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Dear Professional Colleague,

Electricity charge recovered from tenant not includible in renting of immovable property

We are sharing with you an important judgement of the Ld. Commissioner of Central Excise (Appeals), Chennai in the case of **In Tichel Bio Park Ltd. (2013) 33 taxmann.com 102 (CCE-Chennai)** on following issue:

Issue:

Whether electricity charges towards electricity consumed by tenant, recovered on actual basis by landlord are includible in value of renting of immovable property services?

Facts & Background:

M/s Tichel Bio Park Ltd. ("**the Appellant**") was rendering "Renting of Immovable Property Services" ("**the renting services**"). However, the Appellant didn't include the electricity and air conditioning charges in the taxable value while paying service tax on the charges collected towards 'Renting of Immovable Property Services'. The Department contended that the electricity charges were liable to service tax by inclusion in the value of the renting services.

The Appellant contended that no service tax is payable on the electricity charges which was the actual amount paid to the Electricity Board as the same is deductible in terms of Rule 5 (2) of the Service Tax (Determination of Value) Rules, 2006 ("**the Valuation Rules**") under "Pure agent".

Further, the Appellant also argued that no service tax is payable on supply of electricity which is 'goods' and not 'service'.

Held:

It was held by the Ld. Commissioner of Central Excise (Appeals) ("**the Commissioner Appeals**") that ***no Service tax is demandable on electricity charges recovered on actual basis, which was paid to the Electricity Board.***

The Commissioner Appeals observed that the Appellant had provided individual electricity meters for each module in the tenancy area for every tenant and maintained complete record of the electricity consumption for every month. The Appellant collected charges for electricity consumed by tenants and remitted to the Electricity Department. The Appellant did not collect any excess money over the electricity charges. Therefore, the activity of the Appellant was covered by the definition of Pure Agent as per Rule 5(2) of the Valuation Rules and such reimbursable expense need not be included in the taxable value of the Renting services.

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It is pertinent to note that the exclusion from the taxable value is given in sub-rule (2) of Rule 5 of the Valuation Rules, as to the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, on fulfilment of certain conditions enumerated there in. It is construed that the expenditure incurred for procuring the goods and services for the service recipient by the service provider and which was recovered on actual basis will not be included in the taxable value.

Further, it was held that the activity of providing electricity consumed by tenants and remitted to the Electricity Board tantamount to sale of goods and no service is rendered by the Appellant.

Hence, the case was decided in favour of the Appellant.

Relevant legal provisions post Negative List Regime w.e.f 1-7-2012:

Service tax is not applicable w.e.f. July 1, 2012 under Section 66D(k) of the Finance Act, 1994 (**"the Finance Act"**) on transmission or distribution of electricity by an electricity transmission or distribution utility. An 'electricity transmission or distribution utility' has been defined in Section 65B(23) of the Finance Act. It includes the following –

- the Central Electricity Authority
- a State Electricity Board
- the Central Transmission Utility (CTU)
- a State Transmission Utility (STU) notified under the Electricity Act, 2003 (36 of 2003)
- a distribution or transmission licensee licensed under the said Act
- any other entity entrusted with such function by the Central or State Government

In this context the Education Guide on taxation of service issued by the CBEC dated June 20, 2012 (**"the Education Guide"**) clarifies as under:

"4.11.2 If charges are collected by a developer or a housing society for distribution of electricity within a residential complex then are such services covered under this entry?"

No. The developer or the housing society would be covered under this entry only if it is entrusted with such function by the Central or a State government or if it is, for such distribution, a distribution licensee licensed under the Electricity Act, 2003.

4.11.3 If the services provided by way installation of gensets or similar equipment by private contractors for distribution of electricity covered by this entry?"

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No. the entry does not cover services provided by private contractors. Moreover the services provided are not by way of transmission or distribution of electricity.”

Thus if charges are collected by a developer or housing society for distribution of electricity within a residential complex then such activities are not covered under Section 66D(k) of the Finance Act and thus exigible to service tax.

Way forward:

It is important to note the provisions of Rule 5(2) of the Valuation Rules, which provides that the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if specified conditions mentioned there in are satisfied.

It looks like no Service tax is leviable on electricity charges recovered on actual basis, which was paid to the Electricity Board by landlord for the provision of renting of immovable property services provided specified conditions as mentioned under Rule 5(2) of the Valuation Rules are satisfied.

Further, it may also be argued that the activity of providing electricity tantamount as sale of goods and there is no service rendered.

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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