CESTAT, BANGALORE BENCH

Futura Polyester Ltd.

v.

Commissioner of Central Excise

Final Order Nos. 850-851 of 2012

Appeal Nos. ST/69 & 70 of 2005

July 30, 2012

ORDER

Ashok Jindal, Judicial Member – The appellants are in appeal against the impugned order for demand of service tax under the category of "Consulting Engineering Service".

2. The facts of the case are that 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 with regard to manufacture of 'Amorphous Polyester resin and solid state polymerisation of modified polyester'. A consideration was fixed in the agreement but M/s. Futura Polymers Ltd., never sought the advice of the appellants and the appellants admittedly have never rendered any service of transfer of technical know-how to M/s. Futura Polymers Ltd. But the appellants made a debit entry for the services to be provided in future, in their books of accounts and for creating entry in the books of accounts, 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, demand of service tax along with penalties has been confirmed against the appellants. Aggrieved from the said order, the appellants are before us.

3. The learned counsel for the appellants appeared and submitted that in this case 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 is submitted that the supply of technical know-how cannot be taxed under the category of "Consulting Engineering Service" as no demand is leviable, therefore, penalties imposed are also not sustainable.

4. Heard the learned counsel and considered his submissions.

5. In this case, it is an admitted fact that the appellants have never provided any service and no consideration for the service have been received and during the period. The service tax was not payable for the 'service to be provided', as the demand is for the period prior to 16.06.2005. Therefore, as 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. Merely making entry in the books of accounts does not render that the appellants have provided any service. It has been held by the Hon'ble Apex Court in the case of *Association of Leasing & Financial Service Companies* v. *Union of India* [2010] 29 STT 316 (SC) that when no service has been rendered, service tax cannot be levied. As held by the apex court in the case of *Union of India* v. *Martin Lottery Agencies Ltd.* [2009] 20 STT 203 (SC). The Notification No.19/2008 cannot be said to be have retrospective effect, wherein it was explained that "deems creation of book entry" as receipt of consideration is not retrospective in nature. Further, in the case of *CST & STC* v. *Molex (India) Ltd*. [2012] 18 taxmann.com 113 (Kar.), the Hon'ble High Court has held that supply of technical know-how cannot be taxed under "Consulting Engineering Service". In view of these observations, we do not find any merit in the impugned orders, as neither there is service provided nor any consideration have been received. Moreover, supply of technical know-how cannot be taxed under "Consulting Engineering Service", therefore, the impugned orders are set side, and appeals are allowed with consequential relief, if any.