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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 4th September, 2025

\+ **SERTA 5/2024 & CM APPL. 18266/2024**

COMMISSIONER OF SERVICE TAX DELHI .....Appellant
Through: Mr. Akshay Amritanshu, SSC with Ms. Drishti Saraf and Mr. Mayur Goyal, Advs.

versus

M/S KONARK EXIM PVT. LTD. .....Respondent
Through: Dr. G.K. Sarkar, Mr. Malabika Sarkar and Mr. Prashant Srivastav, Advs.

6 WITH

\+ **SERTA 10/2024**

COMMISSIONER OF CGST DELHI SOUTH .....Appellant
Through: Mr. Akshay Amritanshu, SSC with Ms. Drishti Saraf and Mr. Mayur Goyal, Advs.

versus

MS SIDH DESIGNERS PVT LTD .....Respondent
Through: Dr. G.K. Sarkar, Mr. Malabika Sarkar and Mr. Prashant Srivastav, Advs.

7 WITH

\+ **SERTA 7/2024 & CM APPL. 18268/2024**

COMMISSIONER OF SERVICE TAX DELHI .....Appellant
Through: Mr. Akshay Amritanshu, SSC with Ms. Drishti Saraf and Mr. Mayur Goyal, Advs.

versus

M/S G D MANGALAM EXIM PVT LTD .....Respondent
Through: Dr. G.K. Sarkar, Mr. Malabika Sarkar and Mr. Prashant Srivastav, Advs.

8 WITH

\+ **SERTA 8/2024 & CM APPL. 18323/2024**

COMMISSIONER OF SERVICE TAX, DELHI .....Appellant

Through: Mr. Akshay Amritanshu, SSC with Ms. Drishti Saraf and Mr. Mayur Goyal, Advs.

versus

MS DSM INTERNATIONAL .....Respondent

Through: Dr. G.K. Sarkar, Mr. Malabika Sarkar and Mr. Prashant Srivastav, Advs.

9 AND

\+ **SERTA 9/2024**

COMMISSIONER OF CGST DELHI SOUTH .....Appellant

Through: Mr. Akshay Amritanshu, SSC with Ms. Drishti Saraf and Mr. Mayur Goyal, Advs.

versus

M/S YOGMAYA TRADERS PVT LTD .....Respondent

Through: Dr. G.K. Sarkar, Mr. Malabika Sarkar and Mr. Prashant Srivastav, Advs.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE SHAIL JAIN

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode.

2. These appeals arise out of the impugned judgment dated 3rd July, 2023 passed by Customs Excise and Service Tax Appellate Tribunal (hereinafter, *'CESTAT'*). The issue which has been captured in the CESTAT order itself reads as under:

> *"The issue involved in all the appeals is as to whether the amount paid by the respondents to overseas companies situated in Dubai and shown as "commission" in the shipping documents in relation to export of readymade*

> *garments by the respondents is liable to be taxed under "business auxiliary service", as defined under section 65(19) of the Finance Act, 1994."*

3. Dr. G.K. Sarkar, ld. Counsel for the Respondent, raises a preliminary objection that since the issue involves the question as to whether the services are taxable or not, the appeal would lie to the Supreme Court under Section 35L of the Central Excise Act, 1944.

4. A perusal of the above captured issue would show that the question is whether the Respondents are liable to be taxed under 'business auxiliary service' or not. This would, therefore, be a root question. Upon determination of taxability, the applicable rate would also have to be determined.

5. This is the second round in this litigation. In the first round, the Supreme Court in ***Civil Appeal Nos. 5869-5874 of 2019*** titled ***'Commissioner of Service Tax (CST) v. M/s Sidhi Designers Pvt. Ltd. & Ors.'*** had remanded the matter to the Appellate Tribunal in the following terms *vide* order dated 26th July, 2019:

> *These appeals take exception to the judgment and order dated 02.03.2017 passed by the Customs Excise and Service Tax Appellate Tribunal in Appeal Nos.ST/52112-52114 & 52142-52143/2014 with ST/CO/50455/2013-DB, whereby the appeals preferred by the department came to be dismissed on the specious ground that the issues raised in the appeals have already been adjudicated by the High Court in its decision dated 21.12.2016 in W.P. (C) No.4861 of 2015 and connected cases.*
>
> *After considering the rival submissions, we have no hesitation in taking the view that the subject matter before the High Court of Delhi in the aforestated Writ Petition, which was filed by the assessee, was limited to the claim of refund which was rejected by the department. The observations made in the judgment of the High Court, therefore, will have*

to be understood only in that context; and not as having adjudicated the correctness of the order passed by the adjudicating authority, which was the subject matter of appeals before the Appellate Tribunal at the instance of the department.

In the circumstances, the impugned order deserves to be set aside and parties relegated before the Appellate Tribunal for reconsideration of the appeals on its own merits and in accordance with law, uninfluenced by any observation made by the High Court.

We, however, make it clear that we are not expressing any opinion either way on the contentions available to the parties in the remanded appeals. All questions therein are left open.

The Civil Appeals are disposed of in the above terms. Pending applications, if any, stand disposed of.

6. Post the said remand, the impugned order has been passed by the CESTAT. Considering the nature of the matter, the Appellants are permitted to avail of remedies in accordance with law under Section 35L of the Central Excise Act, 1944. Moreover, a Co-ordinate Bench of this Court in the decision in ***SERTA 2/2024*** titled ***'Commissioner of CGST And Central Excise Delhi South v. M/s Spicejet Ltd.'*** held as under:

"*10. However, during the course of hearing, it is clear to this Court that upon the issue of limitation being decided, the question of taxability would have to be adjudicated. It is clear from a reading of Section 35G and 35L of the Central Excise Act, 1944 that whenever issues of taxability arise, the appeal would lie to the Supreme Court. The said provisions are extracted below:*

"***35G. Appeal to High Court***. -

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an

order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The [2] [Principal Commissioner of Central Excise or Commissioner of Central Excise] or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the [3] [Principal Commissioner of Central Excise or Commissioner of Central Excise] or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

[4] [(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.]

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

***Provided** that nothing in this sub-section shall be deemed to take away or a bridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not*

formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

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***35L. Appeal to the Supreme Court** -*

(1)An appeal shall lie to the Supreme Court from -

(a) any judgment of the High Court delivered -

(i) in an appeal made under section 35G; or

(ii) on a reference made under section 35G by the Appellate Tribunal before the 1stday of July, 2003;

(iii) on a reference made under section 35H, in any

case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or].

(b) ***any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment****;.*

*(2)****For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment****."*

11. In view of Sections 35G and 35L of the Central Excise Act, 1944 which applies in respect of Service Tax, whenever issues of determining taxability are involved, the appeal would lie to the Supreme Court. The same has been also been settled in a series of decisions. In ***Commissioner of Service Tax v. Ernst & Young Pvt. Ltd. and ors., 2014 (2) TMI 1133-Del****, the Coordinate Bench of this Court had observed and held as under:*

*"9. Before we examine other judgments, it is important to examine the language of Section 35G in the bracketed portion which relates to matters in which appeal is to be filed before the Supreme Court. Section 35L of the F. Act is specific. T****he words/expression used is "determination of any question in relation to rate of duty or value for the purpose of assessment". The word "any" and expression 'in relation to" gives appropriately wide and broad expanse to the appellate jurisdiction of the Supreme Court***

in respect of question relating to rate of tax or value for the purpose of assessment. Further, if the order relates to several issues or questions but when one of the questions raised relates to "rate of tax" or valuation in the order in the original, the appeal is maintainable before the Supreme Court and no appeal lies before the High Court under Section 35G of the CE Act*. Referring to the expression "other things" in Section 35G of the CE Act in the case of Bharti Airtel Limited 2013 (30) STR 451 (Del), a Division Bench of this Court has stated:*

"3. On a plain reading of Section 35G of the Central Excise Act, 1944 it is clear that no appeal would lie to the High Court from an order passed by CESTAT if such an order relates to, among other things, the determination of any question having a relation to the rate of duty or to the valuation of the taxable service. It has nothing to do with the issues sought to be raised in the appeal but it has everything to do with the nature of the order passed by the CESTAT. It may be very well for the appellant to say that it is only raising an issue pertaining to limitation but the provision does not speak about the issues raised in the appeal, on the other hand, it speaks about the nature of the order passed by the Tribunal. If the order passed by the Tribunal which is impugned before the High Court relates to the determination of value of the taxable service, then an appeal from such an order would not lie to the High Court.

4. However, we feel that although those decisions do support the contention of the

learned counsel for the respondent, the approach that we have taken is a more direct. We reiterate, it is not the content of the appeal that is determinative of whether the appeal would be maintainable before the High Court or not but rather the nature of the order which is impugned in the appeal which determines the issue."

12. Further, a Division Bench of this Court in the judgement of ***Commissioner of Service Tax v. Delhi Gymkhana Club Ltd. [2009 (16) STR 129 (Del)]****, clarified that any issue with regard to the determination of any question in relation to valuation for purpose of assessment, when decided by CESTAT shall be appealed to the Supreme Court. Relevant paragraphs of the said judgement are extracted hereinbelow:*

> "*9. It is clear from the above that against certain orders appeal is provided to the High Court, whereas in respect of the certain other orders passed by the appellate tribunal, direct appeal to the Supreme Court is provided. Section 35L(a) deals with the appeals which are carried from the orders of the High Court. However, clause (b) stipulates the nature of orders passed by the appellate tribunal against which appeal is to be preferred to the Supreme Court. Where order passed by the appellate tribunal relates to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment, the aggrieved party is to approach the Supreme Court directly by filing appeal under Section 35L(b). This is made clear even by the provisions of Section 35G which provides for appeal to the High Court, as it specifically excludes the orders relating, among other things,*

determination of any question having relation to the rate of duty of excise or to the value of goods for the purpose of assessment.

10. The Supreme Court in the case of Navin Chemicals Mfg. & Trading Co. Ltd. v. Collector of Customs, 1993 (68) E. L.T. 3 (S.C.) had an occasion to deal with the expression determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment". Though that was a case under the Customs Act, the provisions of the Central Excise Act were also taken note of, which are in pari materia with that of the Customs Act. The Apex Court specifically took note of sub-section (5) to Section 129D of the Customs Act and noted that this provision was simultaneously introduced in the Customs Act as well as the Central Excise Act by Custom and Central Excise Laws (Amendment) Act, 1988. Thus, Section 129D(5) is identical to Section 35E(5) of the present Act. This provision was interpreted by the Court in the following manner :-

> *"11. It will be seen that sub-section (5) uses the said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment and the Explanation thereto provides a definition of it 'for the purposes of this sub-section'. The Explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the*

value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to sub-section 5 of Section 129D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have, given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods."

11. In view thereof, it is clear that determination of any question in relation to rate of duty or to the value of goods for the purpose of assessment and when it is decided by the CESTAT, appeal thereagainst is provided to the Supreme Court under Section 35L(b) and no such appeal is

permissible to the High Court."

13. Further, in the judgement of ***Commissioner of Service Tax, Delhi v. Bharti Airtel Ltd. [2013(30) S.T.R. 451 (Del.)]****, Division Bench of this Court considered the issues on maintainability of appeal while considering the decision of CESTAT on limitation issue and held as under:*

> "*3. On a plain reading of Section 35G of the Central Excise Act, 1944 it is clear that no appeal would lie to the High Court from an order passed by CESTAT if such an order relates to, among other things, the determination of any question having a relation to the rate of duty or to the valuation of the taxable service. It has nothing to do with the issues sought to be raised in the appeal but it has everything to do with the nature of the order passed by the CESTAT. It may be very well for the appellant to say that it is only raising an issue pertaining to limitation but the provision does not speak about the issues raised in the appeal, on the other hand, it speaks about the nature of the order passed by the Tribunal. If the order passed by the Tribunal which is impugned before the High Court relates to the determination of value of the taxable service, then an appeal from such an order would not lie to the High Court. The learned counsel for the respondent had referred to the following decisions :-*
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> *(1) Commissioner of C. Excise, Chandigarh. Punjab Recorders Ltd. - 2004 (165) E.L.T. 34 (P & H);*
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> *(2) Sterlite Optical Technologies Ltd.v. Commissioner of C. Ex., Aurangabad - 2007 (213) E.L.T. 658(Bom.);*

(3) Commissioner of Customs, Chennai v. Ashu Exports - 2009 (240) E.L.T. 333(Mad.).

4. However, we feel that although those decisions do support the contention of the learned counsel for the respondent, the approach that we have taken is a more direct. We reiterate, it is not the content of the appeal that is determinative of whether the appeal would be maintainable before the High Court or not but rather the nature of the order

5. In the present case, we find that the impugned order deals not only with the question of limitation but also with the question of valuation. It so happens that in the present case, the issue with regard to the valuation of the taxable services was decided in favour of the revenue but, because the extended period of limitation was not invokable, as per the Tribunal, the respondent-assessee did not prefer any appeal against the said order. But, the order which is impugned before us deals with both the issues, that is, the issue of valuation of taxable services as also the issue of limitation. ***The mere fact that the appellant is only aggrieved by the decision on the point of limitation would not make an appeal from the impugned order maintainable before this Court because it is not the issues raised in the appeal which are material but the nature of the order which is appealed against is relevant for the purpose of determining whether an appeal would lie in this Court or not****.*

6. In view of the fact that the impugned order deals with the question of valuation apart from the question of limitation, this appeal would not be maintainable under Section

35G of the Central Excise Act read with Section 83 of the Finance Act, 1994. *The objection taken by the learned counsel for the respondent is well founded. It is for this reason that we dismiss this appeal as being not maintainable.*"

14. Recently, a Co-ordinate Bench of this Court in ***ST Appl. No. 73/2012*** *titled as '****Commissioner of Service Tax v. Intertoll ICS CE Cons O & M Pvt. Ltd.'****, decided vide order dated 16th December, 2022, the Court has observed as under: -*

"*4. The learned counsel appearing for the appellant also fairly states that* ***it is now well settled that when the question of chargeability of an activity is concerned – such as in this case – appeal would lie to the Supreme Court and would not be maintainable before this court****. She however expresses an apprehension that the appellant may be disabled from filing an appeal before the Supreme Court in view of the internal instructions regarding the pecuniary limit for filing such appeals."*

15. Even in the present case, though CESTAT has only considered the issue of limitation and the said issue was framed for consideration vide order dated 23rd January, 2024, the nature of the order, which is appealed, has to be considered. The original order passed by the Commissioner considered the question as to whether CENVAT credit was allowable or not, and whether penalty was imposable or not in terms of the applicable law. It also considered the leviability of service tax on excess baggage charges. Merely because CESTAT has only considered the issue of limitation, the present appeal cannot be filed in the High Court.

16. In view of the above decisions and considering

the nature of issues that have been decided vide the order dated 31st March, 2016, passed by the Commissioner of Service Tax as also the impugned order of the CESTAT dated 3rd July, 2023, this Court is of the opinion that an appeal against the said impugned order would lie, in terms of Section 35L of the Central Excise Act, 1944, to the Hon'ble Supreme Court."

7. In view of the above, the present appeals are rejected as not being maintainable. The Appellant is free to avail of its remedies in accordance with law under Section 35L of the Central Excise Act, 1944.

8. Needless to add, that since these appeals were pending before this Court since December, 2023, in respect of the entire period during which the appeals remained pending here, the Petitioner is free to seek relief for the purpose of calculating limitation, in terms of Section 14 of the Limitation Act, 1963.

9. The appeals are disposed of in these terms. Pending applications, if any, are also disposed of.

PRATHIBA M. SINGH
JUDGE

SHAIL JAIN
JUDGE

SEPTEMBER 4, 2025/kp/ck