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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CENTRAL EXCISE ACT CASE NO. 93/2014**

Date of decision: 31st October, 2014

COMMISSIONER OF SERVICE TAX, NEW DELHI

..... Petitioner

Through Mr. Rahul Kaushik, Advocate.

versus

MENON ASSOCIATES Respondent
Through Mr. J.K.Mittal & Mr. Rajveer Singh,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL):

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).

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. Sub-section (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-in-original 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.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

OCTOBER 31, 2014
VKR