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

2023:PHHC:161533-DB

**STA Nos.13 and 6 of 2021,
STA No.17 of 2019,
STA No.2 of 2022 and
STA No.2 of 2023
Date of Decision: 15.12.2023**

Commissioner of Central Excise, Delhi .....Appellant(s)

Versus

M/s. Evalueserve.com Pvt. Ltd. ...Respondent(s)

**CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MS. JUSTICE LAPITA BANERJI**

Present: Mr. Sourabh Goel, Sr. Standing Counsel,
for the appellant (in STA-13-2021).

Mr. Deepesh Kakkar, Advocate,
for Mr. Anshuman Chopra, Sr. Standing Counsel,
for the appellant
(in STA-6-2021, STA-2-2022 and STA-2-2023).

Mr. Tejinder Joshi, Sr. Standing Counsel,
for the appellant (in STA-17-2019).

Mr. Naveen Bindal, Advocate,
for the respondent.

G.S.SANDHAWALIA, J. (Oral)

Refiling Applications

Applications for condonation of delay of 47-623 days in refiling the appeals are allowed, subject to all just exceptions.

Delay of 47-623 days in refiling the appeals is condoned.

CMs stand disposed of.

Main Cases

1. The present judgment shall dispose of 5 appeals. i.e. STA Nos.13

and 6 of 2021, STA No.17 of 2019, STA No.2 of 2022 and STA No.2 of 2023. STA-17-2019, STA-2-2022 and STA-2-2023. The last four arise out of consequential order passed on an earlier occasion in STA-13-2021 on 27.02.2018 by the Tribunal while relying upon its earlier order. We have called for the said appeal i.e. STA-13-2021 which is pending for 22.02.2024 and with the consent of counsel for the parties, hearing of the same is pre-poned to today and taken on Board today itself. Reference is being made to the said appeal.

2. STA-13-2021 filed under Section 35(G) of the Central Excise Act, 1944 (in short 'the Act') is against the final order No. A/60151/2018-CU[DB] dated 27.02.2018 passed by the Customs of Excise and Service Tax Appellate Tribunal, Chandigarh in Appeal No.ST/60584/2016. The question of law which is posed by the appellant-Revenue reads thus:-

> *"i) Whether the services being provided by the respondent fall under the category of 'intermediary services' under Rule 2(f) of the Place of Provision of Service Rules, 2012 and as such liable to pay service tax?"*

3. A perusal of the order dated 27.02.2018 (Annexure A-10) passed by the Tribunal would go on to show that the challenge in appeal before the Tribunal was regarding the denial of the refund claimed for the period from April 2015 to September, 2015 filed under Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No.27/2012 dated 18.06.2012. The argument before the Tribunal was that the assessee was not liable to pay service tax and was not covered in terms of Rule 9 of Place of Provisions of Rules, 2012 whereas the case of the respondent was that the appellant has provided

intermediary services to the customer of their clients and, therefore, liable to pay service tax under reverse charge mechanism and the refund claimed has been rightly rejected. Accordingly, a finding was recorded after going through the agreement that the assessee was providing services to their clients and facilitating them for providing services and had no direct nexus with the customers of their client and no where had facilitated or arranged for the services provided to their client by third party. They had themselves provided services to their client as the main service provider on principal to principal basis and, therefore, the activity undertaken by the appellant did not qualify as defined in Rule 2(f) of Place of Provision of Services Rules, 2012 (in short 'the 2012 Rules'). In such circumstances, the assessee was held not liable to pay service tax and, therefore, the demand against it was held to be not sustainable and, therefore, the refund claimed was held to be admissible.

4. Counsel for the respondent has raised a preliminary objection that the appeals are not maintainable in view of the fact that the issue is regarding the taxability or excisability for the purposes of assessment while referring to the question of law itself framed by the Revenue. It is, thus, submitted that under Section 35G(1) of the Act, the appeal shall lie to the High Court not being to 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 purposes of assessment. An appeal under Section 35L(2) of the Act would lie only to the Supreme Court regarding the issue of determination of taxability or excisability of goods for the purposes of assessment. Section 35G(1) reads thus:-

*"**35G.**(1) An appeal shall lie to the High Court*

from every order passed in appeal by the Appellate Tribunal on or after 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."

5. Section 35L reads thus:-

Appeal to the Supreme Court -

35L. *(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.]"

6. Reliance has also been placed upon the judgment of the Division Bench of the Delhi High Court in ***Commissioner of Income Tax, New Delhi vs. Menon Associates, 2017 (49) STR 284*** wherein, a similar issue was considered regarding the concurrent appellate jurisdictions of the High Court and the Supreme Court. The discussion was, thus, made whether the appeal was maintainable before the Delhi High Court and after recording a finding that the issue was that whether service tax was payable and whether the service rendered was "export" and no service tax was payable, the appeal was directed to be returned back to take appropriate steps as per law. The said judgment reads thus:-

> *"The Commissioner of Service Tax has filed the present appeal under Section 83 of the Finance Act, 1994 read with Section 35G of the Central Excise Act, 1944 against order dated 2nd January, 2014 passed in appeal No.ST/1402/2011 by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT, for short).*
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> *2. Decisions of the CESTAT can be challenged under Section 35G the Central Excise Act, 1944 before the jurisdictional High Court and before the Supreme Court under Section 35L of the Central Excise Act, 1944, but the Supreme Court and the jurisdictional High Court do not enjoy concurrent appellate jurisdiction. Section 35L of the Central Excise Act, 1944 in clause (b) to sub-section (1) states that an appeal shall lie before the Supreme Court against any order passed by CESTAT relating to among other things, determination of any question having a relation to rate of duty/tax or value of goods/services for the purpose of*

assessment. Subsection (2) to Section 35L inserted by Finance (No. 2) Act of 2014 with effect from 6th August, 2014 states that for the purpose of the said Chapter, determination of any question having a relation to rate of duty/tax shall include determination of taxability or exigibility of goods to tax. In the case of service tax adjudication, it means that the question/issue of chargeability of service to tax under the Finance Act, 1994 read with the relevant provisions, notification or exemptions, is amenable to challenge under Section 83 of the Finance Act, 1994 read with Section 35L of the Central Excise Act, 1944 before the Supreme Court.

3. Appeal under Section 83 of the Finance Act, 1994 read with Section 35G of the Central Excise Act, 1944 would lie to the High Court only when the order determines issues other than any questions relating to the rate of duty or value of goods or services for the purposes of assessment. Thus, if the order determine any question relating to the rate of duty/tax or value of goods or services along with other questions, the appeal is maintainable only under Section 35L of the Central Excise Act, 1944, before the Supreme Court and not before the jurisdictional High Court. This Court in Commissioner of Income Tax versus Ernst and Young Pvt. Ltd. 2014 (34) STR 3 (Delhi), has held that any question having relation to rate of duty would include determination of taxability or levy of tax on a particular service even prior to the amendment by the Finance Act (No.2), 2014. Further, the determination of the question/issue in the order-inoriginal would decide the appellate forum under Section 35L or 35G of the Central Excise Act, 1944, as any other interpretation would lead to incongruous or unacceptable results. The *orders of the Tribunal, which do not relate to the merits of the decisions of the order-in-original, or „interim" orders like pre-deposits, etc may be treated differently. The present appeal is not one such case.*

4. In the present case, the order in original dated 26th May, 2010 dismissed the claim for refund of Rs.15,49,103/- filed by the respondent assessee on the ground that the services rendered were covered under the benefit of Export of Services Rule, 2005. In other words, the respondent assessee had submitted that the services rendered could not have been subjected to payment of service tax, as they were in the nature of exports. The order-in-original rejected the said claim. The respondent assessee succeeded before the Commissioner of Central Excise (Appeals) by order dated 22nd June, 2011, who held that the services rendered by the respondent-assessee were not taxable being in the nature of export services. The said finding relating to levy or imposition of service tax has been upheld by the CESTAT in the impugned order dated 2nd January, 2014.

5. The counsel for the appellant submits that the issue raised in the order-in-original related to the refund of duty and not levy of tax. Secondly, it is submitted that the respondent-assessee did not dispute the factum that they had rendered business auxiliary service under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, but had claimed that the taxable service was covered by clause (iii) of Rule 3(1) of the Export of Services Rule, 2005 and other applicable rules. The respondent-assessee had also relied on certain circulars issued in support of their contention that once the assessee was engaged in export *of services, they were not exigible or liable to pay service tax.*

6. We do not agree with the submissions of the counsel for the appellant-Revenue that the issue raised in the order in original and in the appellate orders did not relate to question of levy of duty/tax or rate of duty/tax. The precise issue, which had arisen was whether the assessee was engaged in export of services and, therefore, whether service tax was payable. Reliance was placed by the respondent-assessee on the Rules to make the claim for refund. Prayer for consequential refund could only be granted in case the service rendered was an "export" and, therefore, no service tax was payable and leviable on the said service in terms of the Rules and the circulars/notifications. In these circumstances, we do not think that the appeal is maintainable before the High Court and the same is accordingly directed to be returned. The appellant, if aggrieved and wants, can take appropriate steps as per law.

7. The appeal is belated and an application for condonation of delay has been filed. However, as we have held that the appeal is not maintainable under Section 83 of the Finance Act, 1994 read with Section 35G of the Central Excise Act, 1944, we are not issuing notice on the application and examining the contents/merits."

7. It has also been brought to our notice that similar views have also been taken by another Division Bench of the High Court of Delhi in ***Commissioner of Service Tax vs. GECAS Services India Pvt. Ltd., 2015 (39) STR 980*** and **in *Commissioner of Service Tax, Bangalore vs. Prakash AIR Freight Pvt. Ltd, 2011 (23) STR 220 (Kar.)*, *Commissioner vs. B.A.***

Research India Ltd., 2013 (13) STR 663 and ***Commissioner of Central Excise and Service Tax, LTU, Bangalore vs. TNT Ltd., 2011 (23) STR 115 (Kar.).***

8. Faced with this situation, counsels for the Revenue also could not point out any judgment to the contrary.

9. Keeping in view the above and the question of law itself raised, we hold that the appeal is not maintainable and dismiss the same. However, liberty is granted to take appropriate steps in accordance with law, if so desired to file the appeal before the Apex Court at the earliest. Keeping in view that STA-13-2021 stands dismissed, other appeals would necessarily also have to be dismissed since the Tribunal only followed its earlier view.

(G.S. SANDHAWALIA)
JUDGE

15.12.2023
shivani

(LAPITA BANERJI)
JUDGE

Whether reasoned/speaking Yes
Whether reportable Yes