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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 26.02.2013

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CEAC 8/2013

COMMISSIONER OF SERVICE TAX DELHI Petitioner

versus

BHARTI AIRTEL LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner

: Mr Rahul Kaushik, Adv.

For the Respondent

: Mr Tarun Gulati, Mr Neil Hildreth and Mr Shankey Aggarwal, Advs.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.1976/2013 (for delay in refiling)

This is an application for condonation of delay in refiling the appeal. For the reasons mentioned in the application the delay in refiling is condoned.

The application is disposed of.

CEAC 8/2013 and CM 1975-1976/2013

1. This is an appeal against the order dated 15.5.2012 passed by the Customs, Excise and Service Tax Appellate Tribunal in service tax appeal no.655/2008. This appeal has been preferred by invoking the provisions of Section 35G of the Central Excise Act, 1944 read with Section 83 and the Finance Act, 1994. Learned counsel appearing on behalf of the respondent/assessee has taken a preliminary objection to the maintainability of this appeal. According to the learned counsel for the respondent, an appeal such as the one filed by the appellant herein is not maintainable before this Court in view of the clear provisions of Section 35G of the Central Excise Act, 1944 which have been made applicable in respect of matters pertaining to service tax by virtue of Section 83 of the Finance Act, 1994. On the other hand learned counsel for the appellant states that the appeal is maintainable because the only point urged on behalf of the revenue/petitioner is with regard to the question of limitation under Section 73(1)(a) of the Finance Act, 1994. He submitted that the Tribunal fell in error inasmuch as it did not permit the revenue to invoke the extended period of limitation of five years. Therefore, according to the learned counsel for the appellant, the only issue that is

sought to be raised is regarding the point of limitation and it has nothing to do with any question which is related to rate of duty of service tax or to the valuation of the taxable service. Therefore, according to him, the present appeal would be maintainable before this Court.

2. We have heard the learned counsel for the parties on this issue at some length. The provisions of Section 35G of the Central Excise Act, 1944 and, in particular, sub-section (1) thereof 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.”

We may also refer to Section 35L which deals with appeals to the Supreme Court. The said provision reads as under: -

“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.”

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 Vs. Punjab Recorders Ltd.** (2004) 165 ELT 34 (P& H);

- (2) *Sterlite Optical Technologies Ltd. Vs. Commissioner of C. Ex., Aurangabad 2007 (213) ELT 658 (Bom.);*
- (3) *Commissioner of Customs, Chennai Vs. Ashu Exports 2009 (240) ELT 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 which is impugned in the appeal which determines the issue.

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 which 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.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

FEBRUARY 26, 2013

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