



IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

1. C. EXCISE APPEAL No.4 OF 2021

Commissioner, Central Goods &
Services Tax, Guwahati, Kedar Road,
Fancy Bazar, PIN – 781001.

.....Appellant

-Versus-

M/s Oil India Limited,
PO: Duliajan, District: Dibrugarh,
Assam, PIN – 786602.

.....Respondent

2. C. EXCISE APPEAL No.3 OF 2021

Commissioner, Central Goods &
Services Tax, Dibrugarh, Milan Nagar,
Lane-F, P.O.C.R. Building, Dibrugarh -
786003.

.....Appellant

-Versus-

M/s Oil India Limited,
PO: Duliajan, District: Dibrugarh,
Assam, PIN – 786602.

.....Respondent

3. C. EXCISE APPEAL No.5 OF 2021

Commissioner, Central Goods &
Services Tax, Dibrugarh.

.....Appellant

-Versus-

M/s Oil India Limited,
PO: Duliajan, District: Dibrugarh,
Assam, PIN – 786602.

.....Respondent

4. C. EXCISE APPEAL No.7 OF 2021

Commissioner, Central Goods &
Services Tax, Dibrugarh, Milan Nagar,
Lane-F, P.O.C.R. Building, Dibrugarh -
786003.

.....Appellant

-Versus-

M/s Oil India Limited,
PO: Duliajan, District: Dibrugarh,
Assam, PIN – 786602.

.....Respondent

5. C. EXCISE APPEAL No.8 OF 2021

Commissioner, Central Goods &
Services Tax, Dibrugarh, Milan Nagar,
Lane-F, P.O.C.R. Building, Dibrugarh -
786003.

.....Appellant

-Versus-

M/s Oil India Limited,
PO: Duliajan, District: Dibrugarh,
Assam, PIN – 786602.

.....Respondent

6. C. EXCISE APPEAL No.9 OF 2021

Commissioner, Central Goods &
Services Tax, Dibrugarh, Milan Nagar,
Lane-F, P.O.C.R. Building, Dibrugarh -
786003.

.....Appellant

-Versus-

M/s Oil India Limited,
PO: Duliajan, District: Dibrugarh,
Assam, PIN – 786602.

.....Respondent

7. C. EXCISE APPEAL No.10 OF 2021

Commissioner, Central Goods &
Services Tax, Dibrugarh.

.....Appellant

-Versus-

M/s Oil India Limited,
PO: Duliajan, District: Dibrugarh,
Assam, PIN – 786602.

.....Respondent

- B E F O R E -

**HON'BLE THE CHIEF JUSTICE
HON'BLE MRS. JUSTICE MITALI THAKURIA**

For the Appellant(s) : Mr. S.C. Keyal, Sr. Standing Counsel,
Central Goods & Service Tax.

For the Respondent(s) : Mr. D. Sen, Advocate.
Mr. D. Das, Advocate.

Date of Judgment & Order : **3rd May, 2023.**

JUDGMENT & ORDER (ORAL)

[Sandeep Mehta, C.J.]

This bunch of Central Excise Appeals has been preferred by the Department for assailing identical orders passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Kolkata, whereby the Service Tax Appeals preferred by the respondent/Oil India Limited against the orders in original passed by the Commissioner

of Central Excise & Service Tax, Dibrugarh confirming the demand of service tax raised from the respondent by the Adjudicating Officer vide various adjudication orders in respect of the periods between April, 2011 to June, 2017 under the category of "Transportation of Goods through Pipelines/Conduits Services" were accepted. The CESTAT held that the respondent assessee was a seller and not a service provider and hence, in absence of service provider/service recipient relationship, there could not be any question of levy of service tax and hence, the demand could not be sustained. Accordingly, the demand of service tax interest and penalty raised by the Adjudicating Authority and affirmed by the Appellate Authority was quashed and set aside.

2. Affidavits-in-opposition have been filed on behalf of the respondent in all these appeals, wherein a pertinent preliminary objection is raised regarding maintainability of these appeals by referring to the provisions contained in Sections 35G and 35L of the Central Excise Act, 1944 (hereinafter referred to as the "1944 Act").

3. Arguments on the aspect of maintainability of these appeals have been heard. The circumstances leading to filing of the appeals were thoroughly analyzed. The applicable statutory provisions, the impugned orders and precedents cited at bar have been perused.

4. Mr. D. Sen and Mr. D. Das, learned counsel representing the respondent vehemently and fervently

contended that as the only issue involved in these appeals is regarding determination of taxability of the goods for the purpose of assessment of service tax, by virtue of Section 35L of the 1944 Act, the appeal from an order of the Appellate Tribunal would lie to the Hon'ble Supreme Court and not to the High Court. They urged that the High Court can entertain an appeal from an order passed in appeal by the Appellate Tribunal only upon being satisfied that the appeal involves substantial question of law and that case does not arise from an order relating, amongst 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 purpose of assessment. They placed reliance upon the following judgments in support of their arguments:

(a)	Commissioner of Central Excise, Pondicherry -Vs- CESTAT, Chennai , reported in 2016 (340) ELT 53 (Mad.)	Madras High Court
(b)	Commissioner of Service Tax, Kolkata -Vs- Calcutta Industrial Supply Corporation , reported in 2018 (19) GSTL 444 (Cal.)	Calcutta High Court
(c)	Commissioner Central Excise, Mumbai-V -Vs- Reliance Media Works Limited , reported in 2020 (372) ELT 220 (Bom.)	Bombay High Court

It was contended that the issue regarding maintainability of the appeal in the High Court in exactly identical scenario has been decided against the revenue in

these cases. On these submissions, learned counsel for the respondent implored the Court to dismiss the appeals as being not maintainable.

5. Per contra, Mr. S.C. Keyal, learned senior standing counsel, Central Goods & Service Tax, vehemently and fervently opposed the submissions advanced by the learned counsel for the respondents. He urged that the situation involved in the case at hand is not covered by the exceptions indicated in Section 35G of the 1944 Act. The substantial questions of law involved in these appeals do not require determination of any issue having relation to the rate of duty of excise or to the value of goods for the purpose of assessment. The question, which is involved in these matters, is as to whether or not the assessee is liable to pay service tax on transportation of goods by pipeline service and that such a question would not fall within the purview of the exception created under Section 35G of the 1944 Act. He submitted that by virtue of the enabling provisions contained in the Finance Act, the word "excise duty" is to be read as service tax and the department has a right to file a statutory appeal against the orders of CESTAT. He thus, implored the Court to admit the appeals on the following substantial question of law:-

"(a) Whether the Hon'ble CESTAT, Kolkata is correct in holding that the assessee is not liable to pay service tax on the 'Transportation of Goods by Pipeline Service' for the consideration received by the assessee for transportation of crude oil from their premises to the buyers' premises?"

6. We have given our thoughtful consideration to the submissions advanced at Bar and have gone through the material available on record.

7. The question regarding maintainability of these appeals falls within a very narrow compass. The relevant provisions of law, i.e. Sections 35G and 35L of the 1944 Act, which have a bearing on the issue are reproduced hereinbelow for the sake of ready reference:

“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 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) filed 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.

[(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 respondent 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 abridge 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 High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the cases including those who first heard it.

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

35L. Appeal to 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.]”

8. The very substantial question of law, which has been proposed by the appellant, raises an issue about the liability or otherwise of the assessee to pay service tax on transportation of goods by pipeline service. Thus, the core issue involved pertains to determination of the rate of duty of excise (service tax) or the value of goods for the purpose of assessment. Perusal of the language of sub-section (2) of Section 35L of the 1944 Act brings more clarity and virtually puts the controversy beyond the pale of doubt that the issues posed for adjudication are falling in the category of exceptions and, as a consequence, the

High Court would not have the jurisdiction to entertain appeal against the order of CESTAT. The provision makes it clear that determination of ***"any question having a relation to the rate of duty shall include the determination of taxability or excisability of the goods for the purpose of assessment"***. The question of law quoted above, as has been proposed by the revenue in these appeals, is regarding liability of the assessee to pay service tax on transportation of oil through a pipeline and the same clearly falls within the ambit of the restriction created by Section 35 G(1) read with Section 35L(1) of the 1944 Act.

9. The Full Bench of Bombay High Court considered identical issue in the case of ***Commissioner Central Excise, Mumbai-V -Vs- Reliance Media Works Limited*** (supra) and held as below:

“3. This reference was made because of divergence of views between two earlier Division Benches of this Court in respect of maintainability of appeals before this Court from the orders of the Tribunal deciding taxability of services and excisability of goods in the context of section 35-G(1) and 35-L(1) and (2) of the Act. The apparent conflict is between the decisions of this Court in Global Vectra Helicorp Ltd. v. C.S.T. Mumbai, CEA No. 66 of 2014, decided on 23rd March, 2015 and Bajaj Auto Ltd. v. Union of India, (2016) 4 STR 384, decided on 24th June, 2015. According to the referring Division Bench, the decision in Global Vectra Helicorp Ltd. (supra), of this Court held that in view of sections 35-G(1) and 35-L(2) of the Act, the question of taxability or excisability of goods for the purpose of assessment would not be an issue of rate of duty. Therefore, an appeal from the order of the Tribunal on the issue of

taxability/excisability would be maintainable before this Court and not before the Hon'ble Supreme Court. On the other hand, in Bajaj Auto Ltd. (supra) this Court held that in view of section 35-G(1) and 35-L(1)(b) of the Act, an appeal on the issue of taxability/excisability would lie to the Hon'ble Supreme Court and cannot be entertained by this Court. Further, this Court in Bajaj Auto Ltd. (supra) also held that section 35- L(2) of the Act which was inserted into the Act w.e.f. 6th August, 2014 was only clarificatory in nature. This as the issue of excisability/taxability was a rate of duty issue at all times.

4. Briefly the facts leading to this reference are as under:—

(a) On 20th November, 2013, the Tribunal passed the impugned order allowing the respondent's appeal. This by holding that chemical preparations for photographic use are not marketable, therefore, not goods. Thus, not classifiable under chapter 37 heading 3707 of the Central Excise Tariff Act, 1985.

(b) Being aggrieved by order dated 20th November, 2013, the Revenue filed an appeal under section 35-G(1) of the Act to this Court.

(c) At the hearing of the above appeal before the Division Bench, the respondent assessee raised a preliminary objection, viz. that the appeal filed by the Revenue is not maintainable before this Court as it deals with excisability of goods. In support, it placed reliance upon the decision of this Court in Bajaj Auto Ltd. (supra) which dealt with the question of taxability, viz. whether service tax is at all liable on payment of royalty. The Tribunal had held that the same cannot be a matter of service and, therefore, outside the scope of Finance Act, 1994. In an appeal filed by the Revenue, the respondent in the appeal, namely, Bajaj Auto Ltd., objected to the jurisdiction of this Court to entertain an appeal under section 83 of the Finance Act, 1994 read with section 35-G of the Act. The Court held that the issue of taxability is a question relating to rate of duty and, therefore, an appeal against such an order in terms of section 35-G(1) of the Act would lie only before the Hon'ble

Supreme Court. Further, the Court also noted that insertion of sub-section (2) to section 35-L of the Act w.e.f. 6th August, 2014 was only clarificatory in nature. Thus, the appeal from an order of the Tribunal relating to taxability/excisability would be appealable before the Hon'ble Supreme Court of India even prior to 6th August, 2014.

(d) On the other hand, the appellant Revenue placed reliance upon the decision of this Court in *Global Vectra Helicorp Ltd. (supra)* where the issue was whether the service rendered by Global Vectra Helicorp Ltd. could be classified under section 65(105)(zzzzj) of the Finance Act, 1994 as contended by the Revenue and upheld by the Tribunal or not at all under the Finance Act, 1994. The objection raised by the Revenue to the maintainability of the appeal to this Court was negated. This on the ground that the issue of rate of duty, i.e. of classification, would only arise when the authorities have to decide the appropriate classification between two competing entries under the Finance Act, 1994. It held no question relating to determination of the rate of duty can arise when the order under challenge decides whether the services rendered can be said to be covered by section 65(105)(zzzzj) of the Finance Act, 1994.

(e) The Division Bench which referred the above question to this Court, noted the fact that although *Global Vectra Helicorp Ltd. (supra)* did in terms refer to section 35-L(2) of the Act, it did not express any view on it. Moreover, it also noted that the binding decision of the Apex Court in *Navin Chemicals Mfg. and Trading Co. Ltd. v. Collector of Customs, (1993) 68 ELT 3* and the decision of this Court were also not considered. Moreover, before the referring Division Bench, the parties did not dispute that post insertion of sub-section (2) to section 35-L of the Act, w.e.f. 6th August, 2014, orders of the Tribunal relating to taxability of services and excisability of goods would be appealable to the Hon'ble Supreme Court.

(f) It is in view of the aforesaid conflict between the two views of this Court, as indicated in *Global Vectra Helicorp Ltd. (supra)* and *Bajaj Auto Ltd.*

(supra), that the aforesaid questions have been referred by the Division Bench to the Full Bench.

5. We have heard Mr. Bangur, for the appellant Revenue and Mr. Sridharan, learned Senior Counsel who appears for the appellant in Central Excise Appeal No. 33 of 2018 where he states an identical question would arise in an appeal filed by M/s Shoppers Stop Ltd. Both of them support the proposition that appeals from orders of the Tribunal in respect of excisability/taxability will lie to this Court. We have also heard Mr. Desai, learned Senior Counsel, who appears for the respondent-assessee to contend that the appeal from orders of the Tribunal in respect of excisability/taxability will be to the Hon'ble Supreme Court.

6. (I)	***	***	***
(II)	***	***	***

(III) (a) We have considered the rival submissions. The appeals from the orders of the Tribunal under the Finance Act, 1994 and the Act prior to the introduction of sub-section (2) to section 35-L of the Act were governed by section 35-G(1) and 35-L(1) of the Act. In terms of section 35-G(1) of the Act, every appeal from order of the Tribunal passed after 1st July, 2003 giving rise to a substantial question of law would be to the High Court except orders of the Tribunal relating to the rate of duty of excise or value of goods for the purpose of assessment. The above orders were excluded from the jurisdiction of the High Court and were appealable only to the Hon'ble Supreme Court in terms of section 35-L(1)(b) of the Act. In the context of the above, we have to consider that when the order of the Tribunal decides a dispute that the service is not covered by the Finance Act or goods not being covered by the Act for the purposes of determining the rate of duty for the purpose of assessment, would be appealable to this Court or not.

(b) The contention of the appellant - Revenue is that deciding of excisability or taxability is not connected to the rate of duty. Therefore, an order of the Tribunal deciding excisability/taxability are appealable to the High Court and not the Hon'ble Supreme Court. In support reliance is placed upon the decision of the

Supreme Court in *Motorola India Ltd. (supra)*, while dealing with *pari materia* provisions under the Customs Act, 1962. We note that the issue in the above case was not with regard to excisability or taxability or importability in the context of Customs Act, 1962 but with regard to eligibility of an exemption notification for non-satisfaction of post import conditions therein. In the above case, there was no issue relating to the rate of duty in respect of the goods imported but the issue was application of an exemption after importation and clearance for home consumption, subject to satisfying the conditions of the notification, viz. utilization of imported material for specific purpose such as manufacture of final product. The Supreme Court, while holding that the above issue is not a rate of duty issue, observed that the dispute is *inter se* between the parties and the decision is not applicable to a separate class or category of assesseees as a whole. The above decision will not apply to a decision of the Tribunal dealing with taxability/excisability which necessarily would require determining the rate of duty for the purpose of assessment. It is only on deciding the taxability of services or excisability of goods that a rate of duty can be decided. The words “determination of any question having a relation to rate of duty of excise for the purpose of assessment” as found in the context of section 35-G and 35-L of the Act was a subject of consideration by this Court in *Sterlite Optical Technologies Ltd. v. Commissioner of Central Excise*, 213 ELT 658. This Court held that the word “assessment” has a very comprehensive meaning, i.e. it can comprehend the whole procedure for ascertaining and imposing duty liability. Thus, the words “for the purpose of assessment” would cover even the issue of the Tribunal deciding excisability and/or taxability as it is a part of the process of assessment. Besides, the answer to the question whether a product/service is excisable/taxable will not only have an impact on a dispute between parties *inter se* but would have an all India impact and, therefore, the statute contemplates an appeal to the Hon'ble Supreme Court for uniformity of decisions. Otherwise, we would have a situation where different High Courts take different views on the issue of

excisability/taxability, leading to a situation where in some States the service/goods are not taxable/excisable and taxable in other States. Thus, the decision of the Apex Court in Motorola (India) Ltd. (supra) has specifically referred to the fact, that the issue before it does not have an all India impact. This as it does not deal with issue of taxability/excisability for the purpose of assessment.

(c) The appellant Revenue also relies upon the decision of this Court in Greatship (India) Ltd. (supra) and of the Supreme Court in Navin Chemicals (supra) to contend that an appeal arising from an order dealing with taxability/excisability would only be before this High Court and not the Hon'ble Supreme Court. We find that the decision in Greatship (India) Ltd. (supra) of this Court is not applicable to the present facts, as it itself records in paragraph 2 and 28 thereof that there was no dispute before it that the services are taxable. Thus, the objection of the Revenue (respondent before it) that this Court does not have jurisdiction, was negatived. So far as reliance upon the decision of the Apex Court in Navin Chemicals (supra) is concerned, we note that in paragraph 11 thereof, the Supreme Court has observed as under:—

‘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 purpose 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 the 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.'

(emphasis supplied)

From the above, it is clear that the Apex Court noted that the classification of goods under the Tariff for the purpose of determining the rate of duty would be a question having relation to the rate of duty. Thus, the above observations by the Apex Court would support the view that taxability/excisability is not appealable before this Court, as decision on the above is in the context of it being classifiable under the Finance Act, 1994 or the Act read with the Tariff.

(d) On the other hand, we note that all the decisions relied upon by the respondent and cited hereinabove have held that the issue of excisability, namely, manufacture taking place or not, are all issues relating to rate of duty. Thus, holding that an appeal on the issue of excisability/taxability from the orders of the Tribunal would be to the Hon'ble Supreme Court. In fact, the Kerala High Court in Kerala State Beverages (supra) has held that whether any goods are excisable or not, will fall within the exclusion provided under section 35-G(1) of the Act. It further noted that this distinction between Hon'ble Supreme Court and the High Court seems to be clearly intended to avoid conflict of views between High Courts on a question having all India impact. It is pointed out to us that except in the decision rendered by the Andhra Pradesh High Court in Sriram

Refrigeration (supra), from which an appeal to the Supreme Court has been admitted on 11th March, 2011 (362 ELT A 108), all the other decisions are final. We find that this Court in *Greatship (India) Ltd. (supra)* has observed in para 20 thereof that this Court in *Commissioner of Central Excise and Service Tax v. Credit Suisse Services (I) Pvt. Ltd.*, (2015) 38 STR 473 had held the issue of the taxability of the services and the rate at which such services would be taxed was required to be considered by the Hon'ble Supreme Court and not by this Court. It is noteworthy that the Revenue has not been able to show a single decision of any Court (including this Court) except the decision in *Global Vectra Helicorp (supra)* to support the contention that the issue of excisability/taxability can be entertained by the High Court. We shall deal with the above decision of this Court in *Global Vectra Helicorp (supra)* separately a little later. During the course of hearing, our attention was also drawn to the decision of the Delhi High Court in *Commissioner of Sales Tax v. Ernst and Young Pvt. Ltd.*, 34 STR 3. In the above case, the Court was concerned with the issue whether the services rendered by the assessee therein were chargeable to tax under the Finance Act, 1994. The assessee therein raised a preliminary objection about the jurisdiction of the High Court to entertain the Revenue's appeal on the above dispute. The Delhi High Court, while following the decision of the Hon'ble Supreme Court in *Navin Chemicals (supra)*, in particular para 11 thereof, held that the orders of the Tribunal deciding the issue of taxability would be appealable to the Supreme Court. It noted in paragraphs 18 and 19 as follows:—

‘18. On reading of the said paragraph, it is lucid and clear that Supreme Court had stated that questions relating to rate of duty and valuation for the purpose of assessment as defined in the explanation to sub-section (5) to section 129-D of the Customs Act, would include question relating to classification of goods under the tariff, whether or not they are covered by exemption notification; whether value for the purpose of assessment should be enhanced or reduced etc. It was further observed that statutory definition accords to the meaning given to the expression above. For the

purpose of present controversy, we are inclined to ignore and not take into consideration explanation 5 to section 129-D or subsection (5) to section 35E. However, in spite of the said position, we do not think that the decision in the case of Delhi Gymkhana Club Ltd. (Supra) is required to be referred to a Larger Bench. Determination of any question relating to rate of tax would necessarily directly and proximately involve the question, whether activity falls within the charging section and Service Tax is leviable on the said activity. The said determination is integral and an important adjunct to the question of rate of tax. In case Service Tax is not to be levied or imposed and cannot be imposed under the charging section, no tax would be payable. The said determination would be direct or proximate to the issue of rate of tax, which will include nil tax, when no tax is chargeable.

19. If the reasoning given by the Revenue is to be accepted, it will lead to anomaly and substantial confusion. All assessments necessarily have to determine and decide the rate of tax after determining and deciding whether or not activity is chargeable or tax can be levied. Assessments against the assessee would decide the rate of tax applicable once it is held that the activity is chargeable to tax under the F. Act. The words 'rate of tax' in relation to rate of tax would include the question whether or not the activity is exigible to tax under a particular or specific provision. This will be a reasonable and appropriate interpretation and will not cause or result in confusion or ambiguity regarding the appellate forum. Line between exigibility and rate of tax as propounded can be rather thin and superfluous in the present statutory context.'

(emphasis supplied)

It further records the fact that the Hon'ble Supreme Court has been entertaining and deciding the appeals under the Act relating to excisability of the goods and in that regard made specific reference to the following decisions of the Supreme Court:—

(a) *Maltex (I) Pvt. Ltd. v. Commissioner of C. Ex.*,
(2004) 165 ELT 129,

(b) Commissioner of Central Excise v. Mahavir Aluminum, 212 ELT 3,

(c) Nestle India Ltd. v. Commissioner of Central Excise, 235 ELT 577.

We are in complete agreement with the reasons of the above Delhi High Court decision in Ernst and Young Pvt. Ltd. (supra) to conclude that issues of taxability and excisability from the orders of the Tribunal are appealable to the Hon'ble Supreme Court.

(e) It was also contended by the appellant Revenue that insertion of subsection (2) to section 35-L of the Act that taxability/excisability would be a rate of duty issue w.e.f. 6th August, 2014 would itself imply that prior to 6th August, 2014, the issue of taxability/excisability was appealable to the High Court. This submission on behalf of the Revenue cannot be accepted in view of the various decisions referred to hereinabove where the Courts have held that issue of excisability of goods and taxability of services are appealable to the Hon'ble Supreme Court even prior to the insertion of sub-section (2) to section 35-L of the Act. The introduction/insertion of sub-section (2) to section 35-L of the Act was done as a matter of abundant caution so as to clarify and make explicit what was implicit in section 35-G(1) and 35-L(1)(b) of the Act. This was done only to ensure that the Courts do not waste time examining the issue again and again, when the issue has already been decided by various Courts upon which the respondent assessee has placed reliance. This in support of its case that an appeal with respect to taxability/excisability is maintainable only before the Hon'ble Supreme Court of India even before the insertion of sub-section (2) of section 35- L of the Act. In fact, this view is also supported by clause 99 of Notes on Clauses to Finance (No. 2) Bill, 2014 which introduced sub-section (2) to section 35-L of the Act. It specifically states that section 35-L is being amended so as to clarify that issue of taxability/excisability is covered by the term rate of duty. Thus, what was implicit has been made explicit. We find support for this view in the decision of the Supreme Court in W.P.I.L. Ltd. v.

Commissioner of Central Excise, 181 ELT 359. We also note that Punjab and Haryana High Court Commissioner of S.T. v. DLF Golf Resort Ltd., (2018) 56 GSTR 247 has held that insertion of subsection (2) to section 35-L of the Act was clarificatory. Therefore, insertion of sub-section (2) to section 35-L of the Act w.e.f. 6th August, 2014 would not justify the contention of the Revenue that prior to 6th August, 2014, the appeals were maintainable before the High Court.

(f) Therefore, in view of the above, we are of the view that even prior to the insertion of sub-section (2) to section 35-L of the Act, the issue of taxability and excisability would be an issue relating to the rate duty of excise/services for the purpose of assessment. Therefore, the appeal from the orders of the Tribunal deciding issue of excisability/taxability, cannot be entertained by this Court in terms of section 35-G(1) and 35-L(1)(b) of the Act de hors section 35-L(2) of the Act.

Thus, question No. (A) as referred, is answered as under:—

Appeals from orders of the Tribunal relating to taxability/excisability passed prior to 6th August, 2014 i.e. the date of insertion of sub-section (2) to section 35-L of the Act being a rate of duty issue, would be appealable only to the Hon'ble Supreme Court and not the High Court.”

10. Similar interpretation, as was made the by Bombay High Court in the above judgment, has been made by various other High Courts in the judgments relied upon by the learned counsel for the appellant. We are in complete agreement with the view taken by the Bombay High Court after apposite evaluation of the statutory provisions. Hence, we are of the firm opinion that these appeals to the High Court against the order of the Customs, Excise and Service Tax Appellate Tribunal

(CESTAT), Kolkata are clearly barred by virtue of Section 35G(1) read with Section 35L of the 1944 Act. Since the issue involved in these appeals is regarding applicability of service tax interest and penalty on transportation of goods through pipelines/conduit services undertaken by the respondent assessee, the same, if were to be challenged, can only be resorted to by filing an appeal before the Hon'ble Supreme Court. Resultantly, the preliminary objection raised on behalf of the respondent regarding maintainability of appeals is sustained.

11. The appeals are dismissed as being not maintainable. Needless to say that the revenue shall be at liberty to file appeals against the impugned order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) before the Hon'ble Supreme Court, if so desired.

JUDGE

CHIEF JUSTICE

Comparing Assistant