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

CENTRAL EXCISE APPEAL NO.14 OF 2020

The Commissioner of CGST & Central
Excise, Thane, Commissionerate
Navprabhat Chambers, Ranade Road,
Dadar (West), Mumbai 400 028. … Appellant
V/s.
Ajit India Private Limited
B-21/24, Road No.16,
Wagle Industrial Estate, Thane 400 064. … Respondent

Mr.Siddharth Chandrashekhar, Advocate for the Appellant.
Mr.Hemant G. Dharmadhikari with Mr.D.A.Bhalerao, Mr.P.H.Dharmadhikari and Mr.Tanmay Bhave, Advocates for the Respondent.

CORAM : DHIRAJ SINGH THAKUR AND
ABHAY AHUJA, JJ.
DATE : DECEMBER 14, 2022.

JUDGMENT : (*Per Abhay Ahuja, J.*)

1. This appeal has been filed under section 35G of the Central Excise Act, 1944 (the "Excise Act") read with Finance Act, 1994 against the order dated 25th May, 2018 passed the Customs Excise and Service Tax Appellate Tribunal, Mumbai (CESTAT), whereby the appeal preferred by the appellant was allowed.

2. The respondent is a manufacturer as well as service provider for the services of business auxiliary service, erection commissioning and installation service, renting of immovable property service and transport of goods by road service.

3. Pursuant to the order in original the respondent was held liable for service tax amounting to Rs. 2,74,35,654/- by invoking extended period of time in the category of erection commissioning and installation services instead of construction of complex service. Aggrieved by the same, the respondent filed an appeal before the CESTAT which was allowed. Aggrieved by the said order, the Commissioner of CGST and Central Excise Thane has preferred this appeal proposing the following questions as substantial questions of law:-

> (i) Whether the CESTAT was justified in taking contrary view to it's earlier order dated 09th October, 2012 passed in the same matter, remanding back the matter for a limited purpose and without keeping the other issue open?
> (ii) Whether the CESTAT was right in holding that the demand under the Show Cause Notice is not raised under the correct head and therefore, it cannot be sustained?
> (iii) Whether the CESTAT was right in holding that the activity carried out by the assessee is classifiable under Works Contract Service?
> (iv) Whether the CESTAT was right in holding that extended period of limitation cannot be invoked in the facts and circumstances of the case?"

4. Mr.Dharmadhikari, learned counsel for the respondent raises an issue of maintainability of this appeal submitting that the question of law at paragraph No.5(c) refers to classification which would involve determination of rate of tax and therefore is not appellable before this court but under section 35L of the Excise Act which appeal would need to be filed before the Apex Court.

5. A bare perusal of the question No.5(c) as above clearly indicates that in order to determine the said question the aspect of classification of the services rendered by the respondent would have to be gone into.

6. Sections 35G and 35L of the Excise Act are quoted as under :-

> "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 the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.
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> 35L. (1) Appeal to Supreme Court.—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 purpose 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."
>
> (Emphasis supplied)

7. The Apex Court in the case of **Navin Chemicals Manufacturing and Trading Company Limited Vs. Collector of Customs**[1] has decided that classification issue is an issue of rate of duty and /or value of goods for the purposes of assessment. Paragraph 11 of the said decision is usefully quoted as under:-

> "11. It will be seen that sub-section (5) of section 129D 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

1 1993(68) E.L.T.3 (S.C.)

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 129D, 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."

(emphasis supplied)

8. The Hon'ble Supreme Court having decided that classification issue in **Navin Chemicals Manufacturing and Trading Company Limited Vs. Collector of Customs** (supra) in an issue of rate of duty and for value of goods for the purposes of assessment, the same is binding on us. Therefore, in view of section 35G(1) as quoted above, which specifically prohibits an appeal being entertained by this Court, if it is an order of the Tribunal relating amongst other things to the determination of any question having arisen on account of "rate of duty" or the "value of goods" for the purposes of assessment, this Court would not have jurisdiction.

9. Considering the above discussion and that question No.5(c) refers to classification issue that would need to be decided, we hold that this appeal is not maintainable before this court and the course of action available to the appellant is to file an appeal before the Supreme Court under section 35L(1)(b) of the Excise Act.

10. Disposed accordingly.

(ABHAY AHUJA, J.) **(DHIRAJ SINGH THAKUR, J.)**

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