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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

FIRST APPEAL NO.2860 OF 2008

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

VERSUS

M/s Midas Care Pharma Pvt. Ltd
B-16, M.I.D.C. Area, Waluj,
Aurangabad ... RESPONDENT

.....
Shri D.S. Ladda, Advocate for appellant
Shri S.M. Godsay, Advocate for respondent
.....

WITH

FIRST APPEAL NO.3869 OF 2008

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

VERSUS

M/s Midas Care Pharma Pvt. Ltd
B-16, M.I.D.C. Area, Waluj,
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Shri D.S. Ladda, Advocate for appellant
Shri S.M. Godsay, Advocate for respondent
.....

CORAM: RAVINDRA .V. GHUGE AND
SUNIL K. KOTWAL, JJ.

DATED : 23rd NOVEMBER, 2017.

ORAL JUDGMENT (PER RAVINDRA V. GHUGE, J.):

1. In both these appeals, the appellant – Central Excise & Customs Department, (hereinafter referred to as the Revenue Department), seeks to challenge the order dated 4.12.2007, and 4.3.2008, passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), West Zone, Bench at Mumbai in two cases. The prayers put forth by the appellant are almost identical, except the dates of the order and the amount mentioned in the demand notice and penalty under Rule 173-Q.

2. Learned counsel for the respondent assessee is aggrieved by the lodging of these appeals in this Court, for the reason that, these appeals are not maintainable under Section 35-G of the Central Excise Act, 1944. It is contended that, this Court does not have jurisdiction to entertain these appeals, and notwithstanding the fact that the appeals have been admitted, jurisdiction cannot vest in this Court when such jurisdiction is not specifically prescribed by the Statute.

3. Prayer clauses (B) and (C) set out in both the appeals read as under :

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- (B) The order dated 4.12.2007, passed by learned CESTAT, Mumbai bearing No.A/900/WZB/C-II/EB may kindly be set aside.
- (C) That, the order passed by the learned Assistant Commissioner, Central Excise & Customs, Aurangabad Division-II vide Order-in-Original No.434/DMD/97, dated 31.10.1997 may kindly be confirmed by upholding the demand of Rs.17,37,276=82 ps. and also to impose penalty of Rs.2,00,000/- under Rule 173-Q.

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- (B) The order dated 4.3.2008, passed by learned CESTAT, Mumbai bearing No.A/317/08/C-I/EB may kindly be set aside.
- (C) That, the order passed by the learned Assistant Commissioner, Central Excise & Customs, Aurangabad Division-II vide Order-in-Original No.164/1999, dated 29.7.1999 may kindly be confirmed by upholding the demand of Rs.6,52,354/- and also to impose penalty of Rs.50,000/- under Rule 173-Q.

4. Considering the pleadings of the litigating sides, we called upon the learned Advocates to state as to whether they

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would prefer to address the Court on the jurisdiction issue prior to dealing with the merits of the matter. Learned counsel have stated that, they would address the Court on the jurisdiction aspect, and in the event this Court can exercise jurisdiction in these appeals, the said appeals could then be posted to a convenient date for hearing them on their merits.

5. Having considered the strenuous submissions of the learned Advocates for the respective sides, we find that, the following factors are germane to this case :-

- (a) The respondent is a pharmaceutical Company, engaged in the manufacturing of goods, falling under CH-30 of the Central excise Tariff Act, 1985.
- (b) On 1.3.1994, the respondent assessee had claimed exemption from paying the tax on the product under Notification No.6/1994, dated 1.3.1994 and as amended by the Notification No.114/1994, dated 3.6.1994.
- (c) The exemption claimed was with regard to a material manufactured by product name Lidocaine Tropical Aerosol (USP), used as an anesthetic and specially restricted to surgery and used in hospitals and dispensaries.
- (d) The respondent has allegedly fraudulently claimed the

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exemption since the said material was being used in the manufacturing of a spray, which carried the brand names like 'Climax', 'Numic' and 'Stud'.

- (e) The labels applied to the above products on the cans while being sold, indicate that, the said material is to be used as a stimulant for the purposes of sexual activities.
- (f) Exemption in the taxes on anesthetic material is specially prescribed by legislation so as to ensure that the said product used for the purposes of administering anesthesia by anesthetists, would lead to reducing the cost of the product, and as such, consequently would reduce the cost of medical treatment and the financial burden on the patients.
- (g) If the said material is to be used as a sex stimulant and not for any surgery, the respondent needs to be deprived of the concessions/ exemption granted.
- (h) By the first order dated 31.10.1997, the Assistant Commissioner of Central Excise & Customs, Aurangabad confirmed the demand pursuant to the show-cause-notices issued.
- (i) The order dated 31.10.1997 reads as under :

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- I) I confirm the demand of Rs.17,37,276=82 as mentioned in the above Show Cause Notices

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after denying noticee the exemption notifications as mentioned in Show Cause Notices dated 31.10.1994.

- II) I impose a penalty of Rs.2,00,000/- under Rule 173-Q of Central Excise Rules, 1944 for availing the inadmissible benefit of exemption notifications.

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I hereby confirm duty liability of Rs.6,52,354/- and order recovery of the same under Section 11A of C.Ex. Act, 1944.

I also impose a penalty of Rs.50,000/- under Rule 173Q of C.Ex. Rules, 1944.

I also order to recover the interest on the said amount under Section 11AA of CEA, 1944.

- (j) In the appeal preferred by the respondent before the Commissioner of Appeals, Central Excise, Mumbai, by order dated 27.12.2000/ 29.11.2002, the appeal of the respondent was allowed.
- (k) In the appeal before CESTAT, filed by the appellant – Department, the Tribunal has rejected the said appeal, by judgment dated 4.12.2007 and 4.3.2008.

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6. We are, therefore, required to consider the effect and the impact of the impugned orders passed by the Tribunal. The contention of Shri Godsay, learned Advocate for the respondent is that, a plain reading of Section 35-G of the 1944 Act, would indicate that, this appeal is not tenable. He has placed reliance upon the judgment delivered by the learned Division Bench of the Allahabad High Court in the case of **Commissioner of Cus. & C. Ex. Vs. ECO Products (I) P. Ltd., reported in 2015 (315) E.L.T. 561 (All.)**.

7. Learned counsel Shri Ladda, appearing on behalf of the appellant Department submits that, there can be no dispute that Section 35, was earlier omitted by the introduction of the National Tax Tribunal Act, 2005. Subsequently, the said Act itself was held to be unconstitutional by the Hon'ble Apex Court in the matter of **Madras Bar Association Vs. Union of India (UOI)** reported in **(2015) AIR (SC) 1571**. He, however, submits that, though Section 35-G has been reintroduced, it would not affect this appeal, and the jurisdiction of this Court would not be ousted. He relies upon an order passed by the learned Division Bench of this Court at Bombay in the matter of **J.V. Gokul & Co. (Pvt.) Ltd. Vs. Union of India**, reported in **2017(01) LCX0038**, in support of his contentions.

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8. For better understanding, while dealing with the jurisdictional objection of the respondent, it would be advantageous to refer to Section 35-G, which permits the filing of an appeal in the High Court. Section 35-G reads as under :-

"35-G. Appeal to High Court : [Omitted by the National Tax Tribunal Act, 2005 (49 of 2005), Section 30 and Schedule, Part VII (w.e.f. 28.12.2005)]

Explanation :

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2. Prior to its omission, S.35-G read as under :

"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.

9. The underlined portion of Section 35-G leads to a plain and simple meaning that an appeal, challenging an order passed by the Tribunal and relating to, amongst other things, the determination of any question having a relation to the rate of the duty of excise or to the value of the goods, for purpose of assessment, would not be maintainable before this Court.

10. Learned counsel for the appellant specifically submits that, the case before this Court is as regards whether exemption granted to the respondent under a misrepresentation, has led to payment of lesser taxes. It is further contended by the appellant that, if this Court holds that the respondent has acquired exemption by misrepresentation, by terming the product as being one which should be used exclusively for the purposes of surgery and medical procedures, the appellant would succeed in recovering higher taxes with penalty from the respondent.

11. In the backdrop of these submissions, we find that, a decision on the merits of these appeals, if is to be delivered by us, would lead to the determination of a question in relation to the rate of duty of excise as against the respondent. As such, if the appellant succeeds, the Department would succeed in raising the taxes on the product at issue and would, therefore, recover more taxes at a higher rate of duty of excise on the product, which was granted exemption by the Department.

12. We have considered the order passed by the learned Division Bench of this Court in the matter of J.V. Gokul & Co. (Pvt.) Ltd. (supra). We do not find that Section 35-G of the

Central Excise Act or any other provision, similar or identical to Section 35-G under the Customs Act, having been considered by the learned Bench.

13. Insofar as the view taken by the learned Division Bench of the Allahabad High Court in *ECO Products (I) P. Ltd.* (*supra*) is concerned, paragraphs 57, 58 and 59 read as under :

"57. Now the submission of Sri Kesarwani that right of appeal under Section 35-G of the Act being statutory remedy and a substantive right, should be interpreted liberally while that portion of this Section which excludes the right of appeal to the High Court has to be construed strictly and in a restrictive sense is to be considered.

58. There is no dispute that right of appeal is a statutory right given under Sections 35-G and 35-L of the Act. The scheme of the Act as delineated by Sections 35-G and 35-L indicates that subject matter of appeal before the High Court and the Apex Court have been clearly demarcated. The right of appeal has been granted to the assessee or revenue before the High Court and the Apex Court on different grounds. There is no question of giving any restrictive interpretation to the exclusionary clause under Section 35-G since the category which was excluded from the appeal before the High Court under Section 35-G of the Act is expressly included under Section 35-L of the Act. The demarcation of the subject matter of appeal before this Court and the Apex Court was with some object and purpose and when the words in sections are plain and unambiguous, the plain and literal

interpretation has to be adopted. It is useful to refer to paragraph 44 of the judgment of the Karnataka High Court in the case of Commissioner of Central Excise, Mangalore Vs. Mangalore Refineries & Petrochemicals Ltd. (supra) where the Karnataka High Court has noticed the intention behind the bifurcation of jurisdiction between the Apex Court and the High Court. Following was laid down by the Karnataka High Court in paragraph 44, which is as under :

"44. The intention behind this bifurcation of jurisdiction between the Apex Court and the High Court seems to be that more often than not, any decision on these aforesaid aspects nor only affects the interest of the manufacturers who are parties thereto, but also to the manufacturers of those products throughout the country. In a country governed by Parliamentary legislation because of the territorial bifurcation in forming states and because of the divergent opinion which is possible, the excise duty payable would vary from place to place. In order to bring uniformity in the levy of excise duty throughout the country and consequently to see that the country's finance is not affected, the Parliament has vested the jurisdiction to decide the disputes with the Apex Court. Therefore, we see a duty policy underlining this bifurcation of the jurisdiction between the Apex Court and the High Courts. All other matters other than what is set out above, which relates to the individual manufacturers and all disputes based on assessment orders which have attained finality, such as the benefits to which they are entitled to, refunds, duty drawbacks, rebates, etc., which relate to a particular manufacturer falls within the jurisdiction of the High Courts."

59. In view of the foregoing discussions, we are of the view that since the question raised in the appeal relates to eligibility of the goods manufactured by the assessee for exemption under Notification No.1/93-C.E., dated 28.2.1993 and goods were manufactured without payment of duty and no assessment had taken place, the proceedings initiated under Section 11-A were for determination of duty liability in which the eligibility of the said goods for exemption was disputed. The question of exemption is directly and proximately related to the rate of duty for the purposes of assessment of excise duty payable by the respondent. The appeal on the said question is clearly excluded under Section 35-G and can be filed by the revenue before the Apex Court under Section 35-L of the Act. Thus, the preliminary objection of the respondent regarding maintainability of appeal is upheld and Central Excise Appeal Defective No.402 of 2005 is held not maintainable under Section 35-G of the Act."

14. Considering the above, and in the light of the specific pleadings of the appellant, and the submissions of the litigating sides, we find that the issue which we are called upon to adjudicate, would lead to a decision (if the appellant succeeds) determining the question of the rate of duty of excise, on the goods, which the respondent sells to the consumers, and the assertion of the appellant that the exemption granted cannot be made applicable. This would lead to permitting the appellant to impose higher rate of duty of excise on the value of the goods, in

relation to which the impugned order has been passed.

15. We, therefore, find that, as the subject matter of both these appeals are squarely covered by the prohibition flowing from Section 35-G. Both these appeals would not be maintainable before this Court. Consequentially, both these appeals are dismissed on the ground of maintainability.

16. At this juncture, learned counsel for the appellants prays that, liberty may be granted to the appellants to approach the Hon'ble Apex Court for filing a proper appeal. We find that, the appellant would have a statutory right to approach the Hon'ble Apex Court in the light of Section 35-L. Naturally, the appellant would be canvassing the point of limitation, keeping in view the time spent by the appellant in this Court from 30.6.2008/ 26.8.2008, when the appeals were instituted, till the passing of the order today. On that count, the period of pendency of these appeals would be a good ground for condonation of delay.

(SUNIL K. KOTWAL)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE