Commissioner Of Cgst And Central Excise ... vs M/S Spicejet Ltd on 5 December, 2024

Author: Prathiba M. Singh

Bench: Prathiba M. Singh, Amit Sharma

$~11
* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ SE
COMMISSIONER OF CGST AND CENTRAL
EXCISE DELHI SOUTH
Through: Mr. R. Ramchandra
ve
M/S SPICEJET LTD.
Through:

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE AMIT SHARMA
ORDER

% 05.12.2024

1. This hearing has been done through hybrid mode.

2. The present appeal under Section 35G of the Central Excise Act, 1944 has been filed challenging the impugned decision dated 3 rd July, 2023, passed by Customs Excise & Service Tax Appellate Tribunal (CESTAT), Principal Bench, New Delhi.

3. The original proceedings arise out of show cause notice dated 21 st October, 2014, wherein, three issues were considered and decided by the Commissioner of Service Tax vide order dated 31st March, 2016. The said issues are as under: -

> "(i) Whether CENVAT credit was not allowable as per the provisions of rule 14 of the 2004 Credit Rules read with section 11A of the Central Excise Act, 1944 and penalty under section 15(3) of the 2004 Credit Rules was imposable or not for contravention of rule 6(3A) of the 2004 Credit Rules?

This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:08

(ii) Whether service tax on excess baggage charges recovered from passengers should be leviable or not?

(iii) Whether the provisions of section 73(1) of the Finance Act was invokable for suppression of facts?"

4. The Commissioner, after a detailed discussion on the first issue, held that the demand for Service Tax which had been raised was not tenable. The operating portion of the said order qua the first issue is as under:

> "Here, in this case, the services of "Transport of passengers by Air" was introduced in July, 2010 for the first time. Thus, in the previous year, it was exempted from levy of Service Tax. The assessee had computed the tax on the basis of the actual figures (current financial year ratio) Rule 6(3A)(h) of the Cenvat Credit Rules, 2004 lays down that in cases where services are being made chargeable to service tax for the first time in the current financial year i.e. in the previous year 100% services were exempt, then in that case no reversal was required to be made of Cenvat and in other words 100% of Cenvat was available for set off against the Output tax. However, at the end of the financial year re-computation was required to be done.
>
> In view of the above, I am on the view that the assessee in correct in stating that the ratio of the previous year should not be adopted for the purpose of reversing the Cenvat credit in respect of exempted services. Also, as per the above Rule, reversal of Cenvat credit is required to be determined on actual basis after end of the financial year as on 30th June and adjustment is required to be made for excess/shortage in reversal of Cenvat credit for exempted services and differential amount is determined to be payable or is adjusted against the final liability Therefore, if a view is taken to apply the previous year's ratio, then in view of 6(3A)(h), no Cenvat would be available in the current year, if in the previous year 100% services were exempt. Further, as per Rule 6 (3A)(g) of This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:08 the Cenvat Credit Rules, 2004 information for adjustment is required to be given to the department within 15 days from the date of such adjustment. The assessee had made the adjustment of tax on 30/06/2012 and accordingly informed the department on 12/7/2012 (within 15 days from the date of adjustment).
>
> Thus, from the above, I am of the view that the demand of Rs. 21.55 crores which has been raised for excess claim of Cenvat during the period July, 2010 to March, 2011 is not tenable".

5. On the second issue i.e.,'whether service tax on excess baggage charges recovered from passengers should be leviable or not', the findings of the Commissioner are as under: -

> "Thus, in the light of the above mentioned facts & in view of the Hon'ble CESTAT's decision, I agree with the assessee's contention that the transport of passenger baggage is indirectly related to the service "Transportation of Passengers by Air Service" and, therefore, charges collected towards excess baggage should be included in the turnover pertaining to "Transportation of Passengers by Air Service". As Service tax on the services of "Transportation of Passengers by Air Service" became applicable w.e.f 01.07.2010 only, accordingly the demand for the period prior to 01.07.2010 is liable to be dropped. However, for the period 01.07.2010 to 2011-12, service tax was payable at the rate of 10% or Rs. 100 per journey whichever is less. For the said period, the assessee has contended that the benefit of Notification No. 26/2010-ST dated 26.02.2010 was available to them, wherein, it has been clearly mentioned that service tax is chargeable at 10% of the gross value of the ticket or Rs. 100/- per journey, whichever is less. As service tax has been paid by the assessee @ Rs. 100/- per ticket on the total number of tickets sold, even if the consideration towards excess baggage was added in the total value of services, there This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:08 would be no change in the number of tickets and the service tax amount would remain the same. I agree with this contention of the assessee and hold that the demand of Rs. 4.01 crores raised by the department in relation to excess baggage charges collected from passengers is not sustainable and hence requires to be dropped."

6. Insofar as the third issue i.e., invoking extended period of limitation in view of wilful suppression of facts as per Section 73(1) of the Finance Act, 1994 was concerned, the Commissioner of Service Tax held that the extended period of limitation could not be invoked for issuance of the show cause notice.

7. The CESTAT in its order dated 3rd July, 2023, after recording the findings of the Commissioner of Service Tax on all three issues primarily held that the show cause notice itself had not been issued within the prescribed period of limitation and that the extended period of limitation could not be invoked by the Department. Needless to add that, by holding the limitation issue against the Department, the learned Tribunal has, in effect, upheld the findings of the Commissioner of Service Tax on the first and the second issue as well, while having considered the same.

8. Further, in view of the settled position of law as held by the Supreme Court in Kunhayammed & Ors. v. State of Kerala & Anr., [(2006) 6 SCC 359], that when the order of a lower Court/ Tribunal/ authority is upheld by a superior court/ legal authority, the lower Court's order merges into the superior Court's decision. This ensures that all issues attain finality, and the superior Court's order

becomes the binding and the operative decision. The Supreme Court emphasized that there cannot be more than one operative order governing the same subject matter at a given time, and the nature of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:09 jurisdiction and scope of the challenge must be considered while applying the doctrine of merger. In view thereof, the decision of the CESTAT while dismissing the appeal on the period of limitation, in effect, upheld the findings of the Commissioner on the first and second issue as well.

9. The present appeal has been filed on 30th December, 2023 and vide order dated 23rd January, 2024, only one issue has been framed by this Court in respect of limitation. The issue framed vide the said order is extracted hereunder:

> "Whether the Tribunal has erred in law in holding that the extended period of limitation could not have been invoked by the Department?"

10. However, during the course of hearing, it is clear to this Court that upon the issue of limitation being decided, the question of taxability would have to be adjudicated. It is clear from a reading of Section 35G and 35L of the Central Excise Act, 1944 that whenever issues of taxability arise, the appeal would lie to the Supreme Court. The said provisions are extracted below:

> " 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 2 [Principal 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:09 the 3 [Principal 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 a bridge 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.

xxx xxx xxx 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 1stday 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."

11. In view of Sections 35G and 35L of the Central Excise Act, 1944 which applies in respect of Service Tax, whenever issues of determining taxability are involved, the appeal would lie to the Supreme Court. The same has been also been settled in a series of decisions. In Commissioner of Service Tax v. Ernst & Young Pvt. Ltd. and ors., 2014 (2) TMI 1133-Del, the Coordinate Bench of this Court had observed and held as under:

> "9. Before we examine other judgments, it is important to examine the language of Section 35G in the bracketed portion which relates to matters in which appeal is to be filed before the Supreme Court. Section 35L of the F. Act is specific. The words/expression used is "determination of any question in relation to rate of duty or value for the purpose of assessment". The word "any" and expression 'in relation to" gives appropriately wide and broad expanse to the appellate jurisdiction of the Supreme Court in respect of question relating to rate of tax or value for the purpose of assessment. Further, if the order relates to several issues or questions but when one of the questions raised relates to "rate of tax" or valuation in the order in the original, the appeal is maintainable before the Supreme Court and no appeal lies before the High Court under Section 35G of the CE Act. Referring to the expression "other things" in Section 35G of the CE Act in the case of Bharti Airtel Limited 2013 (30) STR 451 (Del), a Division Bench of this Court has stated:

"3. On a plain reading of Section 35G of the Central Excise Act, 1944 it is clear that no appeal would lie to the High Court from an order passed by CESTAT if such an order relates to, among other things, the determination of any question having a relation to the rate of duty or to the valuation of the taxable service. It has nothing to do with the issues sought to be raised in the appeal but it has everything to do with the nature of the order passed by the CESTAT. It may be very well for the appellant to say that it is only raising an issue pertaining to limitation but the provision does not speak about the issues raised in the appeal, on the other hand, it speaks about the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:11 nature of the order passed by the Tribunal. If the order passed by the Tribunal which is impugned before the High Court relates to the determination of value of the taxable service, then an appeal from such an order would not lie to the High Court.

4. However, we feel that although those decisions do support the contention of the learned counsel for the respondent, the approach that we have taken is a more direct. We reiterate, it is not the content of the appeal that is determinative of whether the appeal would be maintainable before the High Court or not but rather the nature of the order which is impugned in the appeal which determines the issue."

12. Further, a Division Bench of this Court in the judgement of Commissioner of Service Tax v. Delhi Gymkhana Club Ltd. [2009 (16) STR 129 (Del)], clarified that any issue with regard to the determination of any question in relation to valuation for purpose of assessment, when decided by CESTAT shall be appealed to the Supreme Court. Relevant paragraphs of the said judgement are extracted hereinbelow:

"9. It is clear from the above that against certain orders appeal is provided to the High Court, whereas in respect of the certain other orders passed by the appellate tribunal, direct appeal to the Supreme Court is provided. Section 35L(a) deals with the appeals which are carried from the orders of the High Court. However, clause (b) stipulates the nature of orders passed by the appellate tribunal against which appeal is to be preferred to the Supreme Court. Where order passed by the appellate tribunal relates 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, the aggrieved party is to approach the Supreme Court directly by filing appeal under Section 35L(b). This is made clear even by the provisions of Section 35G which This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:11 provides for appeal to the High Court, as it

> specifically excludes the orders relating, among other things, determination of any question having relation to the rate of duty of excise or to the value of goods for the purpose of assessment.
>
> 10. The Supreme Court in the case of Navin Chemicals Mfg. & Trading Co. Ltd. v. Collector of Customs, 1993 (68) E. L.T. 3 (S.C.) had an occasion to deal with the expression determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment". Though that was a case under the Customs Act, the provisions of the Central Excise Act were also taken note of, which are in pari materia with that of the Customs Act. The Apex Court specifically took note of sub-section (5) to Section 129D of the Customs Act and noted that this provision was simultaneously introduced in the Customs Act as well as the Central Excise Act by Custom and Central Excise Laws (Amendment) Act, 1988. Thus, Section 129D(5) is identical to Section 35E(5) of the present Act.

This provision was interpreted by the Court in the following manner :-

> "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 is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:11 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."

11. In view thereof, it is clear that determination of any question in relation to rate of duty or to the value of goods for the purpose of assessment and when it is decided by the CESTAT, appeal thereagainst is provided to the Supreme Court under Section 35L(b) and no such appeal is permissible to the High Court."

13. Further, in the judgement of Commissioner of Service Tax, Delhi v. Bharti Airtel Ltd. [2013(30) S.T.R. 451 (Del.)], Division Bench of this Court considered the issues on maintainability of appeal while considering the decision of CESTAT on limitation issue and held as under:

> This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:12 "3. On a plain reading of Section 35G of the Central Excise Act, 1944 it is clear that no appeal would lie to the High Court from an order passed by CESTAT if such an order relates to, among other things, the determination of any question having a relation to the rate of duty or to the valuation of the taxable service. It has nothing to do with the issues sought to be raised in the appeal but it has everything to do with the nature of the order passed by the CESTAT. It may be very well for the appellant to say that it is only raising an issue pertaining to limitation but the provision does not speak about the issues raised in the appeal, on the other hand, it speaks about the nature of the order passed by the Tribunal. If the order passed by the Tribunal which is impugned before the High Court relates to the determination of value of the taxable service, then an appeal from such an order would not lie to the High Court. The learned counsel for the respondent had referred to the following decisions :-
>
> (1) Commissioner of C. Excise, Chandigarh.

Punjab Recorders Ltd. - 2004 (165) E.L.T. 34 (P & H);

(2) Sterlite Optical Technologies Ltd.v.

Commissioner of C. Ex., Aurangabad - 2007 (213) E.L.T. 658(Bom.);

(3) Commissioner of Customs, Chennai v. Ashu Exports - 2009 (240) E.L.T. 333(Mad.).

4. However, we feel that although those decisions do support the contention of the learned counsel for the respondent, the approach that we have taken is a more direct. We reiterate, it is not the content of the appeal that is determinative of whether the appeal would be maintainable before the High Court or not but rather the nature of the order

5. In the present case, we find that the impugned order deals not only with the question of limitation but also with the question of valuation. It so happens that in the present case, the issue with regard

to the valuation of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:12 the taxable services was decided in favour of the revenue but, because the extended period of limitation was not invokable, as per the Tribunal, the respondent- assessee did not prefer any appeal against the said order. But, the order which is impugned before us deals with both the issues, that is, the issue of valuation of taxable services as also the issue of limitation. The mere fact that the appellant is only aggrieved by the decision on the point of limitation would not make an appeal from the impugned order maintainable before this Court because it is not the issues raised in the appeal which are material but the nature of the order which is appealed against is relevant for the purpose of determining whether an appeal would lie in this Court or not.

6. In view of the fact that the impugned order deals with the question of valuation apart from the question of limitation, this appeal would not be maintainable under Section 35G of the Central Excise Act read with Section 83 of the Finance Act, 1994. The objection taken by the learned counsel for the respondent is well founded. It is for this reason that we dismiss this appeal as being not maintainable."

14. Recently, a Co-ordinate Bench of this Court in ST Appl. No. 73/2012 titled as 'Commissioner of Service Tax v. Intertoll ICS CE Cons O & M Pvt. Ltd.', decided vide order dated 16th December, 2022, the Court has observed as under: -

> "4. The learned counsel appearing for the appellant also fairly states that it is now well settled that when the question of chargeability of an activity is concerned - such as in this case - appeal would lie to the Supreme Court and would not be maintainable before this court. She however expresses an apprehension that the appellant may be disabled from filing an appeal before the Supreme Court in view of the internal instructions This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:12 regarding the pecuniary limit for filing such appeals."

15. Even in the present case, though CESTAT has only considered the issue of limitation and the said issue was framed for consideration vide order dated 23rd January, 2024, the nature of the order, which is appealed, has to be considered. The original order passed by the Commissioner considered the question as to whether CENVAT credit was allowable or not, and whether penalty was imposable or not in terms of the applicable law. It also considered the leviability of service tax on excess baggage charges. Merely because CESTAT has only considered the issue of limitation, the present appeal cannot be filed in the High Court.

16. In view of the above decisions and considering the nature of issues that have been decided vide the order dated 31st March, 2016, passed by the Commissioner of Service Tax as also the impugned order of the CESTAT dated 3rd July, 2023, this Court is of the opinion that an appeal against the said impugned order would lie, in terms of Section 35L of the Central Excise Act, 1944, to the Hon'ble Supreme Court.

17. Therefore, the present appeal is dismissed as not maintainable.

18. Needless to state that the dismissal of the present appeal would not preclude the Appellant from availing such remedies as may be available in accordance with law and seeking benefit under Section 14 of the Limitation Act, 1963, for the period during which the present appeal was pending before this Court.

19. The present appeal is disposed of in the aforesaid terms.

This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:13

20. Pending applications, if any, are also disposed of.

PRATHIBA M. SINGH, J.

AMIT SHARMA, J.

DECEMBER 05, 2024/bsr/bh/Ns This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 21/12/2024 at 00:32:13