IN THE HIGH COURT OF JHARKHAND AT RANCHI

Tax Appeal No. 05 of 2020

.....

Principal Commissioner of Central G.S.T. & Central Excise, Ranchi

….. Appellant

Versus

Bihar Foundary and Casting Ltd, Marar, Ramgarh Cantt, Ramgarh

….. Respondent

With

Tax Appeal No. 06 of 2020

Principal Commissioner of Central G.S.T. & Central Excise, Ranchi

….. Appellant

Versus

M/s. Gautam Ferror Alloys (Unit of Bihar Foundary and Casting Ltd.), Marar, Ramgarh Cantt., Ramgarh. ....Respondent

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CORAM: **Hon'ble Mr. Justice Rongon Mukhopadhyay**
Hon'ble Mr. Justice Deepak Roshan

For the Appellant :Mr. Amit Kumar, Adv.
For the Respondents :M/s. K. Kurmy, Mr. Nitin Kr. Pasari, Ms. Sidhi Jalan, Advocates

CAVon 31.08.2023 **Delivered on 11.12.2023**

J U D G M E N T

Per Deepak Roshan, J: Heard learned counsel for the parties.

2. Since both these appeals arise out of common order passed by the learned Customs, Excise and Service Tax Appellate Tribunal, Kolkata, Regional Bench, Kolkata (in short CESTAT) and the issue is common in both these appeals; as such, both are heard together and being disposed of by this common judgment.

For brevity, the relevant facts are taken from Tax Appeal No.5 of 2020.

3. At the outset, learned counsel for the Assessee raised a preliminary objection with regard to maintainability of these two appeals and submits that the appeal filed by the Appellant Department under Section 35G of the Central Excise Act, 1944 (hereinafter to be referred as the Act) is not maintainable before this Court and this Court has no jurisdiction to entertain the same, inasmuch as, one of the question in the instant case relates to determination of value of the excisable goods for the purpose of assessment which falls within the exclusive jurisdiction of the Hon'ble Supreme Court of India under Section 35L of the Central Excise Act, 1944.

Learned counsel contended that an appeal against an order passed by Ld. Tribunal under Section 35C of the Central Excise Act, 1944 where one of the issues involved relates to determination of valuation of excisable goods and/or rate of duty of excisable goods, amongst other things, for the purpose of assessment, the appeal would lie before the Hon'ble Supreme Court under Section 35L of the Act. The jurisdiction of the High Court in such matters are specifically excluded under Section 35G and it falls within the exclusive jurisdiction of the Supreme Court under Section 35L of the Act.

4. Learned counsel further draws attention towards the Show Cause Notice (SCN) and submits that in the SCN dated 24-09-2012, one of the issues relates to valuation of excisable goods.

He further contended that the issue of valuation was also before the Ld. CESTAT which is evident from the impugned order dated 09.08.2019 (Tax Appeal 05 of 2020 in Annexure-3).

Relying upon the aforesaid submissions, learned counsel for the Assessee submits that both these appeals are liable to be dismissed *in limine*.

5. In reply to the aforesaid objection, learned Sr. Standing Counsel for the appellant-Revenue submits that the Respondent-Assessee is raising premature and irrelevant objection in the matter, inasmuch as, they are placing the question of law under dispute as 'dispute of valuation for assessment'; whereas the revenue has raised the issues for non-admission of bona-fide evidence' by the CESTAT, Kolkata. The CESTAT Kolkata in Final Order No. 75994-75995/2019 dated 09.08.2019 has erroneously not taken consideration of computer printouts and held them inadmissible. Thus, the question of law raised by the department is not of valuation but of admissibility of evidence which are duly collected during investigation by the Revenue by following due process of law. As non-admission of such crucial evidence of evasion of duty is contrary to the facts and perverse, hence these appeals have been filed with such question of law.

He vehemently contended that none of the objections of

the respondents are related to the admissibility of the evidence which is the core issue in the present matter before this High Court. The department has not raised any question of law related to value of goods of rate of tax in these Tax Appeals. Further, on perusal of Final Order No. 75994-75995/2019 dated 09.08.2019 of CESTAT, Kolkata, it is quite clear that it had not ordered anything related to valuation and the order is only based on 'non-admission of evidences.' Hence, from the impugned order of CESTAT, Kolkata, as quoted above, it is crystal clear that it has not said a single word related to valuation. The whole decision is based on 'non-admission of evidences' and, the same is silent over the issue of valuation and accordingly, appeal on the questions of law raised by the Revenue is not barred as per exclusion clause given in Section 35G of the Central Excise Act, 1944.

He reiterated that none of the questions raised by the department in these Tax Appeals relate to determination of valuation of excisable goods and/or rate of duty of excisable goods. He further submits that neither the order of the CESTAT, Kolkata is related to valuation of goods/rate of duty nor the questions raised in appeal are related to them. Hence, there is no applicability of Section 35L (2) on this issue. He lastly submits that both these appeals are maintainable under Section 35-G and Section 35-L(b) is not applicable.

6. Having heard learned counsel for the parties and after going through the records of the case it transpires that the Assessee has raised an objection to the effect that the appeals filed by the Appellant Department under Section 35G of the Central Excise Act, 1944 is not maintainable before the High Court and this Court has no jurisdiction to entertain these appeals, inasmuch as, one of the question in the instant case relates to determination of value of the excisable goods for the purpose of assessment which falls within the exclusive jurisdiction of the Hon'ble Supreme Court under Section 35L of the Central Excise Act, 1944.

It has been submitted by the Assessee that an appeal against an order passed by learned Tribunal under Section 35C of the Central Excise Act, 1944 where one of the issues involved relates to determination of valuation of excisable goods and/or rate of duty of excisable goods, amongst other things, for the purpose of assessment, the appeal would lie before the Hon'ble Apex Court under Section 35L. The jurisdiction of the High Court in such matters are specifically excluded under Section 35G and it falls within the exclusive jurisdiction of the Supreme Court under Section 35L.

7. It appears from the memo of appeal that the Revenue has framed the following questions of law:-

(i) Whether the Customs, Excise and Service Tax Appellate Tribunal, Kolkata was right in rejecting and not

taking into consideration computer printouts and holding them as inadmissible as it failed to meet the conditions specified in Section 36B of the Central Excise Act, 1944 ?

(ii) Whether the decision of the Customs, Excise and Service Tax Appellate Tribunal, Kolkata is contrary to facts and perverse?

(iii) Whether the decision of the Customs, Excise and Service Tax Appellate Tribunal, Kolkata was erroneous by excluding statement of Shri Gaurav Budhia and computer printouts and thereby holding that there was no evidence to show clandestine removal?

8. To decide the issue involved in both these appeals; the nature of order of assessment shall be decisive as to whether the question of rate of duty or value of the goods are involved or not and not the scope of appeal or questions raised in appeal. For brevity, the provision of **Section 35L** of the Central Excise Act, 1944 is set out below:-

SECTION 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 1st day 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.*
>
> ***(Emphasis Added)***

As per sub-Section (2) of Section 35L, 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. The provision of **Section 35G** of the Central Excise Act, 1944 is set out below:-

> **SECTION 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.*
>
> *XXXX*
>
> ***(Emphasis Added)***

9. The words "amongst other things" under Section 35G and Section 35L manifest the legislative intent that the order for the purpose of assessment if includes question of determination of rate duty or value of excisable goods intermingled with any other question, the appeal would lie to Supreme Court. The word "for the purpose of assessment" refers to the assessment orders (Adjudication Order).

If in a case in the assessment order one of the question relates to rate of duty or valuation, the appeal would lie before the Supreme Court. The Delhi High Court in the case of ***CST Vs. Ernst & Young Pvt. Ltd., reported in 2014 (34) STR 3 (Del.)*** and similarly the Karnataka High Court in the case of ***CST Vs.***

Scott Wilson Kirkpatrick (I) Pvt. Ltd., reported in 2011 (23) STR 321 (Kar.) interpreting the word "for the purpose of assessment" under Section 35G/Section 35L has held that the Order-in-Original (adjudication) shall be the basis for determination as to whether appeal will lie to High Court or Supreme Court.

Further, in the case of ***Pr. Commissioner Vs. Raja Dying reported in 2017 (5) GSTL 231 (P&H)*** it is held by the Punjab and Haryana High Court that the order of the Tribunal shall be the basis of deciding whether appeal should lie to High Court or Supreme Court as the adjudication order merges with the order of the Tribunal. Thus, there are two schools of thought on this issue.

10. In this regard, we may also refer the Board's Circular. The Central Board of Indirect Taxes and Customs (formerly Central Board of Excise & Customs) vide its ***Circular No.390/Misc./100/2010-JC(9-2010) dated 22-09-2011*** has instructed the department for filing appeal before the Hon'ble Supreme Court in cases relating to rate of duty or the value of goods for the purpose of assessment as statutorily prescribed. The relevant portion of the said Circular is set out below:-

> ***Circular No.390/Misc./100/2010-JC (9-2010) dated 22-09-2011***
>
> *Reference is invited to Section 35L(b) of the Central Excise Act, 1944, made applicable to Service Tax vide Section 83 of the Finance Act, 1994 and Section 130E(b) of the Customs Act, 1962 which stipulates that appeal shall lie to the Supreme Court against a Tribunal order in a case involving determination of any question having a relation to the rate of*

duty or value of the goods for the purpose of assessment. Your attention is also invited to Circular No. 935/25/2010-CX., dated 21-9-2010 [2010 (258) E.L.T. T3] regarding Measures to streamline the processing of departmental litigation before the Courts and Tribunals.

***Para 2**. Annexure I of the said Circular deals with provisions for filing of (a) Civil appeals/SLP against the High Court order before the Supreme Court and (b) Civil Appeal against any Tribunal order. It was mentioned therein that Civil Appeal against the Tribunal order is required to be filed in the Supreme Court in cases relating, among other things, to the determination of any question having a relation to the rate of duty or the value of goods for the purposes of assessment as statutorily prescribed.*

***Para 3.** It has come to the notice of the Board that field formations have filed appeals in the jurisdictional High Courts in matters relating either to determination of rate of duty or value of the goods which ought to have been filed in the Supreme Court. Such appeals get dismissed by the High Courts on the ground of jurisdiction alone, invariably after pending for a long time. Civil Appeals filed in the Supreme Court in such cases have frequently been dismissed on the ground of limitation. It may also be noted that the time period for filing Civil Appeal is 60 days from the date of receipt of the Tribunal order in the Commissionerate.*

XXXX

(Emphasis Added)

11. If we peruse the Show Cause Notice dated 24-09-2012; it would transpire that one of the issue relates to valuation of excisable goods. The relevant portion of the show cause notice in Tax Appeal No.5 of 2020 (Annexure-1) is set out below-

"5.0 CONTRAVENTION OF PROVISIONS OF CEA AND CER

From the above, it appears that BFCL & GFA (Noticee No.-1 & Noticee No.2] have contravened the following provisions of CEA and CER, with intent to evade payment of duties of Central Excise.

X x x x

X x x x

(vi) ***Section -4 of CEA read with Rule 6 of the Valuation Rules, 2000*** *– BFCL & GFA have removed certain quantity of their finished products viz. M.S. Ingots, TMT Bars, Silico-manganese under the cover of valid Central Excise Invoices and on payment of Central Excise Duties*

> *shown in the said invoices. Reference's to removals of these goods were found in the seized documents recovered from the factory premises and the seized Laptop [referred to in sub-paras of para-3.0 above]. In the Sale Register retrieved from the seized Laptop, the selling rate of aforesaid removals of MS. Ingots, TMT Bars, Silico-manganese are also indicated.* ***However, on comparison, it was found that the assessable value shown in the relevant invoices was lower than the amount received by BFCL & GFA from the buyers of such goods.*** *It, therefore, appears that BFCL & GFA have received excess amounts over and above the value declared in the Central Excise invoices, from their buyers of M.S. Ingots, TMT Bars, Silico-manganese (refer para-3.2.2 & 3.3 above) and* ***thus, liable to be included in the transaction value in terms of Rule-6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. It therefore appears that BFCL & GFA have resorted to under-valuation in terms of Section-4 of CEA read with Rule-6 of the Valuation Rules, 2000.****"*
>
> ***(Emphasis Added)***

Further, the Order-in-Original dated 11-05-2015 in Tax Appeal No.5 of 2020 (Annexure-2), the Commissioner of Central Excise, Ranchi has found that there was under-valuation of the excisable goods. The relevant portions of the Order-in-Original is set out below-

> ***"123****-The notices in their defence reply .....*
>
> *The Noticee submits that one Sri Hemant Agarwal having mobileno.9350160009 vide his letter dated 17-08-2009 stated that he is working as a Marketing & Sales Head in M/s Trehan Home Developers, Jamshedpur and that the said company had purchased Steel Rods (TMT Bars) from the Noticee for his construction company. He also provided details of payments made through cheques. Sri Hemant Agarwal in the said letter categorically stated that they have made payments by cheques only and there is no payment in cash to the Noticee.* ***The Noticee submitted that a perusal of the statement of Sri Hemant Agarwal it is evident that the allegation of undervaluation and flow back of funds are perverse and contrary to the materials on record. The allegation that the Noticee has purportedly received Rs. 19,75,568/- over and Rs. 70,43,349/- does not***

stand proved.

124 *- I find that the noticee again submitted reply in respect of only one case ignoring and isolating the other entries mentioned in the said writing pad.....* ***Investigation proved its case of flow back of fund of sale proceeds by M/s. Trehan Home Developers by correlating the entries made in the writing pad vis-a-vis party wise ledger incheques as well as in cash. This also proves the case of undervaluation made by the noticees in respect of clearances of the said goods effected by them clandestinely to their buyers/ customers of the said goods.****"*

(Emphasis Added)

The issue of valuation was also before the Ld. CESTAT which is evident from the Impugned Order dated 09-08-2019 in Tax Appeal No.5 of 2020 (Annexure-3). The relevant portion of the impugned Order is set out below-

"11. *A Show Cause Notice dated 24-09-2012 was issued by Ld. Addl. Director General, DGCEI, Kolkata alleging that the* ***BFCL has clandestinely removed/undervalued 42,851.569 MT of their final products i.e.*** *M.S Ingots/TMT Bars/Miss Rolls/Mill Scale/end Cutting/Risers without payment of duty during the period 1st September 2007 to 15th October 2008. In the show cause notice it is* ***further alleged against M/s GFA that it has resorted to clandestine removal/undervaluation of 9488.635 M.T. of final products i.e. Silico Manganese during the said period****. Accordingly, M/s BFCL is required to show cause why Central Excise duty amounting to Rs.22,74,84,876/- should not demanded along with interest and why penalty U/S 11AC/Rule 25 should not be imposed upon them for their purported contraventions of Rule 4,6,8,10,11,12 of the said Rules and* ***Sec.4 read with Rule 6 of the Central Excise valuation (Determination of price of excisable goods) Rule, 2000****. M/s GFA is also required to show cause why excise duty of Rs.8,69,42,965/- should not recovered along with interest and why penalty U/s 11AC/Rule 25 should not be imposed upon them for purported contraventions of Rule 4,6,8,10,11,12 of the Central Excise Rule, 2002. Sri H.K.Budhia, Managing Director, Sri Gaurav Budhia,*

> *Director and Sri Satya Nand Jha are required to show cause why penalty should not be imposed on them under Rule 26 of the Central Excise Rules, 2002.*
>
> *X x x x*
>
> ***18.*** *Heard both sides.....**We have perused the writing pad (Doc. No.32/DGCEI/JRU/BFCL/F/08) and extracts prepared by DGCEI on its basis and find that there is no evidence of flow back of funds to the Appellants.....Rather the investigations conducted by DGCEI, Chennai, Kochi, Jaipur, Kolkata instead of bolstering department's case, supports the contentions of the Appellants."***
>
> ***(Emphasis Added)***

12. At this stage, it is relevant to mention that Section 35G and Section 35L of the Central Excise Act, 1944 applies to Service Tax also by virtue of Section 83 of the Finance Act, 1994 which reads as follows:-

> ***Chapter V of the Finance Act, 1994***
> ***Section 83. Application of certain provisions of Act 1 of 1944.*** *— The provisions of the following sections of the [Central Excise Act, 1944], as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise :-*
>
> *[sub-section (2A) of section 5A, sub-section(2) of section 9A], 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, [12E, 14, [15, 15A, 15B] 31, 32, 32A to 32P, 33A, 35EE, 34A, 35F]], **[35FF,] to 35O** (both inclusive), 35Q, [35R,] 36, 36A, 36B, 37A, 37B, 37C, 37D [38A] and 40.*
>
> ***(Emphasis Added)***

Even the provisions under Section 130 and Section 130E of the Customs Act, 1962 deals with appeal to High Court and Supreme Court respectively which are *pari materia* to Section 35G and Section 35L of the Central Excise Act, 1944, hence, the

ratio of the judgment rendered by different Courts under the Customs Act, 1962 would apply to Central Excise Act, 1944 also. For brevity, the relevant portion of Section 130 and Section 130E of the Customs Act, 1962 are set out below:-

> **Customs Act, 1962**
>
> ***Section 130. - 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 customs or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.*
>
> *X X X X*
>
> ***Section 130E - Appeal to Supreme Court.** — An appeal shall lie to the Supreme Court from -*
>
> *[(a) any judgment of the High Court delivered -*
>
> *(i) in an appeal made under section 130; or*
>
> *(ii) on a reference made under section 130 by the Appellate Tribunal before the 1st day of July, 2003;*
>
> *(iii) on a reference made under section 130A,*
>
> *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 customs or to the value of goods for purposes of assessment.*
>
> *X X X X*

13. In the case of ***UOI Vs Guwahati Carbon Ltd.*** reported in ***2012 (278) ELT 26 (SC)*** it has been held by the Hon'ble Apex Court that against the decision of Tribunal regarding assessable value excluding freight, transportation and insurance charges,

an appeal therefrom shall lie before Supreme Court. The relevant portion of the said judgment is set out below:-

> ***Para 17.*** *Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by excluding the freight/transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.*

Further, in the case of ***CST Vs. Ernst & Young Pvt. Ltd., reported in 2014 (34) STR 3 (Del.)***, it is held by the Delhi High Court that where the **Order-in-Original (Adjudication Order)** is relating to several issues or questions and one of the issue or question relates to rate of tax or valuation, the Appeal would lie before the Supreme Court under Section 35L of the Central Excise Act, 1944 and not before the High Court under Section 35G. The relevant portion of the said judgment is set out below-

> ***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) S.T.R. 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."*

"10. *Section 35G provides for an appeal to the High Court from every order passed in appeal by the Appellate Tribunal on or after 1-7-2003 (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 the purposes of assessment). Thus, an appeal under Section 35G is against the order passed in appeal by the Appellate Tribunal and not against the order of the Adjudicating Authority. An appeal does not lie to this Court from the order of the adjudicating authority/Commissioner. The issue as to whether an appeal is maintainable or not must, therefore, be decided on the basis of and taking into consideration the order passed in appeal by the appellate authority and not by the order passed by the adjudicating authority. In any event, the order of the adjudicating authority would stand merged in the order of the appellate authority. In other words, while determining whether an appeal is maintainable under Section 35G or not, it is necessary to see whether the order passed in appeal by the Appellate Tribunal and not the order passed by the adjudicating authority determines any question having any relation to the rate of duty of*

> *excise or to the value of goods for purposes of assessment. We must, therefore, ascertain what the appellate authority decided in the impugned order."*
>
> ***(Emphasis added)***

14. At this stage, it is also profitable to refer the case of ***CST Vs. Scott Wilson Kirkpatrick (I) Pvt. Ltd., reported in 2011 (23) STR 321 (Kar.)***, wherein the Karnataka High Court has held that the word *"for the purpose of assessment"* means the Order passed in the course of assessment and all Orders passed in the course of assessment involving determination of any question having a relation to the rate of duty or the valuation of goods or services, cannot be subject matter of appeal before the High Court. The word *"among other things"* makes it clear that the issues of rate of duty or value of goods or services may be intermingled with other issue. The relevant portion of the said judgment is set out below-

> ***12.*** *It is argued as the wordings of the section stands, it is only in respect of the two types of cases the jurisdiction of the High Court is denuded. They are:-*
> *(1) Where the assessment relates to the determination of the rate of duty;*
> *(2) The question relates to the determination of the value of the Service.*
> *Any question relating to or in relation to these two aspects alone, the High Court has no jurisdiction and in respect of other things it has jurisdiction.*
> ***13.*** *In order to appreciate this contention, we have to carefully see the wordings employed by the legislature. The relevant words are as under: -*
> *"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 Service for the purposes of assessment".*
> *The key word in the said provision is* ***"for the purpose of assessment". That means the order referred to therein is an order passed in the course of assessment. Therefore, all orders passed in the course of assessment involving***

the determination of any question having a relation to the rate of duty of service or to the value of Service, cannot be the subject matter of appeal before the High Court. By the use of the word 'among other things' it is made clear, even order which may not be directly related to the rate of duty of service or the value of Service, however which are intermingled with those matters are also excluded. In other words those are not the only orders contemplated by the legislation. In order to understand the width and depth of the orders covered under these words, it is necessary to know the meaning of "assessment".

X x x x

X x x x

36. *Broadly the following disputes do not fall within the jurisdiction of High Court under Section 35(G) of the Act :-*

(a) Dispute relating to the service tax payable on any service/taxable service.

(b) ***The value of the taxable service for the purposes of assessment?***

(c) A dispute as to the classification of services.

(d) Whether those services are covered by an exemption notification or not?

(e) ***Whether the value of services for the purposes of assessment is required to be increased or decreased?***

(f) The question of whether any services are taxable services or not?

(g) Whether an activity is a service rendering activity or not, so as to attract levy of service tax?

(h) Whether a particular service falls within which heading, sub-heading of Section 65(105) of the Service Act, 1994 which defines "taxable service.

37. *From the aforesaid discussion, it is clear that an order passed by the Appellate Tribunal relating to the determination of any question having relation to the rate of service taxes or to the value of services for the purposes of assessment lies to the Supreme Court under Section 35L(b) of the Act and not to the High Court under Section 35(G)."*

15. As indicated herein above, there are two views, inasmuch as, in the case of ***Pr. Commissioner Vs. Raja Dying reported in 2017 (5) GSTL 231 (P&H),*** it is held by the Punjab & Haryana High Court that it is the nature of Order of Tribunal and not scope of appeal that determines the maintainability of

appeal under Section 35G of the Central Excise Act, 1944. The relevant portion of the said judgment is set out below-

> ***14.*** *Whether an appeal lies to the High Court under Section 35G or to the Supreme Court under Section 35L cannot possibly depend upon the nature or scope of the appeal that the party intends filing. A party may seek to challenge only that part of the order of the Tribunal which relates to questions other than those relating to the rate of duty of excise or the value of the goods for the purposes of assessment. Such an appeal would, absent any other questions, lie to the High Court. Once it is held that an appeal against the order of the Tribunal which deals with questions that fall within the ambit of Section 35L as well as other questions lies to the Supreme Court under Section 35L the mere fact that the party chooses to challenge only that part of the order that falls within the ambit of Section [35G] would make no difference. In other words, it cannot be said that the party that chooses to challenge the order of the Tribunal only so far as it relates to the determination of questions falling within the ambit of [Section] 35G must file the appeal before the High Court even though the order also deals with questions that fall within the ambit of Section [35L]. In that event, if the other party files an appeal against the order of the Tribunal on issues that fall within the ambit of Section [35L] in the Supreme Court, the very purpose of Section [35G] of bringing the appeals either before the Supreme Court or before the High Court would be defeated. It can hardly be suggested that in that case, the appeal filed under Section [35G] before the High Court ought to stand transferred to the Supreme Court. The scheme of the Act in general and Sections [35G] and [35L] in particular do not indicate such a mechanism.*
>
> **(Emphasis added)**

However, in the case of ***CST Vs. Ernst & Young Pvt. Ltd. cited supra*** the Delhi High Court and the Karnataka High Court in the case of ***CST Vs. Scott Wilson Kirkpatrick (I) Pvt. Ltd. cited supra*** has considered Order-in-Original (Assessment Order) for determining whether appeal would lie before High Court or Supreme Court.

In the case of ***CST Vs. Scott Wilson Kirkpatrick (I) Pvt. Ltd. cited (supra)*** the Karnataka High Court explained the

Legislative intent behind **bifurcation of jurisdiction** between Supreme Court and High Court held in the following lines :-

> ***Para 38. The intention behind this bifurcation of jurisdiction between the Apex Court and the High Court seems to be that more often than not, any decision on these aforesaid aspects not only affects the interest of the parties rendering services who are parties to a dispute, but also to the parties rendering those services throughout the country****. In a country governed by Parliamentary legislation because of the territorial bifurcation in forming states and because of the divergent opinion which is possible, the service tax payable would vary from place to place.* ***In order to bring uniformity in the levy of service tax throughout the country and consequently to see that the country's finance is not affected, the Parliament has vested the jurisdiction to decide the disputes with the Apex Court. Therefore, we see a policy underlining this bifurcation of the jurisdiction between the Apex Court and the High Courts. All other matters other than what is set out above, which relates to the individual service providers and all disputes based on assessment orders which have attained finality, such as the benefits to which they are entitled to. refunds, duty drawbacks, rebates, etc., which relate to a particular manufacturer falls within the jurisdiction of the High Courts****. In other words all disputes emanating from the orders determining the rate of service tax and value of service, which has reached finality are to be determined by the High Court and not disputes arising prior to the stage of determining the rate of service tax and value of service.*
>
> **(Emphasis Added)**

Even, the Punjab & Haryana High Court also in the case of ***Pr. Commissioner Vs. Raja Dying*** *(supra)* while explaining the reasons for **bifurcation of jurisdiction** between the Supreme Court and High Court, has held in the following lines-

> ***"11.*** *The words* ***"among other things"*** *in Section 35G are of singular importance in determining the ambit of Section 35G. These words indicate that an appeal is maintainable under Section 35G to the High Court only if the order passed in appeal by the Tribunal is not one relating to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment, an appeal against that order would lie only to the Supreme Court under*

Section 35L and not to the High Court under Section 35G. This would be so even if the appeal is only in respect of questions other than the rate of duty or the value of the goods for the purpose of assessment. It is the nature of the order of the Tribunal and not the scope of the appeal that determines the maintainability of the appeal under Section 35G.

12. *It is not necessary to look far for the reason for this provision. The intention is to consolidate all appeals from the order of the Tribunal in one Court - either in the High Court or in the Supreme Court. A contrary view would result in multiple appeals being filed before both the Courts where the order of the Tribunal relates to the determination of questions having a relation to the rate of duty of excise or value of goods as well as to other questions. In such cases the party which desires challenging the order of the Tribunal relating to both types of questions would have to file one appeal in the High Court and another in the Supreme Court. The party which desires challenging one type of issue would have to file an appeal before the Supreme Court and the other party that intends challenging the other type of issue would have to file an appeal before the High Court. There could potentially be four appeals against the same order of the Tribunal - two in the High Court and two in the Supreme Court. It was precisely to avoid these situations that Section [35G] was enacted. It was to avoid the bifurcation of proceedings before the Supreme Court and the High Court.*

13. *This would also avoid conflicting findings. A view to the contrary would lead to the possibility of an appeal against the order of the Tribunal being maintainable in certain respects before the High Court and in other respects before the Supreme Court. This could lead to considerable confusion and complication. For instance, it may well be necessary in a given case for the Supreme Court to refer to, analyse and adjudicate upon the facts in relation to an order relating to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment. It may equally be necessary for the High Court in an appeal against the same order to consider, analyse and adjudicate upon the same facts but in relation to the other questions. Although theoretically, it would be possible to bring the matter to a conclusion with consistent findings the process would be considerably cumbersome and in many cases impractical. For instance, in a given case, a party may not challenge the order of the High Court. Against the same order in the appeal before the Supreme Court, it would be possible to come to different conclusions on the facts. The party, against whom the facts have been determined, would be faced with the findings of fact by the High Court. Both the judgments would have attained finality but with inconsistent findings. This could not have been the intention of the Legislature."*

16. After going through the aforesaid judgments including the Board's Circular on the issue of maintainability and the facts of the case wherein we have perused the SCN as well as OIO; reference of which are made in the preceding paragraphs, it clearly transpires that one of the issues involved relates to determination of valuation of excisable goods and/or rate of duty of excisable goods, amongst other things, for the purpose of assessment.

Thus, we are having no hesitation in holding both these appeals as not maintainable and the same would lie before the Hon'ble Apex Court under Section 35L of the Act, inasmuch as, the jurisdiction of the High Court in such matters are specifically excluded under Section 35G and it falls within the exclusive jurisdiction of the Apex Court under Section 35L of the Act.

17. Consequently, both these appeals are, hereby, dismissed at the admission stage itself.

(Rongon Mukhopadhyay, J)

(Deepak Roshan, J)

Jharkhand High Court
Dated/ 11 /12 / 2023
Amardeep/AFR