

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Service Tax Appeal No.232 of 2012

(Arising out of Order-in-Appeal No.01/ST/BBSR I/2012 dated 20.02.2012 passed by Commissioner (Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar)

M/s Paradeep Phosphates Ltd.
PPL Township, Paradeep

.....Appellant

VERSUS

**Commissioner of Central Excise, Customs
& Service Tax, Bhubaneswar**
C.R.Building, RajaswaVihar, Bhubaneswar-751007, Odisha

...Respondent

Appearance:

Shri Ajay Sanwaria & Ms.Shreya Mundhra, both Chartered Accountants for the Appellant

Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:

**HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER**

FINAL ORDER NO.75459/2022

DATE OF HEARING : 13.06.2022

DATE OF PRONOUNCEMENT : **11 AUGUST 2022**

Per P.AnjaniKumar :

The appellants were admitted to the Board for Industrial and Financial Reconstruction (BIFR) and a Scheme for Financial Reconstruction was sanctioned. In terms of the Scheme, dues of current unsecured creditors including OCP-MP Morocco to the extent of 11% of the over dues were proposed to be waived off ; in respect of non-current unsecured creditors including M/s Group Chimique Tunisien (GCT), a waiver of 70% were granted. An appeal was filed against the same before the Appellate Authority for industrial and financial reconstruction, which remanded back the matter to BIFR with a direction to the Bank to grant similar dispensation to M/s Group Chimique Tunisien (GCT). The said order was challenged by the

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appellant company before the Hon'ble High Court and the Hon'ble Supreme Court. In subsequent proceedings, the BIFR directed the appellants to resolve the settlement of outstanding dues with GCT and submit completion report to the Board and MA (SBI). Accordingly, the appellant entered into an agreement and appointed M/s Cotunace to mediate and get the matter settled with GCT for a mediation fee of USD 10,00,000/-, which was paid by the appellants to M/s Cotunace. The appellants deposited the service tax under the Head "Management Consultant's Service" on reverse charge basis under protest. The appellant felt that the fees paid to M/s Cotunace did not qualify under any category of taxable service and therefore, filed a refund claim for Rs.45,78,857/- on 16.03.2011.

2. The Department issued a show-cause notice proposing to reject the refund claim and the claim was rejected by the Order-in-Original and such rejection was upheld by the impugned order dated 20.02.2012. Hence, this appeal.

3.1 The Learned Chartered Accountant appearing on behalf of the appellants, submits, it is evident that the sine qua non for taxability of a service provided by a management or business consultant is that it should be in connection with the management of any organisation. The term "management" was examined by the Hon'ble Apex Court in the case of R. Dalmia Vs CIT 1977 (106) IT (SC) to include the "act of managing by direction, or regulation, or administration or control or superintendence". In the aforesaid judgment, it has also been observed that in the context of business, "Manage" means "to control, to guide, to administer, to conduct or direct affairs", carry on "business".

3.2 Further, the scope of 'management consultancy services' was examined by the Central Board of Excise and Customs (CBEC) in consultation with the Indian Institute of Management, Ahmadabad and the opinion obtained was communicated vide Board's Circular No. 1/1/2001-S.T., dated June 27, 2001 which reads as follows :

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"7. In this regard, the Board had consulted the Indian Institute of Management, Ahmadabad for obtaining an expert opinion on the subject matter. They have opined that the term "management" is generally understood to mean running the affair of an organisation in an organised and systematic manner. To be able to do this efficiently and effectively, management typically involves carrying out a host of activities, functions and tasks and at different levels. Thus management encompasses both strategic and operational level functioning and would include tasks such as planning, organising, staffing, directing, controlling and coordinating. Management also invariably involves designing organisational structure around functions such as marketing, manufacturing, research and development and finance and/or business area such as product groups or geographical markets. Thus management of any organisation involves carrying out a wide variety of clearly defined activities across a number of organisational sub-units in a coherent and coordinated manner. Since the expression "Management" is an inclusive term, 'management consultant' would also be equally encompassing expression and would include any adviser who renders services on any aspect of management."

3.3 In view of the aforesaid, it can be inferred that the levy of Service tax is on the activity involving advise or consultancy in connection with the management of any organisation, which involves controlling guiding or administering or conducting or directing affairs of such organisation and does not cover mere provision of a service in connection with the business of the organisation. The activity of management would encompass decision making activities required to run the business in an efficient manner.

3.4 In the present case, the contract between the Appellant and M/s. Cotunace for mediation services to settle outstanding dues payable by the Appellant to its supplier, GCT, was in pursuance to the Order of the BIFR. In terms of such Order, M/s Cotunace was to arrive at a

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settlement such that the pending disputes between the Appellant and GCT are resolved and arbitration between the parties is precluded.

3.5 At this juncture, a reference is made to the meaning of the term 'mediation' as defined under the Black's Law Dictionary (8th Edition), which states that mediation is "a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution".

3.6 The concept of mediation has also been clarified in the Mediation Training Manual of India. Issued by the Mediation and conciliation Project Committee, Supreme Court of India, Delhi as:

"1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/ commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

1.8 the mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions."

3.7 In line with the process of mediation summarized herein-above, M/s cotuance enabled the parties, viz. the Appellant and GCT to find a solution to the dispute relating to the outstanding dues. M/s cotuance has not in any circumstance provided any advice or consultancy or assistance with respect to management of the financial aspects of the Appellant Company. This factual scenario is evident from the agreement between the Appellant and the M/s Cotunace as well as

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from the Order of the BIFR intending to settle the outstanding dues between the parties.

3.8 The Appellant submits that in the absence of any form of guidance or advice or assistance with respect to management of the finances of the Appellant, the activity by the Mediator, which is executionary in nature, cannot be said to fall under the category of management or Business Consultant service. Reliance in this regard is placed on M/s Basti Sugar Mills Company Ltd., Vs. CCE-2007 (7) S.T.R. 431 (Tribunal), which has been affirmed by the Hon'ble Supreme Court in 2012 (25) S.T.R. 1154 (S.C.).

3.9 The Appellant further submits that while undertaking the mediation activity, the Mediator is expected to possess a skill of negotiation and communication to resolve the disputes relating to outstanding dues between the parties and not in any area of management of the Appellant Company. In the absence of any such expertise or performance of an activity relating to such expertise provided by the Mediator, the present activity can by no stretch be taxed under the above-mentioned entry. Reliance in this regard is placed on the judgment of Swaraj Mazda Ltd. Vs. CCE, Chandigarh 2013 (31) STR 205 (Tri.-Del).

3.10. It is further submitted that the Respondent has grossly erred in as much it has considered the activity of mediation to be similar to that of financial management of the Appellant, which is concerned with the planning and controlling of the firm's financial resources. In the present case, while the activity of mediation by M/s Cotunace no doubt leads to resolving a contractual dispute between the parties in relation to the outstanding dues, which ultimately has an impact on the finances of the Appellant, the aforesaid entry cannot be said to include each any every activity which has a financial implication on the business. Hence, the finding of the Respondent is grossly unsustainable and liable to be set aside.

3.11 Consequently, there is no basis for levy of Service Tax under the head "Management or Business Consultant Service" and the entire

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refund claim of the tax paid inadvertently is admissible to the Appellant along with interest thereon. The impugned order is liable to be set aside for this reason itself.

4. The learned Chartered Accountant for the appellants relies on the following case laws:

1.	K.R. Alloys Ltd Vs CCE, Calicut 2009 (13) STR 584 (Tri-Bang)
2.	Telephone Cables Ltd, Vs CCE, 2007 (7) STR 657 (Tri-Del)
3.	Swaraj Mazda Ltd, Vs CCE, Chandigarh 2013 (31) STR 205 (Tri-Del)
4.	CCE, Chennai Vs Sundaram Finance Ltd., 2007 (7) STR 55 (Tri-Chennai)
5.	Commissioner Vs Basti Sugar Mills Co Ltd, 2012 (25) STR J154 (SC) affirming 2007 (7) STR 431 (Tri)
6.	Commissioner Vs Sterlite Optical Technologies Ltd, 2016 (41) STR J305 (Guj) affirming 2009 (13) STR 582 (Tri)
7.	Glaxo Smithkline Pharmanceuticlas Ltd., Vs CCE 2005 (188) ELT 171 (Tri-Mumbai)
8.	CCE, Chennai Vs Futura Polyesters Ltd, 2011 (24) STR 751 (Tri)
9.	Nirulas Corner House Pvt Ltd, Vs Commissioner 2009 (14) STR 131 (Tri-Del)

5. The learned Authorised Representative for the Department submits that the definition of "Management Consultants" is vast and encompasses the activities undertaken by M/s Cotunace to the appellants. He reiterates the findings of the impugned order and submits that the Department has rightly rejected the refund claim on merits as well as unjust enrichment. He relies on the Tribunal's decision in the case of S. Gurumurthy Vs. Commissioner of Central Excise and Service Tax, Chennai III reported in 2019 (22) GSTL 55 (Tri-Chennai). He submits that the Circular issued in 2001, will not be of any help to the appellants as it was issued in the period before the amendment to the definition of Management Consultants.

6. Heard both sides and perused the case records.

7. We find that in terms of Section 65(105)(r) of the Finance Act, 1994, taxable service has been defined as "any service provided or to be provided to any person, by a management consultant in connection with the management of any organization, in any manner".

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Section 65 (65) of the Finance Act, 1994, provides that "management or business consultant" means any person, who is engaged in providing any service, either directly or indirectly, in connection with the management of any organization in any manner and includes any person, who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management. Learned authorised representative submits that from the above definition, it can be seen that the definition of management consultant is under two parts : the first part says that any service either directly or indirectly in connection with the management of any organization, would be eligible to be claimed management consultancy service and the second part i. e inclusive part, provides for rendering of any advice, consultancy or technical assistance in relation to the financial management etc, would constitute management consultancy service.

8. We find that the definition prima facie appears to be all encompassing. However, for the same reason one cannot jump to conclusion that it covers any service in connection with the organization in any manner. One has to look into the definition and the manner in which courts have interpreted the same. We find that the term management or business consultancy service or for that matter any consultancy would necessarily indicate work which is advisory in nature and not physical execution of the work. Moreover, the work done or advice so given should be in relation to management of any organisation or business like financial management, human resource management, marketing management, production management. The term "Management means to control, to guide, to administer, to conduct or direct affairs of business". We find that Tribunal in the case of GlaxoSmithkline Pharmaceutical Ltd. 2004 (188) ELT 171 (Tri. Mum), held that work of a management consultant is advisory in nature. In other words, management consultant does not take up work which is executive in nature.

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9. We find that international council of management consulting institute defines "Management Consulting" and "Management Consultant" as below:-

Management Consulting: The rendering of independent advice and assistance about the process of management to the clients with management responsibilities.

Management Consultants: An individual who provides independent advice and assistance about the process of management to the clients with management responsibilities.

Apex Court in the case of R. Dalmia Vs CIT (1977) 106 ITR 895 (SC) observed as follows:-

"In the context of business, "manage" means to "control, to guide, to administer, to conduct or direct affairs; carry business" (shorter Oxford Dictionary, Webster's New World Dictionary), "management" includes the act of managing by direction, or regulation, or administration or control or superintendence."

10. From the above it can be seen that the work of the consultant is to advise the top management in order to help them in running the organisation in more efficient and effective manner after studying the peculiar features of the existing organisation. Thus, the work of the consultant falls in the realm of thinking and giving ideas and not executing the work or performing the task himself. In the instant case M/s Cotunace have only mediated between the organisations in settling the financial dispute. As submitted by the learned Chartered Accountant for the appellant the role of M/s Cotunace was to arrive at a settlement of the pending dispute between the appellant and GCT. We find that Black's Law Dictionary (8th addition) defines mediation to be "a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution". Mediation is explained, in the mediation training manual of India issued by the mediation and conciliation project committee, Supreme Court of India, as follows:-

"1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of

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the parties, such as personal, business/ commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

1.8 the mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.”

11. On going through the facts of the case and the contract we find that M/s Cotunace worked as middle man for settling the dispute, relating to the outstanding dues, between the appellant and M/s GCT . They have performed the actual act of mediation and their work did not end with mere advice or consultancy. The activity of the mediator i.e. M/s Cotunace cannot be said to fall under the category of management of business consultant. We find that Mumbai Bench of the Tribunal in the case of Ghodawat Energy Pvt. Ltd. 2020 (4) TMI 104 has gone into the issue as together mediation or arbitration would fall under management of business consultancy service. The bench observed that

“Arbitration proceedings are, increasingly, prevalent in settling of trade dispute that would, otherwise, have depended on judicial institutions for resolution. As a statutorily recognised surrogate, recourse to such proceedings can hardly be construed as ‘service’, let alone fitted within one of the taxable services enumerated in section 65(105) of Finance Act, 1994. The mandatory fees for initiation of such proceedings, as well as charges paid for mediation as a prelude arbitration, cannot be any stretch, be rendered liable to tax. We also find that the definition of ‘management or business consultant’ in section 65(65) of Finance Act, 1994 is in relation to management of any organisation of business; the enumeration therein demonstrates, abundantly, the various segments of management that are intended to be covered and the advice obtained from M/s Agri-Waste Technologies does not appear to fit in with such activity. The confirmation of demands in the order impugned before us in the first appeal on these two counts fails to find sustenance.”

12. We find that Tribunal in the case of Basti Sugar Mills Co. Ltd. CCE (2007) STR 431 (T) has held that the activity of a mediator

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cannot fall in to the category of business consultant service. This case was upheld by Supreme Court 2012 (25) STR 3154 (SC). The Tribunal observed that

6. *The definition of management consultant under the taxing statute may be noted:-*

“Management Consultant” means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organization in any matter and includes any person who renders any advice, consultancy, devising, development, modification, rectification or up-gradation of any working system of any organization.”

7. *The above definition makes it clear that what is envisaged from a consultant is advisory service and not the actual performance of the management function. In the present case, the appellant was in-charge of the operation of the factory and thus was performing the management function.*

8. *An ocean separates a manager from a management consultant, a performer from an advisor or a coach. That ocean exists in the present case also. We dealt with a similar case in Rolls Royce Industries Power (I) Ltd. (Supra) and held that where the agreement conferred operational autonomy and responsibility on the contracted party, the relationship is not one of consultancy. The ratio of that decision covers the present dispute also. There is no management consultancy in the facts of the present case and the demand is clearly beyond the scope of the statute.*

13. On-going through the case law relied upon by the appellant, we find that case law supports the contention of the appellant. Tribunal in the case of K. R. Alloys Ltd. 2009 (13) S.T.R. 584 (Tri.-Bang.) observed that

“4. We have carefully considered the submissions and have perused the definition of the term "Management Consultant. The term Management Consultant service, as already extracted, refers to any service provided to a client by a management consultant in connection with the management of any organization in any manner. The appellant is Limited Company, who is carrying on the activity of manufacture of MS Ingots, incidentally, they assisted one Shri SK. Rataria in sing the shares from M/s Akshay Ispat & Ferro Alloys (P) Ltd for which, they charged certain amount as commission Revenue wants to levy Service Tax under the category of Management Consultant in terms of the definition, the appellant is not carrying on the activity of management consultant but are manufacturers of Ferro alloys. Incidentally, they helped in act of acquisition of shares. This activity on their part cannot be brought within the ambit of Management Consultant as is definition. The definition itself clarifies that the activity should be done by a management consultant and it should be connection with the management of any organization in any manner. The appellant has not carried out any activity of management consultant in connection with the management of any organization in any manner. The Commissioner has relied on the Board's Circular which

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clarifies the activity of management consultant, who renders services in an advisory capacity in respect of merger and acquisition transaction. Such an activity has not been done by the appellant. Even Para of the clarificatory Circular states that such an activity of merger and acquisition transaction are not to be treated as management Consultant. They have to be treated only under Banking and Other Financial Services. The Commissioner not read the Circular fully. There is a misapplication of the Circular. The appellants are not Management Consultant by rely playing a role in acquiring shares for a particular person. The impugned order is not legal and proper. The same is (aside and the appeal is allowed with consequential relief, if any.

13.1 Similarly, Tribunal in the case of Sundaram Finance Ltd. 2007 (7) S.T.R. 55 (Tri.-Chennai) observed that

4. After giving careful consideration to the submissions, we find substance in the view taken by the lower appellate authority that the work done by the respondents was in the nature of "in-house services rendered by them as partner of the JV company. Section 65(21) of the Finance Act, 1904 defines Management Consultancy as follows:-

"Management consultant means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organization in any manner and includes any person who renders any advice consultancy or technical assistance, relating to conceptualizing devising, development, modification, rectification or upgradation of any working system of any organization.

We have already enumerated the services rendered by the respondents. None of these has been shown to be a service rendered directly or indirectly in connection with the management of FISAF Again none of these services has been can to involve advice, consultancy, or technical assistance relating to conceptualization, devising, development modification, rectification or upgradation of any working system of the JV company. There is substance in the submission consultant that some of the services in question are covered by the definition of "Business Auxiliary Services which me to be introduced for levy of service tax w.e.f. 1-7-2003. The services in question were rendered in Oct 1999. The definition of "Management Consultancy has continued to be same even after introduction of "Business Auxiliary services for levy of service tax. It would, therefore, mean that a service appropriately classifiable as "Business Auxiliary Service cannot fall within the ambit of "Management Consultancy On this point, the respondents can legitimately claim sport from the Tribunal's decision in Glaxo Smithkline Pharmaceuticals (supra)"

14. In view of the above we find that M/s Cotunace have not rendered any advice for running the organisation of the appellants in an effective manner. Their role was mediation /arbitration in resolving the dispute. They have only performed the work of mediator/arbitrator in resolving the dispute between the appellant and M/s GCT. Actual work performed cannot be equated with advice. Therefore, M/s

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Cotunace did not render any management consultancy service to the appellant. The services rendered by M/s Cotunace do not fall under management consultancy service in terms of Section 65 (65) of Finance Act, 1994. The case of S. Gurumurthy (supra) relied upon by the learned authorised representative is not applicable to the facts of the impugned case and in view of the pronouncements cited above. Therefore, we are of the considered opinion that the appellants are not liable to pay any service tax on reverse mechanism on the services rendered by M/s Contunace to the appellants. Any tax paid this regards is liable to be refunded, if otherwise in order.

15. Accordingly, the appeal is allowed.

(Pronounced in the open Court on 11.08.2022)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(P. Anjani Kumar)
Member (Technical)

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