherein it was explained that "deems creation of book entry" as receipt of consideration.

Furthermore, reliance was also placed on the case of *CST & STC* v. *Molex (India) Ltd*. [2012] 18 taxmann.com 113 (Kar.), the Hon'ble High Court had held that supply of technical know-how cannot be taxed under "Consulting Engineering Service". Therefore, the argument of Revenue to tax the supply of technical know-how under "Consulting Engineering service" was also rejected by the Hon'ble CESTAT.

In view of the above observations, it was held that ***neither there is service provided nor any consideration has been received. Moreover, supply of technical know-how cannot be taxed under "Consulting Engineering Service"***. Henceforth, the contention of the Department was rejected and case was decided in the favour of the Appellants.

Hope the information will assist you in your Professional endeavours. In case of any query/ information, please do not hesitate to write back to us.

Thanks & Best Regards.

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