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

Date of decision: 18th December, 2024

+ **CEAC 4/2024, CM APPL. 36246/2024 & CM APPL. 36247/2024**

THE COMMISSIONER OF CENTRAL TAX, CGST DELHI EAST

.....Appellant

Through: Mr. Shubham Tyagi, Advocate.

versus

M/S JMD LIMITED

.....Respondent

Through: Mr. Prabhat Kumar Sahu, Adv.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE AMIT SHARMA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present appeal has been filed by the Appellant under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as the “Central Excise Act”), read with the Central Goods and Services Tax Act, 2017, challenging the impugned order dated 08 November, 2023 of (F.O.No.51530/2023) passed by the Customs, Excise, and Service Tax Appellate Tribunal (“CESTAT”) in Appeal No. 50472 of 2017. The impugned order set aside the Order-in-Original No. 20/2016-ST dated 06 December, 2016, wherein the Directorate General of Central Intelligence (Adjudication Cell) had imposed Service Tax amounting to Rs. 4,97,55,251/-, pursuant to the Show Cause Notice dated 14 October, 2014.
3. The case of the Respondent-Assessee was that it had developed projects at Ludhiana and Gurugram. Show Cause Notice dated 14th October, 2014 was issued by the Director General of Central Excise Intelligence raising



a demand of service tax on the premise that the services provided by the Respondent-Assessee would constitute ‘*commercial or industrial construction service*’ as defined under Section 65 (25b) of the Finance Act, 1994 which is made taxable under Section 65 (105) of the said Finance Act.

4. This was disputed by the Respondent on the ground that the collaboration agreement was not for commercial or industrial construction service and these were composite work contracts involving transfer of goods and services. Thus, the services would qualify as ‘works contract’ in terms of the judgment of the Supreme Court in *Commissioner of Central Excise versus Larsen and Toubro Ltd, 2015 (39) S.T.R. 913 (S.C.)*

5. This stand of the Respondent was accepted by the CESTAT. Ld. Counsel for the Respondent challenges the maintainability of the present appeal before this Court on the ground that it involves an issue of taxability and such an appeal ought to be preferred before the Supreme Court.

6. The question, therefore, is whether the services rendered by the Respondent would be taxable or not. Since the issue is one of taxability, the decision of CESTAT would have to be assailed before the Supreme Court in view of Section 35L of the Central Excise Tax as the question of law involved is regarding the taxability of the said service. This is the settled position in law as per a series of decisions including a recent order of this bench in *SERTA 2/2024* titled ‘*Commissioner of CGST and Central Excise, Delhi v. M/s Spicejet Ltd.*’ This Court dismissing a similar appeal preferred under Section 35G, from the decision of CESTAT, *vide* order dated 5th December, 2024 observed as under:

“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 the series of decision commencing from **Commissioner of Service Tax v. Ernst & Young Pvt. Ltd. and ors., 2014 (2) TMI 1133-Del**, wherein 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. The 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, Division Bench of this Court in the judgement of **Commissioner of Service Tax v. Delhi Gymkhana Club Ltd. [2009 (16) STR 129 (Del)]**, clarifies 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. Recently, a Co-ordinate Bench 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 16.12.2022, has observed and held 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.”



14. 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 :-

- (1) *Commissioner of C. Excise, Chandigarh. Punjab Recorders Ltd. - 2004 (165) E.L.T. 34 (P & H);*
- (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 invocable, 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.”*

15. *In view of the above decisions and considering the nature of issues that have been decided, vide the order in original 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 the appeal would lie in terms of Section 35L of the Central Excise Act, 1944 to the Hon’ble Supreme Court.*

16. *Therefore, the present appeal is dismissed as not maintainable.”*



7. In view of the above discussion, the present appeal is rejected with liberty to avail remedies under Section 35L of the Central Excise Act, 1944 in accordance with law. Needless to state that the Appellant is free to claim benefit under Section 14 of the Limitation Act, 1963 for the period during which the present appeal was pending before this court.

8. The appeal is disposed of in the above terms, along with all pending applications.

**PRATHIBA M. SINGH
JUDGE**

**AMIT SHARMA
JUDGE**

DECEMBER 18, 2024/KG/am
(Corrected & uploaded on 24th December, 2024)