

**STA No. 24 of 2016(O&M)**

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**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH**

**STA No. 24 of 2016(O&M)  
Date of Decision : 03.05.2017**

**Commissioner Service Tax**

**...Appellant**

**Versus**

**DLF Golf Resorts Ltd.**

**...Respondent**

**CORAM:     *HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE  
                  HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL***

**Present:     Mr. Sourabh Goel, Advocate for the appellant.**

**Mr. Amrinder Singh, Advocate for the respondent.**

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**S.J. VAZIFDAR, C.J.(Oral)**

**CM Nos. 26973-26974-CII-2016**

For the reasons stated therein, the applications for condonation of delay of 61 days in re-filing as well as 35 days in filing the appeal are allowed.

**STA No. 24-2016**

This is an appeal against the order of the Customs, Central Excise & Services Tax Appellate Tribunal, New Delhi, dated 20.11.2015 (Annexure A-3), allowing the respondent/assessee's appeal against the order of the Commissioner confirming the demands proposed in the show cause notice issued by the Commissioner himself.

2.           The respondent is the holder of the service tax registration for providing various services including as a Mandap Keeper, Health Club &

Fitness Centres and Manpower Recruitment services. The department on scrutiny of the respondent's record observed that during the period from 16.06.2005 to 31.03.2007, the assessee collected charges from members of clubs for various services but had not paid service tax in respect thereof. The department was of the view that these amounts would fall within the ambit of the words “any other amount” as defined in Section 65 (105) (zzze) read with Section 65 (25a) of the Finance Act, 1994. The respondent on the other hand contended that it was not liable to pay any service tax. The contention was based on the doctrine of mutuality as well as on the ground that these provisions have been declared ultra vires by the Gujarat High Court in the case of ***Sports Club of Gujarat Ltd. Vs. Union of India***, 2013 (31) S.T.R. 645 (Gujarat) and the Jharkhand High Court in the case of ***Ranchi Club Vs. CCE***, 2012(26) S.T.R. 401 (Jhar.)

3. According to the appellant, the following substantial questions of law arise in this appeal:-

- (a) *Whether the impugned order dated 20.11.2015, passed by the Ld. Tribunal on the basis of the judgment passed by the Hon'ble Jharkhand High Court in case of Ranchi Sports Club Ltd. v. CCE, 2012(26) STR 401(Jhar) which has not yet attained finality and appeal against the said judgment is pending before the Hon'ble Supreme Court is arbitrary and illegal?*
- (b) *Whether the Ld. Tribunal committed a grave error in allowing the appeal filed by the respondent?*
- (c) *Whether the impugned order dated 20.11.2015, Annexure A-3, passed by the ld. Tribunal is against the settled position of law and is therefore liable to be set aside?*
- (d) *Whether the services of a club, i.e. Green Fees, Academy Revenue, Lessons Fee, Package Horse Ride Charges, Night Charges, Non-Member Academy Revenue, Guest*

*Fees, Package Tennis Charges, Tournament Charges, Swimming gala, Cady Fees etc., provided by the respondent-Club to its members and non-members are amenable to service tax under Section 65(25(a), Section 65(105)(zzze) and Section 66 of the Finance Act, 1994 as incorporated/amended by the Finance Act, 2005?*

4. Mr. Amrinder Singh, the learned counsel appearing for the respondent raised a preliminary objection as to maintainability of the appeal. He contended that in view of Section 35L of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, these issues can be decided only by the Supreme Court and not by the High Court in an appeal under Section 35G.

The contention is well founded.

5. In ***CST Vs. Delhi Gymkhana Club Ltd.***, 2009(16) S.T.R. 129 (Del.), a Division Bench of the Delhi High Court considered an almost identical case. It was held that the appeal was not maintainable under Section 35G. A similar view was also taken by another Division Bench of the Delhi High Court in ***CST Vs. Ernst and Young Pvt. Ltd.***, 2014(34) S.T.R. 3(Del.).

6. It is not necessary to set out the detailed observations in both the judgments as the matter now stands concluded on account of the amendment to Section 35L. Section 35L as amended reads as under:-

**“SECTION 35L. Appeal to the 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.”*

7. Sub Section (2) was inserted w.e.f. 06.08.2014 by Section 107 of the Finance (No.2) Act, 2014. The amendment is, however, clarificatory and, therefore, operates retrospectively. That it is clarificatory, is accepted by the department. The Ministry of Finance, Department of Revenue, Tax Research Unit issued a circular dated 10.07.2014, which refers to the Finance Minister having introduced Finance (No.2) Bill, 2014 in the Lok Sabha on 10.07.2014. Paragraph 14 of Annexure IV referred to in this circular, reads as under :-

*“14. Section 35L is being amended so as to **clarify** that determination of disputes relating to taxability or excisability of goods is covered under the term 'determination of any question having a relation to rate of duty' and hence, appeal against Tribunal orders in such matters would lie before the Supreme Court.”*  
*(emphasis supplied)*

8. A Division Bench of the Delhi High Court in ***CST Vs. Gecas Services India Pvt. Ltd.***, 2014(39) STR 980 (Del.) held as under :-

“7. Section 83 of the Finance Act, 1994, makes the provisions of Sections 35G and 35L of the CE Act ipso facto applicable in relation to Service Tax. Section 35G concerns appeals to the High Court from orders of the CESTAT whereas Section 35L deals with appeals to the Supreme Court from orders of the CESTAT. Section 35L (b) provides that appeals from orders of CESTAT would lie directly to the Supreme Court where it involves the “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.” In *Ernst & Young* this Court held that any question having relation to a rate of duty would include a determination as levy of tax on a particular service. It was held that “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.” Accordingly, it was held that an appeal under Section 35-G of the CE Act against the order of the CESTAT on the question of exigibility of a service to tax was not maintainable before this Court. The Special Leave Petition (SLP) filed by the Appellant herein against the decision in *Ernst & Young*, being SLP [(CC) No. 21099] of 2014 (*Commissioner of Service Tax v. Ernst and Young Pvt. Ltd.*) (along with other similar petitions) was dismissed as withdrawn by the Supreme Court by its order dated 19<sup>th</sup> January 2015.

8. Following the decision in *Ernst & Young*, sub-section (2) was inserted in Section 35(L) of the CE Act by the Finance (No.2) Act, 2014 to clarify that “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.” A Circular was also issued on 10<sup>th</sup> July 2014 by the Tax Research Unit, Department of Revenue, Ministry of Finance, Government of India, New Delhi clarifying the position.”*

9. It is, therefore, evident that the department has considered the amendment to be clarificatory and has proceeded on that basis, inter alia, by withdrawing various proceedings before the Supreme Court. The controversy as to whether the issues such as the one raised in the present appeal relates to taxability or not, is now set at rest including by the department. We are informed that similar questions are, in fact, pending before the Supreme Court.

10. In the circumstances, the appeal is liable to be dismissed only on the ground that it is not maintainable under Section 35G.

The appeal is, accordingly, dismissed.

**(S.J. VAZIFDAR)**  
**CHIEF JUSTICE**

**(ANUPINDER SINGH GREWAL)**  
**JUDGE**

**03.05.2017**  
*kanchan*

**Whether speaking/reasoned? Yes**

**Whether reportable? Yes**