

3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The appellant, namely, Commissioner of Service Tax, has preferred this appeal under Section 35 of the Central Excise Act, 1944 (hereinafter referred to as the 'Act'). The impugned orders are passed by the Custom Excise & Service Tax Appellate Tribunal (for short, 'CESTAT'). Learned counsel, who appeared for the respondents in CEAC No. 5/2007 challenged the maintainability of this appeal. Though nobody appeared for the respondents in the other appeal, since the question is about the maintainability of the appeal and the issue involved is the same, which is common to both the appeals, we took up both the appeals together. However, for the sake of convenience, we will take note of facts as they appear in CEAC No. 5/2009.
2. The respondent in this case is Delhi Gymkhana Club Limited. It was served with three show-cause *cum* demand notices dated 24.6.2002, 3.7.2003 and 18.5.2004 respectively. Service tax in the sum of Rs.22,93,564/-, along with interest payable till the date of its demand under Sections 73 and 75 of the Act, was demanded by these show-cause notices. Penalty under Sections 75A, 76, 77 and 78 of the Act was also proposed. The respondent submitted reply to these show-cause notices challenging the proposed move on the ground that no such service tax was payable by the respondent club as it is the members of the club who were using the facility and there

was no such question of providing services by the members to themselves. The Assistant Commissioner, Service Tax Division – I, New Delhi, however, did not agree with the aforesaid contention of the respondent and passed orders dated 18.5.2005 confirming the demand of Rs.22,93,564/- with interest and also imposed penalties. Being aggrieved with the aforesaid order in original, the respondent preferred appeal to the Commissioner (Appeals), Delhi – I. The appellate authority accepted the contention of the respondent and set aside the order in original by allowing the appeal of the respondent vide orders dated 25.8.2006. The appellant herein did not accept this order and challenged the same before the CESTAT. However, it has remained unsuccessful in its challenge as CESTAT has dismissed the appeal of the appellant on 13.6.2008. The Tribunal has noted in the impugned order that the Commissioner (Appeals) followed the judgment of the Calcutta High Court in the case of *Dalhousie Institute v. Asstt. Commissioner, Service Tax Cell* reported in 2006 (3) STR 311 as well as in the case of *Saturday Club Ltd. v. Asstt. Commissioner, Service Tax Cell*, (2006) 3 STR 305. The Tribunal was of the opinion that the Commissioner (Appeals) rightly held that when the service is provided by a club to its members, it does not attract service tax, as held by the Calcutta High Court in *Dalhousie Institute* (supra) as under :-

“The principle of mutuality in this case is also squarely applicable, as going by the definitions of mandap, mandap keeper and the taxable service, in this case the facility of use of the premises to the members by its club cannot be termed to be a letting out nor the members of the club using the facility of any portion of the premises for any function can be termed

to be a client. The services rendered by any person to his client presupposes the element of commerciality and obviously this transaction must be involved with the third parties, as opposed to the members of the club.”

3. The Tribunal also took note of the following observations of the

Calcutta High Court in *Saturday Club Ltd.* (supra) :-

“So far as the merit is concerned, law is well settled by now that in between the principal and agent when there is no transfer of property available question of imposition of service tax cannot be made available. It is true to say that there is a clear distinction between the ‘members club’ and ‘proprietary club’. No argument has been put forward by the respondents to indicate that the club is a proprietary club. Therefore, if the club space is allowed to be occupied by any member or his family members or by his guest for a function by constructing a mandap, the club cannot be called as mandap keeper, because the club is allowing his own member to do so who is, by virtue of his position, principal of the club. If any outside agency is called upon to do the needful it may raise a bill along with the service tax upon the club and the club as an agent of the members, is supposed to pay the same. The authority cannot impose service tax twice once upon the people carrying out the business of ‘mandap keeper’ as well as the members’ club for the purpose of using the space for constructing or using it as ‘mandap’. Therefore, apart from any other question possibility of double taxation cannot be ruled out. If I explain my first query as above it will be crystal clear that if a person being an owner of the house allows another to occupy the house for the purpose of carrying out any function in that house it will not be construed as transfer of property. But if such person calls upon a third party ‘mandap keeper’ to construct a ‘mandap’ in such house then in that case such ‘mandap keeper’ can be able to raise bill upon the user of the premises along with the service tax. Therefore, I cannot hold it good that members’ club is covered by the Finance Act, 1994 for imposition of service tax to use its space as ‘mandap’. So far as the other point is concerned whether the ratio of the judgments can be acceptable herein or not I like to say ‘yes it is applicable’. Income-tax is applicable if there is an income. Sales tax is applicable if there is a sale. Service tax is applicable if there is a service. All three will be applicable in a case of transaction between, two parties. Therefore, principally there should be existence of two sides /entities for having transaction as against consideration. In a members’ club there is no question of two sides. ‘Members’ and ‘club’ both are same entity. One may be called as principal when the other may be called as agent, therefore, such transaction in between themselves cannot be recorded as income, sale or service as per applicability of the revenue tax of the country. Hence, I do not find it is prudent

to say that members' club is liable to pay service tax in allowing its members to use its space as 'mandap'.

4. As mentioned above, the present appeal is preferred under Section

35 of the Act. This section reads as under :-

“35. Appeals to Commissioner (Appeals) – (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals) (hereafter in this Chapter referred to as the Commissioner (Appeals)) within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.”

5. Other provisions of the Act, which are relevant for our purposes, may first be taken note of.

6. Section 35E deals with powers of the Board or Commissioner of Central Excise to pass certain orders. We are concerned with sub-section (5) and explanation thereto, which is in the following terms :-

“35E. Powers of Board or Commissioner of Central Excise to pass certain orders. –

xx xx xx

(5) The provisions of this section shall not apply to any decision or order in which the determination of any question having a relation to the rate of duty or excise or to the value

of goods for the purposes of assessment of any duty is in issue or is one of the points in issue.

Explanation. – For the purposes of this sub-section, the determination of a rate of duty in relation to any goods or valuation of any goods for the purposes of assessment of duty includes the determination of a question –

- (a) relating to the rate of duty of excise for the time being in force, whether under the Central Excise Tariff Act, 1985 (5 of 1986), or under any other Central Act providing for the levy and collection of any duty of excise, in relation to any goods on or after the 28th day of February, 1986; or
- (b) relating to the value of goods for the purposes of assessment of any duty of excise in cases where the assessment is made on or after the 28th day of February, 1986; or
- (c) whether any goods are excisable goods or whether the rate of duty of excise on any goods is *nil*; or
- (d) whether any goods fall under a particular heading or sub-heading of the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), or the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), or the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), or that any goods are or not covered by a particular notification or order issued by the Central Government or the Board, as the case may be, granting total or partial exemption from duty; or
- (e) whether the value of any goods for the purposes of assessment of duty of excise shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in this Act.”

7. Section 35G was introduced by the Finance Act, 1999 with effect from 11.5.1999 and Finance Act, 2003 with effect from 14.5.2003.

We are concerned mainly with sub-section (1) and (2) thereof, which read as under :-

“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 the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The 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) file within one hundred and eighty days from the date on which the order appealed against is received by the 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.

xx xx xx”

8. Section 35L provides appeal to the Supreme Court and is couched in the following nature :-

“35L. An appeal shall lie to the Supreme Court from –

- (a) any judgment of the High Court delivered on a reference made under section 35G or 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 the passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or
- (b) any order passed 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.

9. It is clear from the above that against certain orders appeal is provided to the High Court, whereas in respect of 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) ELT 3 (SC) 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 129-D, 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.
12. It would be of interest to note at this stage that in the case of *Perfect Electric Concern Pvt. Ltd. v. Asst. Collector/Commissioner, Central Excise*, 2000 (118) ELT 578 (Del), a writ petition was filed against such an order without availing the statutory remedy of appeal to the

Supreme Court provided under Section 35D of the Act. Argument by the petitioner therein, based on the judgment of the Supreme Court in *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261 was that the remedy of writ was always available. This contention was turned down and writ petition was dismissed by this Court observing that the judgment in *L.Chandra Kumar* (supra) nowhere suggests that the petitioner should file petitions under Articles 226/227 of the Constitution of India even bypassing the statutory remedy of an appeal to the Supreme Court provided by an enactment. In this backdrop, it cannot be disputed that if the question of determination relates to the rate of duty or excise or the value of goods “*for the purposes of assessment*”, appeal lies to the Supreme Court. It also cannot be disputed that in the present case that the question of rate of duty of service tax for the purpose of assessment arose for consideration and has been decided and, therefore, normally an appeal to this Court would not be maintainable.

13. The submission of Mr. Mukesh Anand, learned counsel appearing for the appellant, however, is that such an appeal is maintainable and to substantiate his contention, he has relied upon the provisions of the Finance Act, 1994 vide which service tax was introduced. His submission was that the question of law raised in this appeal is as to whether the respondent club is liable to pay service tax in allowing its members to use its space as Mandap which is a taxable service in

view of Section 65 read with Section 67 and 105 of the Finance Act, 1994.

He submitted that though the present appeal has been filed under Section 35G of the Act but the dispute relates to the levy of the service tax against the respondent under the Finance Act, 1994 which is defined under Section 65 (66 & 67) of the said Act. The classification of the taxable service is defined in Section 65A of the Finance Act, 1994. The charge of service tax within India and outside India is provided under Section 66 and 66A of the said Act. According to him, what will be the valuation of taxable service for charging service tax is well-defined under Section 67 as well as the Service Tax (Determination of Value) Rules, 2006 vide Notification No. 12/2006-ST dated 19.4.2006. Thus, he argued that in the present appeal there is no question regarding any right of duty or value of goods for the purpose of assessment of any duty. The only question is as to whether the respondent is liable to pay service tax for the services rendered by it in view of Section 65 read with Sections 67 and 105 of the Finance Act.

14. This argument needs outright rejection. Appeal provision is Section 35G, under which these appeals are filed. Therefore, that provision, along with Section 35L, is to be considered (as already done) to decide the issue of maintainability. Moreover, the aforesaid argument will not change the character of the dispute. As is clear from the order of the Appellate Tribunal, in essence, the question

that is decided relates to rate of duty. Whether nomenclature thereof is given as service tax, it is the rate of duty of that tax which would essentially fall for consideration. Against such a decision, appeal is filed by the appellant under Section 35G of the Act which would not be maintainable in view of the decision of the Supreme Court in *Naveen Chemicals* (supra), as discussed in detail above. The remedy for the appellant is to file appeal under Section 35L of the Act, which lies to the Supreme Court.

15. We are, therefore, of the opinion that these appeals are not maintainable for want of jurisdiction and are, thus, dismissed on this ground.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

August , 2009
nsk

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CEAC No. 17 of 2007

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Reserved on : July 24, 2009
Pronounced on : August 28, 2009

Commissioner of Service Tax

. . . Appellant

through :

Mr. Mukesh Anand with
Mr. RCS Bhadoria, Mr. Sumit
Batra and Mr. Shailesh Tiwari,
Advocates

VERSUS

India International Centre

. . . Respondent

through :

NEMO

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see CEAC No. 5/2009.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

August 28, 2009

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