IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3968 OF 2002

1. Bajaj Auto Limited, having their registered office/factory at Bajaj Nagar, Waluj, Aurangabad.

2. Narayan G. Mengane, Age : 57 Years, Occu. : Bajaj Vihar, Aurangabad. .. Petitioners

Versus

1. Union of India.

2. The Commissioner of Central Excise & Customs, N-5, Town Centre, CIDCO, Aurangabad.

3. The Additional Commissioner of Central Excise & Customs, Service Tax Cell, N-5, Town Centre, CIDCO, Aurangabad - 431 003.

4. The Assistant Commissioner of Central Excise & Customs, Service Tax Cell, N-5 Town Centre, CIDCO, Aurangabad 431 003.

5. The Superintendent, Service Tax Cell, Central Excise Headquarters, N-5 Town Centre, CIDCO, Aurangabad 431 003. .. Respondents

Shri Arshad Hidaytullah, Senior Counsel i/by Mrs. Charuta S. Deshmukh, Advocate for Petitioners.
Mrs. Kalpalata Patil Bharaswadkar, Advocate for Respondent Nos. 1 to 5.

WITH
FIRST APPEAL NO. 589 of 2005

The Commissioner of Central Excise
and Customs, N-5, Town Centre,
CIDCO, Aurangabad 431 003. .. Appellant

Versus

M/s Bajaj Auto Limited,
M.I.D.C. Waluj,
Aurangabad. .. Respondent

Mrs. Kalpalata Patil Bharaswadkar, Advocate for the Appellant.
Shri Arshad Hidaytullah, Senior Counsel i/by Mrs. Charuta S. Deshmukh, Advocate for the Respondent.

CORAM : S. V. GANGAPURWALA AND
A. I. S. CHEEMA, JJ.

DATE ON RESERVED FOR JUDGMENT : 08.05.2015
DATE ON JUDGMENT PRONOUNCED : 24.06.2015

JUDGMENT (*Per S. V. Gangapurwala, J.*) :-

. Both these matters are concerning same subject matter and are between the same parties, as such are dealt together.

2. The petitioner in Writ Petition No. 3968 of 2002 Bajaj Auto Limited, Waluj (for short "BAL") is an assessee. The petitioners

in the said petition assail the show cause notice dated 29th July, 2002 demanding service tax from the petitioners, so also seeks declaration that the second proviso to Rule 6 (as it then was) and Rule 2(1)(d)(iv) of the Service Tax Rules 1994 (hereafter referred as to the "Said Rules" for the sake of brevity) be declared ultra virus as being directs conflict with the charging section of the said Act i. e. Sec. 68 of the Service Tax Act {Finance Act} (for short "Said Act"). This Court had admitted the writ petition by granting Rule on 29.10.2002. However, had refused the interim relief. As the interim relief was not granted, the proceedings pursuant to the said show cause notice impugned in the writ petition continued. The O.I.O. i. e. the office of the Commissioner of Central Excise and Customs, Service Tax Cell found the assessee i. e. M/s Bajaj Auto Limited liable to pay service tax and also imposed penalty. The assessee assailed the said order before the Commissioner of Central Excise and Customs (Appeals). The said appeal was dismissed thereby confirming the judgment of the O. I. O. The assessee thereafter preferred appeal to the Customs, Excise and Service Tax Appellate Tribunal West Regional Bench at Mumbai (CESTAT). The CESTAT allowed the said appeal setting aside the demand and the penalty. The department has assailed the said judgment in First Appeal No. 589 of 2005.

3. We have heard Mr. Hidaytullah, the learned senior counsel in First Appeal No. 589 of 2005 and Mr. Hidayatullah the

learned senior counsel along with Mrs. C. S. Deshmukh, the learned counsel in Writ Petition No. 3968 of 2002 on behalf of assessee and Mrs. Kalpalata Patil Bharaswadkar, the learned counsel for the department.

4. The challenge to the show cause notice in Writ Petition No. 3968 of 2002 was based on various counts, so also validity of second proviso to Rule 6 and Rule 2(1)(d)(iv) of the said Rules. The same would not survive in view of the judgment of the Apex Court in a case of **M/s Kerala State Electricity Board Vs. The Commissioner of Central Excise** reported in ***AIR 2008 SC 798***, wherein it is held that, the service recipient is liable to pay service tax and interest on amount of tax due to the service provider, who did not have any independent office in India. As far as other grounds of challenge that the said provision has come into effect from 28.02.1999 and in the impugned show cause notice the service tax is claimed from 07.07.1997 to 31.03.2002 is concerned, the same can be considered while dealing with proceedings pursuant to the said show cause notice. In the light of that, the writ petition stands disposed of.

5. As far as First Appeal No. 589 of 2005 is concerned, the same assails the judgment of CESTAT. The appeal is filed under the provisions of Sec. 35-G of the Central Excise Act as amended by the Finance Act 2003.

6. Mr. Hidaytullah, the learned senior counsel for the respondent/assessee raised a preliminary objection that the appeal is not maintainable U/Sec. 35-G of the Central Excise Act, as the dispute is with regard to the "rate of tax". According to the learned senior counsel the technical assistance fee and the royalty to be paid pursuant to the agreement between the respondent/assessee and Kawasaki Heavy Industries, Japan (for short "KHI") cannot be classified as service. As such it is not susceptible to the service tax. Even the CESTAT has held that royalty is not subject matter of service tax. Right to use trade mark is a transaction in property and not in consultancy or advice and that no consultancy or advice is involved. It is a transaction of intangible property, so also technical assistance does not come within the ambit and purview of service tax. The dispute come within the purview of rate of tax. The learned senior counsel relies on the judgment of the Division Bench of Kerla High Court in a case of **C.C.E. Manglore Vs. Manglore Refinery & Petrochemicals Ltd.** reported in ***2011 (270) E.L.T. 49 (Kar)***. According to the learned senior counsel, the said judgment stands confirmed by the Apex Court as the special leave petition filed against the said judgment is withdrawn by the department with liberty to file appeal, that is appeal U/Sec. 35-L of the Central Excise Act to the Apex Court. The learned senior counsel also relies on the judgment of this Court in a case of **Sterlite Optical Technologies Ltd. Vs. Commissioner of Central**

Excise Aurangabad reported in ***2007 (213) E.L.T. 658 (Bom)***.

7. Mrs. Kalpalata Patil Bharaswadkar, the learned counsel for the department strenuously contends that the appeal will have to be decided on merits as it is admitted. According to the learned counsel, if the S.L.P. is dismissed in *limine* or is withdrawn, the principle of merger does not apply. For the said purpose the learned counsel relies on the judgment of the Apex Court in a case of **Kunhayammed and others Vs. State of Kerala and another** decided on **19.07.2000**. The learned counsel submits that, the substantial question of law is required to be adjudicated. According to the learned counsel as per Article 11.7 of the agreement between KHI and BAL, all taxes concerning payment to KHI shall be made by BAL directly to Government of India on behalf of KHI and BAL will send certificate of said tax payment to the KHI. The respondent/assessee has agreed to pay the tax on behalf of KHI and now cannot resile from the same. As per Sec. 65 of the Finance Act, tangible services in respect of consulting engineering means any service provided by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering. As per Rule 6 of Service Tax Rules, more particularly it's second proviso, the assessee is liable. According to the learned counsel, the appeal is perfectly maintainable before this Court U/Sec. 35-G of the said

Act, as the dispute does not come within the ambit and purview of rate of duty. The learned counsel relies on the judgment of the Karnataka High Court in a case of **Commissioner of Customs Vs. Motorola India Limited** reported in ***2011 CJ (Kar) 1081***, so also another judgment of the Karnataka High Court in a case of **Commissioner of Central Excise Vs. Manglore Refineries and Petrochemicals Ltd.** reported in ***2010 CJ (Kar) 2578***. The learned counsel also relies on the judgment of the Apex Court in a case of **Union of India and another Vs. Guwahati Carbon Ltd.** reported in ***2012 CJ (SC) 1491*** and contends that the appeal U/Sec. 35-G of the said Act shall lie to the High Court from the order passed in any appeal by the Appellate Tribunal. If the order of the Tribunal does not relate among other things to the determination of any question having relation to the rate of duty or to the value of goods, the dispute with regard to the assessable value is always maintainable before this Court. The learned counsel also relies on the judgment of this Court in a case of **Commissioner of Central Excise Vs. Universal Ferro & Allied Chemicals Ltd.** reported in ***2008 CJ (Bom) 568***.

8. We have considered the submissions canvassed by the learned counsel for respective parties. We had apprised the learned counsel for respective parties that, we would be dealing with the aspect of the maintainability of appeal U/Sec. 35-G of the said Act first and the arguments are heard on the ground of

maintainability of appeal.

9. Before adverting to the contentions raised by the learned counsel for respective parties, it would be appropriate to refer to the relevant provisions of the Central Excise Act, 1944 i. e. Sec. 35-G as it stood then and Sec. 35-L as under :

THE CENTRAL EXCISE ACT, 1944

1. ....

35. Appeals to [Commissioner (Appeals)].--

35-A ....

35-G. 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.

(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.

(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 respondents 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 or 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;

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

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

"**35-L. 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 35-G; or

(ii) on a reference made under section 35-G by the Appellate Tribunal before the 1st day of July, 2003;

(iii) on a reference made under section 35-H

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 purpose 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]"

10. This Court had framed the following substantial questions of law while admitting the appeal.

(1) Whether royalty paid/received as consideration for transfer of technology know how can form part of taxable value ?

(2) Whether M/s BAL are authorized person as per the provisions of Rule 6(1) of the Service Tax Rules 1994 to pay the taxes as applicable as per agreement clause 11.7 on behalf of M/s Kawasaki Heavy Industries Ltd. Japan ?

11. From the substantial question of law framed by this Court at the time of admission of appeal, it is manifest that the matter in issue was as to whether royalty paid/received as consideration for transfer of technology know how can form part of taxable value and whether the said issue would come within the province of rate of duty or to the value of the goods for the purpose of assessment as envisaged U/Sec. 35-G is required to be considered.

12. The CESTAT in the judgment impugned in the present appeal has held that right to use trade mark is a transaction in property and not consultancy or advice. It is a transaction of intangible property and in the present case, as per agreement the assessee has right to use trade marks/trade name of KHI as per article 7 of the agreement which deals with industrial property rights and brand names. Whether the same can be classified as services is *prima dona* question to be decided. In a case of **Commissioner of Central Excise Vs. Manglore Refineries and Petrochemicals Ltd.** referred supra, it is held by the Karnataka High Court that, whether the goods are excisable and entitled to exemption relates to the rate of duty and the appeal against it to the High Court is not maintainable U/Sec. 35-G of the Central Excise Act. The said judgment was assailed by the Department before the Apex Court. The Department withdrew the said appeal. No doubt, if S. L. P. is summarily dismissed, the theory of merger does not apply. There cannot be any dispute with the said proposition. However, it is not a case of dismissal of S.L.P., but it is a case of withdrawal of appeal with liberty to file appropriate appeal. The said judgment stands confirmed.

13. Even in a case of **Sterlite Optical Technologies Ltd. Vs. Commissioner of Central Excise Aurangabad** referred supra, this Court has held that term levy appears to be wider in its import than the term assessment. It is held that, it

may include imposition of tax as well as assessment. Even in a case of **Commissioner of Customs Vs. Motorola India Limited** referred supra and relied by the learned counsel for the Department, the Karnataka High Court has observed as under :

> **41.** Broadly the following disputes do not fall within the jurisdiction of High Court under Section 130 of the Act:
>
> (a) Dispute relating to the duty of customs payable on any goods.
>
> (b) The value of the goods for the purpose of assessment.
>
> (c) A dispute as to the classification of goods.
>
> (d) Whether those goods are covered by an exemption notification or not.
>
> (e) Whether the value of goods for the purposes of assessment is required to be increased or decreased.
>
> (f) Whether what is imported or exported is goods which attracts customs duty.

14. It has been held that, a dispute as to the classification of goods, so also whether particular goods attract duty would come within the ambit of rate of duty for assessment.

15. Even sub section 2 of Section 35-L of the Central Excise Act as introduced in the year 2014 lays down that for 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 said sub section 2 of Sec. 35-L is in the nature of explanation, though the same is introduced subsequently, it can be relied on to consider interpretation of rate of duty for the purpose of assessment. In the present case, whether the royalty paid would come within the ambit and purview of service tax is a question required to be determined. Considering the judgments as referred above, so also sub section 2 of Section 35-L of the Central Excise Act as introduced recently, it would be clear that the said issue will come within the scope of the terminology "rate of duty for the purpose of assessment". In the light of that, the appeal U/Sec. 35-G would not be maintainable.

16. In the result, the appeal is disposed of as not maintainable U/Sec. 35-G, with liberty to the Department to prosecute appeal if it so desires U/Sec. 35-L of the Central Excise Act. The first appeal accordingly stands disposed of with no order as to costs.

Sd/-	**Sd/-**
[A. I. S. CHEEMA, J.]	**[S. V. GANGAPURWALA, J.]**

bsb/June 15