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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 61 OF 2017

The Commissioner of Central Excise Pune - III … Appellant
Versus
M/s. Eon Hinjewadi Infrastructure (P) Ltd. …Respondent

CENTRAL EXCISE APPEAL NO. 73 OF 2017

The Commissioner of Central Excise Pune - III … Appellant
Versus
Vansum Industries …Respondent

CENTRAL EXCISE APPEAL NO. 139 OF 2017

The Commissioner of Central Excise Pune - III … Appellant
Versus
M/s. India Land Infrastructure Development Pvt. Ltd. …Respondent

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Mr. Swapnil Bangur, with Mr. Sham Walve for Appellant in CEXA No. 61 of 2017 and CEXA No. 139 of 2017.
Mr. Swapnil Bangur with Mr. J.B. Mishra for Appellant in CEXA No. 73 of 2017.
Mr. Prakash Shah with Mr. Jas Sanghavi, i/b PDS Legal for Respondent in CEXA No. 61 of 2017 and 139 of 2017.
Mr. Chirag Shetty, i/b Economic Law Practice for Respondent in CEXA No. 73 of 2017.

CORAM: M.S.SANKLECHA &
RIYAZ I. CHAGLA, JJ.
DATED: 3RD SEPTEMBER, 2018.

PC:-

1. These three Appeals under Section 83 of the Finance Act, 1994 (the Act) read with 35G of the Central Excise Act, 1944 takes

exception to the common order dated 18th April, 2013 passed by the Customs, Excise Service Tax Appellate Tribunal (Tribunal).

2. The Revenue has urged the following identical questions of law in all these appeals for our consideration.

> *"(a) Whether the Tribunal is correct in holding that the supply of electricity by the Respondent herein to their tenants / clients amounts to "sale of goods" and "not supply of service"?*
>
> *"(b) Whether the supply of electricity by the Respondent herein to their tenants / clients is an essential and integral part of the service namely "Renting of Immovable Property Services", as provided under Section 65 (105) (zzzz) of Finance Act, 1994"?*

3. We find that the impugned order of the Tribunal points out that the proceedings commenced with the show cause notice issued to the Appellants invoking the Rule 5 of the Service Tax (Determination of Value), Rules 2006 seeks to include the electricity charges received by the Respondents as reimbursements from its tenants in the assessable value of the service of renting of immovable properties under Section 65 (105) (zzzz) of the Act. The Respondent contended before the Tribunal that the electricity made available to the tenants is sale of goods and not supply of services. Alternatively, it was contended that supply of goods is to be excluded from valuation of service by

virtue of Notification No. 12/03 ST dated 20th June, 2003. The impugned order of the Tribunal accepted the Respondent's claim and held that electricity is goods and therefore, cannot form a part of the assessable value for the purpose of payment of service tax on providing service of renting of immovable properties.

4. On the aforesaid facts, we inquired of Mr. Bangur, the learned counsel for Revenue that on perusal of the impugned order, the issue arising in these Appeals relate to valuation of service namely valuation of service provided for renting of immovable property. Therefore, the appropriate remedy to challenge the common impugned order would be before the Apex Court in view of Section 35G (I) and 35L (I) (b) of the Central Excise Act, 1944 which is made applicable to the Act by virtue of Section 83 thereof. We pointed out to him Section 35 G (1) of the Act excludes the jurisdiction of this Court to appeals from order of the Tribunal relating to valuation. Section 35L (I) (b) of the Central Excise Act, 1944 bestow jurisdiction to the Hon'ble Supreme Court in respect of such orders.

5. In response Mr. Bangur states that so far as question No.1 is concerned, the issue whether it is sale of goods or supply of services is a question which touches taxability of the consideration received for supply of electricity. In support he relies upon the

decision of this Court in ***Global Vectra Helicorp Ltd. Vs. C.S.T., Mumbai***[1].

6. Our jurisdiction in terms of Section 35G(1) of the Central Excise Act, 1944, is determined by the nature of the order passed by the Tribunal. It is not determined by the manner in which the question is proposed. This is evident from Section 35G (1) of the Central Excise Act, 1944, which excludes our appellate jurisdiction on the basis of the issue decided by the Tribunal. In fact on this issue we are in respectful agreement with the view of the Punjab and Haryana High Court in ***Principal Commissioner of Central Excise and Sales Tax Vs. Raja Dyeing***[2]. On perusal of the common impugned order of the Tribunal we are of the view that the issue decided by the Tribunal is in respect of valuation of services and not with regard to taxibility of the service.

7. We note that the Apex Court in ***Navin Chemicals Mfg. & Trading Co. Ltd. Vs. Collector of Customs***[3] had construed the words "determination of any question having a relation to the rate of duty or to the value of goods for purpose of assessment" *inter alia* to mean increasing or reducing the value of goods for assessment. This finding of the Apex Court it observed was in

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1 CEA No. 66 of 2014 decided on 23rd March, 2015.

2 2017 (5) GSTL 231.

3 1993 (68) E.L.T. 3 S.C.

accord to the meaning given in Section 129 D (5) of the Customs Act. Therefore, its finding is independent of Section 129(D) (5) of the Act as observed therein. The Supreme Court further held that the above issue of valuation must have a direct nexus to the valuation of the service. The questions raised by the Revenue whether the sale of goods would amount to supply of service for purpose of valuation is an issue which directly relates to valuation of goods. It is relevant to note that the Central Government had issued a Notification No. 12/03 ST dated 20th June, 2003 exempting supply of good from service tax. This *prima facie* would suggest that otherwise the value of goods supplied by a service provider may be included in the valuation of the services, in the absence of the Notification. However, these are all issues relating to valuation and not within the jurisdiction of this Court.

8. The decision in the case of ***Global Vectra Helicop Ltd. (Supra)*** relied upon by Mr. Bangur would have no application to the present facts. In that case the issue was whether a particular service was at all taxable under the Act. In the above case, the Court was concerned with the order of the Tribunal that determined that in the facts before it that Section 65 (105) (zzzz) of the Act viz. supply of tangible goods without loss of possession / control of the same, is not attracted. In the absence

of the service being held taxable under the above head, it was not taxable. In the above facts, the issue is one of taxibility. Therefore, in the above context this Court entertained the appeal. In the present facts the issue arising in this Appeal is one with regard to valuation of service provided while renting of immovable property. The question is one relating to valuation and not relating to taxibility.

9. The above view of ours is fortified by the fact that the very division bench of our Court which decided ***Global Vectra Helicop Ltd. (Supra)*** on 23rd March, 2015 had in ***Greatship India Ltd. Vs. CST, Mumbai***[4] had on the next day, after relying on the decision of the Supreme Court in ***Navin Chemical (Supra)*** entertained an appeal on the ground that the issue before it does not involve classification of goods or valuation of goods for purpose of assessment. It observed that there is no dispute about the service being taxable and the rate at which service tax is payable. In passing, it mentions that the appeal did not raise issues regarding excisability and taxibility of the goods. In fact, after placing reliance upon the decision of the Apex Court in ***Navin Chemicals (Supra)*** this Court in ***Greatship (India) Ltd. (Supra)*** observed as under:-

4 CEA No.20 of 2015 decided on 24 March 2015.

"16. Perusal of paragraph 11 would reveal that the Apex Court has carved our the following categories of cases, to which the legislature has gives special treatment:-
(i) determination of a question relating to a rule of duty;
(ii) determination of a question relating to the valuation of goods for purposes of assessment;
(iii) determination of a question relating to classification of goods under the taxibility and whether or not they are covered by an exemption notification;
(iv) 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.
The aforesaid interpretation placed by the Apex Court in interpreting the words "determination of any question having a relation to the rate of duty or the value of goods for the purpose of assessment".
In view of the amendment to Section 35L, the following category of cases would be required to be excluded to the said categories.
"determination of disputes relating to taxibility or exercising of goods for purpose of assessment".

10. In the facts of this case, the common impugned order relates to valuation of services for the purposes of assessment under the Act.

11. In the above view, the challenge to the impugned order dated 18 April, 2013 cannot be entertained by us in view of Section 35G (i) of the Central Excise Act, 1944 as made applicable in terms of Section 83 of the Act. The appeal, if any would be before the Hon'ble Supreme Court in terms of Section

35L(1) (b) of the Central Excise Act, 1944 read with Section 83 of the Act.

12. Accordingly, the Appeal is disposed of as not maintainable with liberty to the Revenue to approach the Hon'ble Apex Court, if so advised.

(RIYAZ I. CHAGLA J.) **(M.S.SANKLECHA, J.)**