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HIGH COURT OF CHHATTISGARH, BILASPUR

Tax Case No. 44 of 2016

Commissioner, Central Excise Customs & Service Tax Bilaspur.

---- Appellant

Versus

M/s. SEPCO Electric Power Construction Corporation, 150, Jinger Road, Jinan, Shandang, 250001, China

---- Respondent

For Appellant : Shri Vinay Pandey, Advocate.
For Respondent : Shri P.K.Sahu and Shri P.K.Tulsyan, Advocates.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Sharad Kumar Gupta, Judge

Judgment on Board

Per Thottathil B. Radhakrishnan, Chief Justice

26/07/2017

1. Heard learned counsel for the parties at the stage of admission. Filing of paper book is exempted.

2. Learned counsel for the Respondent questions maintainability of this appeal before the High Court. He points out that it does not fall within Section 35G of the Central Excise Act, 1944; for short 'Act', inasmuch as the substance of this appeal is something that goes under what has been carved out for appeal to the Supreme Court. Reference is made to the judgment in **Commissioner, Service Tax v. DLF Golf Resorts Ltd** in STA No. 24 of 2016 (O&M) by the High Court of Punjab and Haryana, **Commissioner of Service Tax v. Gecas Services India Pvt. Ltd.; 2015 (39) STR 980 (Del), Commissioner of Service Tax v. Ernst & Young Pvt. Ltd.; 2014 (34) STR 3 (Del)** by the High Court of Delhi, and the judgment in **Commissioner of Central Excise, Salem v. Thriveni Earth Movers Pvt. Ltd.; 2015 (39)**

SR 749 (Mad) by the High Court of Madras. He also made specific reference to the provisions contained in Section 35L of the Act to point out that the issues sought to be raised in this appeal fall within the scope of an appeal under that provision.

3. Having heard learned counsel for the Appellant-Department, we may also notice the pronouncements in **Commissioner of S.T., Bangalore v. Scott Wilson Kirkpatric (I) Pt. Ltd.; 2011 (23) STR 321 (Kar), CCE Mangalore v. Mangalore Refineries & Petrochemicals Ltd; 2011 (270) ELT 49 (Kar)** and in **Commissioner of Central Excise & Customs v. Swiss Glass Coat Equipments Ltd; 2011 (273) ELT 364.** Profitable reference could also be made to the judgment in **The Commissioner, Central Excise, Customs & Service Tax. v. M/s. Kerala State Beverages (Manufacturing & Marketing) Corporation Ltd.; 2014 (300) ELT 217 (Ker)**, which states, *inter alia*, as follows:

> "3. The ratio of the precedents cited in support of the objection as to maintainability is that the question as to whether any goods are excisable or not, would also fall within the exclusion in terms of Sub-section 1 of Section 35G and that the bifurcation of jurisdiction between the Supreme Court and the High Courts seems to be clearly intended, also to exclude conflict of opinions between the different High Courts on matters which relate to issues having national impact in the fiscal scenario. We see abundant substance and support for this view in the manner in which the provisions of Section 35G relating to exclusion of jurisdiction of the High Court need to be understood. Section 35G (1) provides, among other things, that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal (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 purpose of assessment). The precedents noted above are rendered dilating on the concept of the term 'rate'. The question whether any particular transaction or goods is excisable is an issue directly linked to the question as to what would be the rate of duty of excise. If it is not liable for levy of excise duty, then it would be a case of 0% or 'nil'. The question of coverage is, thus, a matter intrinsically linked with the determination of questions having a relation to the rate of duty of excise. Not only that, the phrase "any question having a relation to the rate of duty of excise" is part of the exclusionary clause in Section 35G (1). Reverting to

> Section 35L, we notice that clause (b) thereof provides for an appeal to the Supreme Court from 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. This means that anything attendant to the determination of any question having a relation to the rate of duty of excise would also fall within the trappings of the exclusion, thus, taking the jurisdiction away from the High Court; to be agitated before the Supreme Court in terms of Section 35 L."

4. The issues sought to be raised herein is as to whether the activity of the Respondent would fall within the definition of "consulting engineer" for the relevant period. This essentially is a question as to rate, if any, at which duty leviable is to be paid. Such issue is excluded from the purview of the jurisdiction of the High Court in terms of Section 35G of the Act.

5. For the aforesaid reason, this appeal is held as not maintainable and is dismissed without prejudice to the other remedies of the Appellant-Department, in accordance with law.

Sd/-	Sd/-
(Thottathil B. Radhakrishnan) **CHIEF JUSTICE**	(Sharad Kumar Gupta) **JUDGE**

Amit