

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 18.03.2013

+ **W.P.(C) 1784/2013**

**SERCON INDIA PRIVATE LIMITED
THROUGH MOHAN GOEL**

... Petitioner

versus

**COMMISSIONER (ADJUDICATION),
SERVICE TAX**

... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Nageshwar Rao with Ms Rajeshwari K. G., Mr Raghuram
Srinivasan and Ms Sayaree Basu Mallik

For the Respondent : Mr Rahul Kaushik

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the order dated 05.02.2013, whereby the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has granted partial relief to the petitioner on its application under Section 35F of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 with regard to the amount of pre-deposit to be made by the petitioner.

2. As per the order-in-original, which is the subject matter of the appeal before CESTAT, a demand of service tax of approximately ₹ 3.57 crores has been raised against the petitioner. A penalty of ₹ 4 crores has also been imposed on the petitioner. As against this, the Tribunal has directed that the petitioner should deposit a sum of ₹ 1 crore in three instalments, namely, ₹ 40 lacs by 20.02.2013, ₹ 30 lacs by 20.03.2013 and ₹ 30 lacs by 10.04.2013. The petitioner has already deposited the first instalment of ₹ 40 lacs. The petitioner is before us seeking waiver of deposit of the balance amount of ₹ 60 lacs.

3. It is the case of the petitioner that the respondents have added a figure of approximately ₹ 37.55 crores and have levied service tax on that amount to the extent of ₹ 3.57 crores. It is the case of the petitioner that the figure of ₹ 37.55 crores is *ex facie* wrong inasmuch as the petitioner has only received a sum of ₹ 14.22 crores by way of reimbursement for expenses incurred by it. It is, if at all, only the sum of ₹ 14.22 crores which could be the subject matter of taxation. If the approximate average rate of tax is taken to be 10%, then the entire tax liability, if at all, would be only to the extent of ₹ 1.4 crores. Therefore, according to the learned counsel for the petitioner, even if the stand of the revenue is accepted that

the reimbursed expenditure can be the subject matter of service tax, only an amount of ₹ 1.4 crores would be the resulting tax. However, the learned counsel for the petitioner submitted that the issue of charging service tax on reimbursable expenditure has been decided against the revenue in the case of **Intercontinental Consultants & Technocrats Pvt. Ltd v. Union of India: 2013 (29) STR 9 (Del)**. Therefore, according to the learned counsel for the petitioner, even that issue stands settled and as a consequence, no amount of service tax would be due from the petitioner in respect of the relevant period, i.e., 01.10.2002 to 31.03.2007.

4. There is also the issue of invocation of the extended period of limitation inasmuch as there has been, according to the petitioner, no wilful suppression or concealment on the part of the petitioner. Therefore, in any event, the show cause notice ought to have been issued within the period of one year and it is only the demand for the period of one year before the date of issuance of the show cause notice that could be raised, if at all. He submitted that if the period of one year is taken, then the entire demand would be reduced to approximately ₹ 7 lacs, as against which the petitioner has already deposited a sum of ₹ 40 lacs.

5. The learned counsel for the respondents, however, submitted that the demand raised under the order-in-original specifically indicates that the expenditure to the extent of ₹ 37.55 crores was reimbursed and, therefore, on that basis the demand of ₹ 3.57 crores has been worked out. As against that, the Tribunal has already granted substantial relief by restricting the pre-deposit amount to ₹ 1 crore and has also granted the petitioner the benefit of instalments. Therefore, according to the learned counsel for the respondents, the petitioner has been adequately protected and substantial relief has been given to the petitioner and this Court ought not to interfere with the impugned order passed by the Tribunal.

6. Having examined the matter at some length, we find that, *prima facie*, the issue of levying and charging service tax on reimbursable expenditure has been settled by the decision of this Court in ***Intercontinental Consultants & Technocrats Pvt. Ltd*** (*supra*). Therefore, *prima facie*, the amount of ₹ 14.22 crores, which has been actually received by the petitioner from its clients towards reimbursement of expenses, could not be the subject matter of service tax. Anyhow, even if we assume that the expenditure, which has been reimbursed to the petitioner could be the subject matter of levy of service tax, that amount

would have to be restricted, *prima facie*, to the sum of ₹ 14.22 crores and not to the figure of ₹ 37.55 crores which has been taken by the revenue. This is so because we do not find any material which would indicate that the petitioner received anything in excess of ₹ 14.22 crores by way of reimbursement from its clients. The figure of ₹ 37.55 crores includes the direct expenditure incurred by the petitioner for which no reimbursement was claimed nor given. That can never be added on to the figure of professional fees which has been charged for by the petitioner and paid for by the clients and on which service tax has already been levied and collected.

7. As per the financial statements of the petitioner, total revenue, on account of transactions between 01.10.2002 and 31.03.2007, came to approximately ₹ 57.58 crores. Out of this, the billing for professional service was a figure of approximately ₹ 33 crores. The expenditure for which the reimbursement was claimed and billed by the petitioner was to an extent of approximately ₹ 14.58 crores (though the actual amount received as reimbursement was approximately ₹. 14.22 crores). The balance figure of approximately ₹ 10 crores was stated to be 'contra entries'. These contra entries, according to the learned counsel for the

petitioner, merely inflated the figure of receipts, but in reality, the actual receipts did not increase by ₹ 10 crores inasmuch as there were contra entries indicating direct costs of the same amount of ₹ 10 crores.

8. Thus, if the figure of ₹ 37.55 crores, which has been taken by the revenue, is added to the figure of ₹ 33.00 crores, which has been billed and received by the petitioner for professional services, the resulting amount would be approximately ₹ 70 crores. This would mean that the petitioner actually received a sum of ₹ 70 crores as revenue from its clients. But, according to the learned counsel for the petitioner, it is nobody's case that the petitioner actually received the said sum of ₹ 70 crores. Therefore, in whichever way we look at it, we find that the petitioner has been able to make out a very good *prima facie* case that no additional tax is payable by it in respect of the service rendered by it. However, since the petitioner has already paid a sum of ₹ 40 lacs, following the directions of the Tribunal, we are not inclined to interfere with that part of the order. Insofar as the balance ₹ 60 lacs is concerned, we feel that it would not be necessary for the petitioner to deposit the same by way of pre-deposit so as to have the petitioner's appeal heard by the Tribunal.

9. Consequently, we allow this writ petition by directing that the pre-deposit of ₹ 40 lacs be regarded as sufficient compliance of the provisions of Section 35F of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 for hearing the petitioner's appeal which is pending before the Tribunal. The petitioner shall not be required to deposit any further amount till the disposal of the appeal. We also make it clear that our views indicated above are only *prima facie* and should not be taken into account by the Tribunal while hearing the appeal on merits.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

MARCH 18, 2013
SR