Vidya Amin

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

CENTRAL EXCISE APPEAL NO. 13 OF 2021

The Principal Commissioner of CGST and Central Excise, Mumbai East Commissionerate … Appellant

Versus

ICICI Bank Ltd. …Respondent

Mr. Swapnil Bangur a/w. Mr. Ruju R. Thakkar for the appellant.
Mr. Prasad Paranjape i/b. Luninere Law Partners for the respondent.

CORAM: G. S. KULKARNI & RAJESH S. PATIL, JJ.
DATED: 8 June, 2023

ORAL JUDGMENT (Per G.S. Kulkarni, J.)

1. This appeal filed by the revenue under section 35G of the Central Excise Act, 1944 arises from the order dated 14 January, 2020 passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai disposing of Service Tax Appeal No. 86128 of 2014 filed by the respondent whereby the respondent's appeal has been allowed.

2. The appellant has urged that the following substantial question of law for determination of this Court in the present proceedings:

> "a) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessee/respondent was not rendering Collection Agency Services in relation to Securitization deals originated prior to February, 2006?
>
> b) Whether in the facts and circumstances of the case, the Tribunal was right in holding that imposition of detriment is without authoirty of law merely because in view of typing mistake, Section 73(4) is invoked instead of 73(1) of the Finance Act, 1994?

c) Whether in the facts and circumstances of the case, the Tribunal was right in holding that taxing consideration earned from Liquidity Facility is in breach of the exemption afforded to interest?

d) Whether in the facts and circumstances of the case, the Tribunal was right in holding that beneficiary of the facility is not the "Special Purpose Vehicle" but the assessee/respondent themselves and therefore, there is no service rendered to another person?

3. Learned counsel for the respondent has raised a preliminary objection to the maintainability of this Appeal before this Court on the ground of remedy available in terms of Section 83 of the Finance Act, 1944 read with Section 35G of the Central Excise Act, 1944 (for short **"CE Act"**).

4. The question which arises for consideration necessarily in regard to the taxability and valuation of Collection Agency Services rendered by the respondent during the period October, 2007 to March, 2012 in realtion to assignment/securitization deals (ABS & MBS) originated prior to February, 2006. In such context, our attention has been drawn to the show cause notice dated 23 July, 2013 issued by the Department of Revenue to the respondent. The objection raised on behalf of the respondent is to the effect that when the question arises for determination in relation to the rate of duty of excise or to the value of goods for purposes of assessment, as excluded from the provisions of Section 35G, would be a question which would be required to be determined by the Supreme Court in Appeal as provided for in Section 35L(2) of the CE Act.

5. In the context of the objection as raised on behalf of the respondent, it would be appropriate to note all the three provisions:

"**83. Application of certain provisions of Act 1 of 1944**

The provisions of the following sections of the Central Excise Act, 1944 (1 of 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, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F, 35FF to 35-O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."

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, amoung 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.

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 motiion 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."

6. Learned counsel for the respondent in support of the objection to the maintainability of this appeal before this Court, has drawn the Court's attention to the grounds of appeal as raised in the memo of the appeal, more particularly (c), (n) and (v) to contend that necessarily the question as raised in the appeal relates to the valuation. In support of such contention, learned counsel for the respondent would submit that this Court has taken a consistent view holding that such appeals which arise from the orders of the Tribunal relate to taxability or excisability passed prior to 6 August, 2014, i.e., the date on which Section 35L(2) of the CE Act came to be inserted, being a issue on rate of duty, would be appealable only before the Supreme Court.

7. Our attention has been drawn to the decision of the Full Bench of this Court in the case of ***The Commissioner of Central Excise, Mumbai-V Commissionerate vs. M/s. Reliance Media Works Ltd.***[1] as also to the recent decisions of the co-ordinate Benches of this Court in ***Commissioner of Service Tax vs. Surindra Engineering Co. Ltd.***[2] *and* in case of ***The Commissioner of Service Tax, Mumbai -VII, Mumbai vs. M/s. Phoenix International Freight***

1 2020 (372) E.L.T. 220 (Bom.)

2 2022 SCC Online Bom 4054

Service Pvt. Ltd.[3]. Learned counsel for the respondent submits that the preliminary objection as raised on behalf of the respondent be sustained, relegating the revenue to file an appeal before the Supreme Court in terms of Section 35L(2) of the CE Act as provided.

8. On the other hand, learned counsel for the appellant/revenue has also made detailed submissions. He has also drawn our attention to the impugned order as also the question of law and grounds as raised in the appeal, so as to assist the Court to adjudicate the objection as raised on behalf of the respondent.

9. We have heard the learned counsel for the parties and also perused the record. From the perusal of Section 83 of the Finance Act, 1944, it is clear that Section 35G and Section 35L of the Central Excise Act, 1944 are made applicable in relation to service tax, as they apply to the rate of excise duty. Section 35G provides for Appeal to High Court. Sub-section (1) thereof clearly provides that 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, however, 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

3 Central Excise Appeal No. 18 of 2022 decided on 7 December, 2022 involves a substantial question of law. Thus, there is clear exclusion in regard to appealability of an order not being an order relating to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment. As such issue stands excluded by the provisions of Section 35G in regard to its appealability to this Court, section 35L has been incorporated, which provides that an appeal shall lie to the Supreme Court in terms of what sub-section (1) (b) would provide, namely, an order passed by the Appellate Tribunal relating 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. Sub-section (2) of Section 35L provides that for the purposes of said 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.

10. On a cumulative reading of the provisions of Section 83 of the Finance Act, 1944 read with the provisions of Section 35G and 35L of the CE Act, we are of the clear opinion that necessarily the law itself provides that an appeal would lie to the Supreme Court from an order passed by the Appellate Tribunal. The question which arises for determination is one having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

11. On perusal of the question of law and the grounds of appeal relating to the issue which were required to be contested by the respondent and replied in the show cause notice, in our opinion, necessarily the issue is in regard to the taxability and valuation of Facility Services rendered by the respondent and as noted by us. This was the issue which required adjudication in the statutory appeals as also before the tribunal.

12. Insofar as the decisions as cited on behalf of the respondent, we find that the reliance on the decision of the Full Bench of this Court in the case of *The Commissioner of Central Excise, Mumbai vs. M/s. Reliance Media Works Ltd.* (supra) is apposite. The following question had fell for consideration of the Full Bench as arisen from the orders as referred by the Division Bench:

> "a) Whether the question of taxability or excisability of goods is an issue of rate of duty arising from orders of the Tribunal which are appellable only to the Supreme Court in terms of Section 35L(2) of the Act, applies even to appeals from order of the Tribunal passed prior to 6 August, 2014, i.e., the date of insertion of sub-section (2) to Section 35L of the Act?
>
> b) Whether the amendment made to Section 35L of the Act on 6 August, 2014 by insertion of sub-section (2) therein, is clarificatory or prospective in nature".

13. The Full Bench, considering the provisions of Section 35G and 35L and the law in such context, answered the issue in terms of what has been held in paragraph 9 of the said judgment, which reads thus:

> "9. In view of our above discussion, we now answer the questions posed in the reference for our opinion as under:

> a) Regarding question (a) – Appeals from orders of the Tribunal relating to taxability or excisability passed prior to 6th August, 2014, i.e., the date of insertion of sub-section (2) to Section 35L of the Act, beiing a rate of duty issue would be appealable only to the Hon'ble Supreme Court and not the High Court.
>
> b) Regarding question (b) – The amendment made to Section 35L of the Act is clarificatory in nature and, therefore, retrospective in operation.

14. Similar view was taken by this Court in the case of *M/s. Surindra Engineering Co. Ltd.* (supra) as also in the case of *M/s. Phoenix International Freight Service Pvt. Ltd.* (supra).

15. For the aforesaid reasons, we are of the clear opinion that the issue in the present appeal is in regard to taxability and valuation. The remedy for the appellant in terms of what has been provided for under section 35G(1) read with Section 35L(1)(b) would be to approach the Supreme Court by filing an appeal. We, accordingly, dispose of this appeal permitting the appellant to file an appeal before the Supreme Court. All contentions of the parties are expressly kept open.

16. Disposed of in the above terms. No costs.

(RAJESH S. PATIL, J.) **(G. S. KULKARNI , J.)**