IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.10.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

CMA Nos.875 & 876 of 2018

M/s.Plaza Maintenance and Services Ltd.,
Spencer Plaza,
769, Anna Salai,
Chennai - 600 002 ... Appellant in both CMAs

vs.

The Commissioner of Central
Tax & Central Excise,
Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai - 600 040. ... Respondent in both CMAs

Civil Miscellaneous Appeals are filed under Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, praying to set aside the impugned Common order made in Final Order Nos.41806 & 41807 of 2017 dated 28.08.2017 in Appeal Nos.ST/625/2009 & ST/337/2011 DB respectively, by the Hon'ble CESTAT, Chennai Bench upholding the demand of service tax under management, maintenance or repair service.

For Appellant in both CMAs : Mr.B.Kumar, Senior Counsel for Mr.S.Jaikumar

For Respondent in both CMAs : Mr.A.P.Srinivas Srinor Standing Counsel

COMMON JUDGMENT
(Order of the Court was delivered by SUBRAMONIUM PRASAD, J)

Instant Civil Miscellaneous Appeals are directed against the common order in Final Order Nos.41806 & 41807 of 2017 dated

28.08.2017 in Appeal Nos.ST/625/2009 & ST/337/2011 DB respectively, passed by the Customs, Excise and Service Tax Appellate Tribunal [CESTAT], Chennai, upholding the demand of service tax under management, maintenance or repair service.

2. Short facts leading to the filing of the instant Civil Miscellaneous Appeals, are as follows:

(i) M/s.Plaza Maintenance and Service Limited, the appellant herein enters into agreement with persons who purchase a portion of the Commercial Complex known as Spencer Plaza for rendering such services and to do all acts as would be necessary to maintain the Spencer Plaza with its appurtenance including common areas, lobbies, etc.

(ii) Intelligence reports were received by the department that the appellant though are collecting service charges for the purpose of maintenance and repair services, but, are not paying service tax. This resulted in a Show Cause Notice No.79/2008, dated 01.04.2008, being issued to the appellant. The relevant portion of the show cause notice read as under:-

> "3. The above service of PMS is classifiable as "Management, Maintenance or Repair Service" which has come in to force from 16.06.2005. Whereas during investigation / verification it was noticed that for providing the above service, PMS had received the charges from the various occupants at Spencers Plaza but has neither taken registration nor paid the service tax.
>
> 4. Maintenance or Repair Service was brought under Service Tax w.e.f 1.7.2003 which originally covers only repair & maintenance service provided to goods. Further with effect from 16.06.2005, the scope was expanded to cover service rendered to immovable property also. The "Management, Maintenance or Repair Service" as defined in Section 65(64) of Finance Act, 1994, is as follows:
>
> "Maintenance or Repair" means any service provided by-
>
> (i) any person under a contract or an agreement; or
>
> (ii) a manufacturer or any person authorised by him, and in relation to -
>
> (a) maintenance or repair including reconditioning or restoration, or servicing of any goods or equipment, excluding motor vehicle; or
>
> (b) maintenance or management of immovable property;
>
> 5. With effect from 16.06.05 sub clause (zzg) of clause (105) defines the taxable service as follows:
>
> "Taxable Service means any service provided

or to be provided to a customer, by any person in relation to management, maintenance or repair."

With effect from 1.05.2006, the words 'management, maintenance or repair' were substituted for words, 'maintenance or repair'.

6. On scrutiny of the records, it is noticed that PMS have not registered under the "Management, Maintenance or Repair Service", with the Service Tax department till the investigation initiated against the company. They have also not paid the service tax on the charges received by them inspite of the fact that they are liable for service tax under the "Management, Maintenance or Repair Service", as explained above. Further the fact of receipt of such charges from the various customers and also the non-payment of service tax on such amount were not declared to the Department and the above facts were noticed on during the Investigations conducted by the officers of the SIV Cell of the Service tax Commissionerate, Nandanam, Chennai – 600 035.

7. PMS were asked to furnish the details of charges they had received from various occupants of Spencers Plaza by the Officers of the SIV Cell through various letters. They did no furnish the said details to the department. Hence a summon dated 14.02.2008 was issue to Shri M.Balasubramaniam, Director of Plaza Maintenance and Services Limited to appear before the Assistant Commissioner of Service Tax (SIV CELL) on 20.02.2008. Whereas he has authorised Shri.S.K.Rahamatulla, Assistant General Manager (F&A) working in PMS, through a power of Attorney dated 20.02.2008 to appear before the Assistant Commissioner of Service Tax (SIV CELL). Shri M.Balasubramaniam, Director of Plaza Maintenance and Services Limited, has stated in the power of attorney that the statement given by Shri.S.K.Rahamatulla, is binding on the company. Shri.S.K.Rahamatulla, appeared before the Assistant Commissioner of Service Tax (SIV CELL) on 20.02.08 and also on 25.02.08 and statements were recorded from him on 20.02.08 and also on 25.02.08.

8. In the above statement Shri.S.K.Rahamatulla, inter alia stated that

a. PMS main objective is to provide Building Maintenance and Allied services to the occupants of M/s.Spencer Plaza which consists of three phases.

b. M/s.Mangal Thirth Estates was the promoters of Spencers Plaza who also took over the responsibility of maintaining the Spencers

Plaza on behalf of the occupants.

c. Accordingly, M/s.Mangal Thirth Estates has entered in to agreement with all the occupants of Spencers Plaza for entrusting the maintenance work to PMS. The occupants of Spencers Plaza agreed for the arrangement and contributed their share of maintenance expenses to PMS.

d. PMS accordingly recruited staff to carry out the various jobs and entered into contracts with various service agencies to maintain Spencers Plaza. PMS collects the amount from the occupants of Spencers Plaza every month and appropriates the same towards the common expenses. PMS maintains separate set of accounts of the members and all connected expenses both direct and indirect expenses recovered from the members. PMS also renders miscellaneous jobs such as providing plants to individual occupants and doing minor electrical works fro the individual occupants and the charges are collected based on the work. This amount is admitted as income and related expenses are accounted and income tax has been paid on the surplus.

e. As regards the member account the net surplus / deficit are accounted in Plaza owners fund account and accounted in current liability and current assets respectively. The deficit arising on account of various expenses are collected from the members.

f. The amount collected by PMS as maintenance charges from the occupants of the Spencers Plaza and spend towards 1. Common Electrical Charges 2. For supply of water 3. Maintenance of common areas (which includes security arrangements) and equipments like lift, escalator, water purification plant and other electrical and mechanical components 4. Insurance charges for the building etc.

g. The electricity is commonly provided to its buildings of Spencers Plaza by the TNEB and the electric charges are charged actual in case where the users are provided with the meter and for other areas where it has been commonly used, the electricity charges are collected from the occupants based on Sq.feet they are occupying.

9. Shri S.K.Rahamtulla, has further stated in the statement that there are totally 588 occupants in Spencers Plaza in the three phases and PMS will charge maintenance bill every month. In the said bill it

consists of the following categories.
a. Old outstanding if any,

b. Electricity charges for utilisation inside the office premises.

c. Common electricity charges which included Air conditioning charges also.

d. Contribution towards expenses @4.91/- per sq.ft. And this charges will be charged periodically based on their expenses budged.

e. Belated payment charges.

f. Other charges.

10. Shri S.K.Rahamatulla, has further stated in the statement that contribution towards expenses based on the sq.ft is charged on the following categories taken in to account.

- Security charges provided by outside agency and salary for their own security personnel.
- House keeping – cleaning of all area.
- Water charges for buying outside.
- Annual maintenance charges paid to other agencies.
- Building and equipment insurance.
- Repairs and maintenance of building and replacement of light fittings and other repair of equipments not covered by AMC.
- Salary paid to staff and workers working for the maintenance of Spencers Plaza.

11. From the foregoing, it appears that the above said services rendered by PMS to the occupants of Spencers Plaza is classifiable under the "Management, Maintenance or Repair Service" w.e.f.16.6.2005.

12. On scrutiny of the statement dated 18.03.08 produced by PMS, it is seen that they had received from various occupants of Spencers Plaza for the period from 16.06.2005 to 31.01.08 an amount of Rs.66,63,99,941/- as listed in the Annexure Z to this Notice on which the Service tax, Education Cess & Secondary & Higher Education Cess, together works out to Rs.7,76,47,888/- (Service tax of Rs.7,58,86,329/- Education Cess of Rs.15,17,727/- and Secondary & Higher Education Cess Rs.2,43,832/-).

13.From the foregoing, it appears that PMS have contravened the provisions of Sections 69, 68 & 70 of the Finance Act, 1994 in as much as they have not registered themselves with Service Tax department for providing the taxable service, not paid Service Tax on the value of the taxable service realised and not filed ST3 returns, and also suppressed the facts as detailed in para 6 above, with willful intent to evade payment of Service Tax & Education Cess. Thus it appears that the extended period of time limit provided under proviso to Section 73(1) of the Finance Act, 1994 for demand of Service tax and Education Cess. It further appears that PMS are liable to pay interest on the Service Tax & Education Cesses not paid on due dates under Section 75 of the Finance Act, 1994 and are also liable to penal action under Section 67, 77 & 78 of the Finance Act, 1994.

14. M/s. Plaza Maintenance and Services Limited, Chennai, are therefore required to Show Cause to the Commissioner of Service Tax, Service Tax Commissionerate, No.693 (Old No.473), Anna Salai, M.H.U. Complex, 6th Floor Chennai 600 035, within 30 days from the receipt of this notice, as to why:-

a. An amount of Rs.7,76,47,888/- [Rupees Seven Crores Seventy-six lakhs forty-seven thousand, eight hundred and eighty-eight only) being the Service tax of Rs.7,58,86,329/- Education Cess of Rs.15,17,727/- and Secondary & Higher Education Cess Rs.2,43,832/-involved on the amount received, as detailed in the Annexure-A to this notice should not be demanded under proviso to Section 73(1) of the Finance Act, 1994;

b. Interest at applicable rate should not be demanded invoking extended period under Section 75 of the Finance Act, 1994;

c. Penalty under Section 76 & 78 of the Finance Act, 1994 should not be imposed on them for the above contraventions."

(iii) The appellant replied to the show cause notice, stating that one Mangal Tirth Estate Limited [MTEL], was formed to promote Spencers Plaza on the land belonging to Spencers & Co. The project envisaged a large number of occupants over 800. In view of the large size of the project, it was decided that a single agency would be entrusted with the task for maintenance and the task was entrusted to Mangal Tirth Maintenance & Services Ltd. [MMSL], whose name was changed to Plaza Maintenance & Services Ltd. [PMSL], the appellant herein. The appellant was therefore entrusted with the task of maintenance, for and on behalf of all the occupants. Every occupant has to enter into a maintenance agreement with the appellant. It is therefore stated that the appellant is acting only as an agent, for and on behalf of owners of Spencers Plaza complex.

(iv) It was also stated that the maintenance has been done on a no profit or no loss basis and there was no commercial consideration accruing to the appellant and the appellant was acting as a pure agent, for and on behalf of all the occupants. It was stated that the surplus / deficits after expending from collections received was accounted to the plaza owners fund account.

(v) Reply of the appellant to the show cause notice as far as utility charges i.e., electricity and water, are summarised as follows:

(i) We act as a pure agent of the owners when it makes payment to the utility providers.

(ii) The utilities, namely, electricity and water are consumed by the recipient of the service, namely the occupants of the plaza.

(iii) The owners / occupants are aware that they are liable to make the payment to the utility provider through us, as we have been given power connection due to TNEB's inability to provide power to individual occupants and also in terms of the agreement with the owners.

(iv) The owners in the agreement have expressly authorised the company to collect and make payment on their behalf of the utility providers.

(v) The owners / occupants are aware that the electricity and water is being provided by TNEB and the water suppliers.

(vi) We have been issuing an invoice to the owners, which clearly indicates the electricity consumed insider the premises and the other common electricity charges apportioned to them.

(vii) We collect only the amounts as has been levied by the utility provider and there is no mark up or profit for us. In fact as already mentioned the agreement with TNEB also clearly mentions that there will be no mark up or profit.

(viii) This practice has been followed by 1989 onwards much before the introduction of service tax.

(vi) As far as other collections are concerned, regarding maintenance, repairs, etc., the gist of the reply is as under:

i. PMSL is acting as a pure agent for and on behalf of the occupants.

ii. PMSL provides a budgeted expenditure on the basis, which contributions are collected from the occupants and extended for and on behalf of the occupants.

iii. Any surplus / deficit after expending the money from collections is accounted as belonging to or due from the occupants.

iv. The accounts of the company right from inception has not taken into income the receipts from the owners nor accounted as expenditure. Any expenses incurred for and on behalf of the occupants and the surplus / deficit has been shown as belonging / due to the owners.

v. The funds therefore at no point belong to PMSL and always belongs to the occupants on whose behalf the amounts are expended by the company.

vi. Electricity connection has been obtained in the name of PMSL due to TNEB's inability to supply power to individual occupants and the electricity amounts are only collected from the occupants and paid to TNEB and no profit or mark up is made on the charges. Moreover electricity is to be treated as supply of goods and therefore not subject to service tax.

vii. Water for sake of convenience is obtained by PMSL and distributed for consumption to the owners for and on behalf of the occupants and no mark up or profit is made. Moreover water is also treated as goods under sales tax and therefore cannot be treated as service and therefore not be subjected to service tax.

viii. Insurance premium is paid for and on behalf of the occupants whose property and assets are insured and PMSL does not have any insurable interest. PMSL therefore acts as a pure agent and no service is rendered by PMSL.

(vii) The case of the appellant before the authorities was since they are only acting as an agent, for and on behalf of all the owners, the expenses / costs for the management and maintenance are budgeted and share of each owner is received and spent. If it is surplus, the amount is carried forward to the next budgeted period.

(viii) On 22.10.2009, one more show cause notice No.591 of 2009 was issued and the relevant clause reads as under.

> "2.0. Maintenance or Repair Service was brought under Service Tax net w.e.f. 01.07.2003 which originally covered only repair & maintenance service provided to goods. Further with effect from 16.06.2005, the scope was expanded to cover service rendered to immovable property also. "Management, Maintenance or Repair Service" as defined in Section 65(64) of Finance Act, 1994, is as follows:
>
> "Maintenance or Repair" means any service provided by-
>
> (i) any person under a contract or an agreement; or
>
> (ii) a manufacturer or any person authorised by him, and in relation to -
>
> (a) management of properties, whether immovable or not;
>
> (b) maintenance or repair of properties, whether immovable or nor; or
>
> (c) maintenance or repair including reconditioning or restoration, or servicing of

any goods excluding a motor vehicle;

2.1. With effect from 16.06.05 sub clause (zzg) of clause (105) defines the taxable service as follows:

> "Taxable Service means any service provided or to be provided to a customer, by any person in relation to management, maintenance or repair."

With effect from 1.05.2006, the words 'management, maintenance or repair' were substituted for words, 'maintenance or repair'.

3.0. On enquiry it was observed that PMSL did not register themselves under "Management, Maintenance or Repair Service" even after the receipt of the above Show Cause Notice. They also did not pay service tax on the charges received by them inspite of the fact that they are liable for service tax under "Management, Maintenance or Repair Service", as explained above. Further the fact of receipt of such charges from various customers and the non-payment of service tax on such amount were not declared to the Department.

....

5. Now, therefore, PMSL are required to show cause to the Commissioner of Service Tax, Service Tax Commissionerate, MHU Complex (6th Floor), 692, Anna Salai, Nandanam, Chennai - 600 035, within thirty days of the receipt of this notice as to why:-

(a) Service Tax of Rs.4,85,78,648/- (Rupees four crore eighty five lakh seventy eight thousand six hundred and forty eight only) payable for the period from February 2008 to August 2009, as detailed in the Annexure to this notice, should not be demanded from them under proviso to Section 73(1) of the Finance Act, 1994;

(b) Interest at appropriate rate should not be demanded under Section 75 of the said Act on the above said demand of Service Tax from the due date of payment till the date of actual payment of Service Tax; and

(c) penalty under Section 76, 77 & 78 of the said Act should not be imposed on them for the contraventions mentioned supra.

(ix) Similar reply was given to the said show cause notice. The adjudicating authority framed the following question for consideration.

i. Whether PMSL are liable to pay service tax under the category of 'Management, Maintenance or Repair Service'?
ii. Whether PMSL are liable to pay service tax on the gross amount charged form the occupant?
iii. Whether PMSL are entitled to take Cenvat Credit as claimed by them?

iv. Whether the extended time limit under proviso to Section 73(1) of Finance Act, 1994 is invokable for demand of sevice tax?

v. Whether PMSL are liable for penal action as proposed in the show cause notice.

(x) The adjudicating authority after analysing all the agreements entered into between the parties, came to a conclusion that the appellant herein are not acting as pure agent of the owners/occupants, but are providing maintenance service, as per the contract of service, entered into with the respective owners of the apartments, by collecting maintenance charges, proportionate to the area occupied. It was observed that the sale deed / builders' agreement clearly specify that the maintenance services shall be provided only by the agency specified or nominated by the developer and accordingly, appellant are providing the maintenance service. This puts beyond doubt that the appellant are service providers and the owners/occupants are service receivers.

(xi) The adjudicating authority therefore held that according to Section 68 of the Finance Act, 1994 every person providing taxable service to any person shall pay service tax as per Section 66 of the Finance Act, 1994 and therefore, appellant, who is a service provider, is liable to pay service tax.

(xii) The adjudicating authority rejected the argument of the appellant that since maintenance is done on a no profit or no loss basis, they are not providing services and therefore the appellant is not liable to pay service tax. The adjudicating authority held that as long as service is provided for certain consideration, they are service providers and charges which are being levied would be exigible for service tax.

(xiii) Though, it was contended by the appellant that without prejudice to their argument that they are not service providers, in any event, they are entitled to offset the tax paid on input services, the adjudicating authority rejected the argument stating that no details and documents were furnished in support of the claim of the appellant and it is only during the investigation stage, the ledger accounts were furnished with copies of some input services. The adjudicating authority, therefore held that after scrutiny of documents the appellant is entitled to take credit of Rs.7,85,686/- towards tax paid on inputs, as against the claim of Rs.51,33,226/-

(xiv) The adjudicating authority rejected the claim of the appellant that the department could not invoke the extended period of limitation under the proviso to Section 73(1) of the Finance Act, 1994. The relevant portion is as under.

> "It is observed that PMSL have collected the above amount even without obtaining registration with the department and did not deposit the same. The fact of collection of service tax was also not disclosed to the department at any stage. I also observe that they never approached the department for any sort of clarification and therefore it cannot be concluded that PMSL are under bonafide belief that they are not liable to pay service tax. At this juncture, I would like to refer to the following decisions of CESTAT:-

Sl.No.	Citation	Decision
1	Winner Systems 2005 (191) ELT 1051 (T)	A blind belief cannot be a substitute for bonafide belief.
2	Air Cell Digilink I Ltd.- 2006 (3) STR 386 (T)	There was nothing on record to suggest that the appellants ever approached the office of the service tax authorities to ascertain the details of their liability to pay Service Tax
3	Interscape 2006 (198) ELT 275 (T)	A belief can be said to be bonafide only when it is formed after all the reasonable considerations are taken into account.

> As already observed PMSL neither informed the department about their activity nor paid service tax. Considering the facts of the case, I have no doubt in coming to the conclusion that it is not a case of bonafide belief or omission but suppression of vital information with intent to evade payment of Service Tax and accordingly the invoking of extended time limit under proviso to Section 73(1) of the Act is fully justified.

(xv) Accordingly, the demand of Service Tax of Rs.7,76,47,888/- was upheld. The CENVAT credit of Rs.7,85,686/- was granted. A penalty of Rs.7,80,00,000/- was imposed under Section 78 of the Finance Act, 1994.

(xvi) The matter was taken up in further appeal before the

CESTAT, Chennai. The CESTAT, Chennai, framed the following questions.

(a) Whether the assessees are rendering Management, Maintenance or Repair Services to the occupants and are liable to pay service tax under such category? Whether the amount collected from occupants would be consideration of services and whether they are liable to pay service tax on the amount collected by them from the occupants.

(b) Whether the contention of the assessees that they are acting as pure agent of the occupants and thee is mutuality of interest is acceptable.

(c) Whether the assessees are liable to pay service tax on the electricity / water and insurance charges collected.

(d) Whether the assessees are eligible for the CENVAT credit to the tune of Rs.51,33,226/-"

(xvii) Before the CESTAT, Chennai also, it was argued that the appellant are not collecting any amount other than the actuals and therefore, no consideration as mentioned in Section 67 of the Finance Act has been received by them. The tribunal rejected the arguments by holding that the appellant was rendering service of management, maintenance and repair service, to the occupants and that it would amount to providing services. The tribunal held that the agreement shows that the occupants have agreed to pay charges for the maintenance and services and whether the assessee makes profit / surplus out of the charges collected, is not relevant for the purpose of levying service tax. It held that the law in regard to the 'consideration' is well settled and that the 'consideration' should be real and valid in law and need not be adequate. The tribunal therefore, held that the arguments raised by the appellant that they are only pure agents of the occupants for providing services on no profit or no loss basis and therefore will have no liability to pay service tax, as not tenable. The tribunal therefore, dismissed the appeal.

3. The common order of the tribunal in Final Order Nos.41806 & 41807 of 2017 dated 28.08.2017, is under challenge in the instant appeals on the following substantial questions of law.

"1. Whether the Tribunal is right in setting aside the Order in Original No.6/2011 Dt.28.02.2011 and remanding the matter for fresh adjudication, where the demands have been rightly dropped by the Commissioner on the basis of the finding that the show cause notice did not at all brought out the allegations against the appellant in any clear terms, which is the requirement under Section 73 of the Act and when sub section (1A) of section 73, which enables the Department to issue a mere Statement of Demand was not in force during the relevant period?

2. Whether the tribunal is correct in holding that the appellant is liable to pay service tax under management, maintenance or repair service, when there is no value for such service, as contemplated under Section 67 of the Act and thereby no service tax can be levied under Section 66 of the Act?

3. Whether the Tribunal is correct in ignoring the ratio laid down by the Hon'ble Delhi High Court, since upheld by the Hon'ble Apex court, in Intercontinental Consultants and Technocrats Pvt. Ltd., supra, to the effect that the reimbursement of expenses claimed by the service provider car never become part of the "gross amount charged for providing the service"?

4. Whether the Tribunal is correct in upholding the demand of service tax on various amounts collected by the appellant, while dropping the demand in respect of electricity, water and insurance charges alone, when the rationals for dropping the demand in respect of electricity, water and insurance charges would equally apply in respect of other amounts also?

5. Whether the tribunal is right in disregarding the decision of the Income Tax Department to consider the amounts collected by the appellant from the owners as reimbursements and not consideration and take a contrary stand that such collections are consideration and not reimbursement?"

4. On notice, Mr.Rajinish Pathiyil, learned counsel for the revenue raised a preliminary objection that the appeal, as framed, is not maintainable in this Court ant that it is an appeal having relation to the rate of duty of excise or to the value of the goods for the purpose of assessment and therefore, the appellant has to file an appeal under Section 35(L) before the Hon'ble Supreme Court of India.

5. Heard Mr.G.Natarajan, learned counsel for the petitioner and Mr.Rajinish Pathiyil, learned standing counsel for the revenue.

6. Section 35 (G) and 35(L) of the Central Excise Act and Section 83 of the Finance Act, 1994, reads as under.

Section 35G. : 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 Principal Chief Commissioner of Central Excise or 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) filed within one hundred and eighty days from the date on which the order appealed against is received by the Principal Chief Commissioner of Central Excise or 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.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-Section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(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; or

(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.

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.

Section 83 of the Finance Act, 1994:

Application of certain provisions of Act 1 of 1944 -The provisions of the following section of the Central Excise Act, 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise: -

Sub-section (2A) of section 5A, sub- section (2) of section 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F, 35FF to 35O (both inclusive}, 35Q,35R, 36,36A, 36B, 37A, 37B, 37C, 37D, 38A and 40.

7. A perusal of Section 35(G) would show that an appeal shall lie to the High Court from every order passed in appeal by the appellate Tribunal, but that should not be an order relating to the determination of any question having relation to the rate of duty / tax or value of the goods for the purpose of assessment. The question therefore as to whether services that had been provided would be exigible to tax or not, would fall in the latter part.

8. The learned counsel for the revenue, placed heavy reliance on the judgment of the Hon'ble Supreme Court in the case of Navin Chemicals MFG & Trading Co. Ltd., Vs. Collector of Customs, reported in 1993 (68) ELT (3) SC. Paragraph Nos.7 to 12, which lays down the law, reads as under.

"7. The controversy, therefore, relates to the meaning to be given to the expression 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment'. It seems to us that the key lies in the words 'for purposes of assessment' therein. Where the appeal involves the determination of any question that has a relation to the rate of customs duty for the purposes of assessment that appeal mast be heard by a Special Bench. Similarly, where the appeal involves the determination of any question that has a relation to the value of goods for the purposes of assessment, that appeal must be heard by a Special Bench. Cases that relate to the rate of customs duty for the purposes of assessment and which relate to the value of goods for the purposes of assessment are advised treated separately and placed before Special Benches for decision because they, more often than not, are of importance not only to the importers who are parties thereto but also to many other importers who import or propose to import the same or similar goods. Since the decisions of CEGAT in such matters would have wide application they are, by the terms of the statute, to be rendered by Special Benches. The phrase 'relation to" is, ordinarily, of wide import but, in the context of its use in the said expression in Section 129-C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.

8. Before we consider whether the case of the appellant fails within the said expression, we must note that Section 130, Sub-section (l)and Section 130-E, Clause (b) of the said Act also use the said expression and they refer respectively to the Statement of Case to the High Court on a reference by CEGAT and an appeal to the Supreme Court directly. Section 130(1) states that the Collector of Customs or the other party may require CEGAT to refer to the High Court any question of law arising out of an order under appeal before it provided it is not an order relating among other things to the 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment'. Clause (b) of Section 130-E provides that an appeal shall lie 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 customs or to the value of goods for purposes of assessment'.

9. The importance of the present appeal lies not so much in deciding which appeals can be heard by a member of CEGAT sitting singly and which by a Special Bench thereof as in determining where a reference can be made by CEGAT to the High Court and in which cases an appeal against an order of CEGAT can be filed directly before the Supreme Court. Where an appeal lies to the Supreme Court, the necessity of the reference on a question of law to the High Court is obviated. An appeal to this Court is provided where, as aforementioned, the questions in issue, relating to the rates of duty or the value of goods for the purposes of assessment, have relevance not only for the parties there concerned but for other importers as well.

10. Section 129-D deals with the powers of the Central Board of Excise and Customs and the Collector of Customs to call for and examine the record of any proceedings before authorities subordinate thereto and examine the legality or propriety thereof and also to direct such authorities to file appeals. Sub-section 5 was added to Section 129-D by the Customs & Central Excise Laws Amendment Act, 1988 and it reads thus:

(5) The provisions of this section shall not apply

to any decision or order in which the determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment of any duty is in issue or is one of the points in issue.

Explanation - For the purposes of this sub-section, the determination of a rate of duty in relation to any goods or valuation of any goods or valuation of any goods for the purposes of assessment of duty includes the determination of a question.-

(a) relating to the rate of duty for the time being in force, whether under the Customs Tariff Act, 1975 (51 of 1975), or under any other Central Act providing for the levy and collection of any duty of customs, in relation to any goods on or after the 28th day of February, 1986; or

(b) relating to the value of goods for the purposes of assessment of any duty in cases where the assessment is made on or after the 28th day of February, 1986; or

(c) whether any goods fall under a particular heading or sub-heading of the First Schedule or the Second Schedule to the Customs Tariff Act, 1975 (51 of 1975), or that any goods are or not covered by a particular notification or order issued by the Central Government granting total or partial exemption from duty; or

(d) whether the value of any goods for the purposes of assessment of duty shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in this Act.

11. It will be seen that Sub-section 5 uses the said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the Explanation thereto provides a definition of it 'for the purposes of this sub-section'. The Explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and 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. Although this Explanation expressly confines the definition of the said expression to Sub-section 5 of Section 129-D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have, given to the said expression above. Questions relating to the rate of duty and to the value of goods for

purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods.

12. This, then, is the test for the purposes of determining whether or not an appeal should be heard by a Special Bench of CEGAT, whether or not a reference by CEGAT lies to the High Court and whether or not an appeal lies directly to the Supreme Court from a decision of CEGAT : does the question that requires determination have a direct and proximate relation, for the purposes of assessment, to the rate of duty applicable to the goods or to the value of the goods."

9. The substantial question of law that has been framed, especially Question No.2, which reads, whether the tribunal is correct in holding that the appellant is liable to pay service tax under management, maintenance or repair service, when there is no value for such service, as contemplated under Section 67of the Act and thereby no service tax can be levied under Section 66 of the Act?, would categorically indicate that the issue as to the valuation of the service tax is to whether the service provided by the appellant is exigible to service tax or not, has to be decided.

10. The Hon'ble Division Bench of this Court in SRF Ltd., Vs. CESTAT, Chennai, reported in 2017 (350) ELT 33 (Mad) observed as under.

"17. The learned counsel for the appellant submitted that the appeal is within the jurisdiction of the Madras High Court, under Section 35G. It is also his submission that the issue in the instant appeal, is not on Classification of Yarn or valuation of yarn or the rate of duty on yarn or the eligibility of the exemption notification for 210d yarn, but is only a challenge to the error committed by the Customs, Excise and Service Tax Appellate Tribunal in applying the 5th test report, which result, is not the same as that of the previous four test reports. Therefore, according to him, the relief sought for, ought to have been granted, by following the decision of the Hon'ble Supreme Court in the case of Tata Engineering & Locomotive Company Ltd. vs. Municipal Corporation of the City of Thane and Other, reported in 1993 Supp (1) SCC 361. Further, he has also contended that the appeal is pending for more than ten years, and at this distance point of time, the stand taken by the respondent department should not be accepted.

....

21. Therefore, principles of law has been settled in various decisions, by the Hon'ble Apex Court, as well as this Court that where there is a lack of inherent jurisdiction of the Court, the decree is then said to be a 'nullity'. Hence, we are not inclined to accept the contention of the learned counsel for the appellant that the instant appeal can be entertained, since it is pending before this Court, for a period of ten years. Further, we are of the view that the substantial questions of law raised by the appellant relates to the rate of duty. In view of the above, the substantial questions of law framed in the instant appeal, with regard to the maintainability of the instant appeal under Section 35G of the Central Excise Act, 1944, is answered against the appellant. Hence, we are not inclined to go into the merits of the case. On the above discussion and decisions, in the light of additional substantial questions of law, we are not inclined to entertain the appeal, on the grounds of lack of jurisdiction, under Section 35G of the Act. Since we have answered the additional substantial questions of law, which is against the assessee, instant appeal filed by the appellant assessee is liable to be dismissed."

11. The Hon'ble Division Bench of Delhi High Court in Commissioner of Service Tax vs. Amadeus India Pvt. Ltd., reported in 2015 (3) STR 973 observed as under.

"8. Section 83 of the Finance Act, 1994, makes the provisions of Sections 35 G and 35 L 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 35G 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 vs. Ernst and Young Pvt. Ltd.) (along with other similar petitions) was dismissed as withdrawn by the Supreme Court by its order dated 19th January 2015.

> 9. 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 10th July 2014 by the Tax Research Unit, Department of Revenue, Ministry of Finance, Government of India, New Delhi clarifying the position."

12. As noticed above, the core issue as to whether the appellant is providing services or not, for which it is liable to service tax under Section 67 of the Finance Act, 1994, can be dealt with the Hon'ble Supreme Court of India and the High Court does not have any jurisdiction to decide this issue. The appellant have no other alternative to approach the Hon'ble Supreme Court, by filing an appeal, under Section 35 (L) of the Central Excise Act, 1944. The appeals are returned as not maintainable, since the question raised relates directly to the issue as to whether or not the activity is exigible to Service tax under the Finance Act. The appeals stand dismissed in limine. No Costs.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

ars

To

1. The Commissioner of Central
Tax & Central Excise,
Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai - 600 040.

2. The Assistant Registrar,
Customs, Excise and Service Tax Appellate Tribunal
Chennai, Branch

+1cc to Mr.A.P.Srinivas, Advocate SR.No.69755

+1cc to Mr.S.Jaikumar, Advocate SR.No.69484

CMA Nos.875 & 876 of 2018

TM(CO)

GMY(13/12/2018)