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

CENTRAL EXCISE APPEAL (L) NO. 20 OF 2015

M/s. Greatship (India) Ltd. ... Appellants.
Versus
Commissioner of Service Tax
Mumbai -I & anr. ... Respondents.

Mr. V. Shridharan, Sr. Counsel a/w. Mr. Prakash Shah i/b. PDS Legal, advocate for Appellant.

Mr. Pradeep S. Jetly a/w. Ms. Suchitra Kamble, advocate for respondent No. 1.

Mr. J.H. Motwani i/b. Economic Law Practice, advocate for respondent No. 2.

CORAM : B.R. GAVAI & A.S. GADKARI, JJ
DATE : MARCH 24, 2015

P.C.:(Per B.R. Gavai, J)

1 The appeal has been filed by the appellant/assessee being aggrieved by the order dated 29/9/2014 thereby dismissing the appeal filed by the appellant challenging the order in original dated 18th June, 2012 passed by the Commissioner (EAR).

2 The appellant which is a company duly registered under the Company Act, 1956, is engaged in providing services in relation to offshore exploration and production of oil and natural gas.

3 The appellant has entered into a contract with M/s. Oil and Natural Gas Corporation Limited (hereinafter referred to as 'ONGC'). The appellant provided offshore drilling services to ONGC in terms of the contract entered with the ONGC at various locations. Vide notification dated 7/7/2009 services provided on installations, structure and vessels were made taxable. It is not in dispute that by a subsequent notification dated 27/2/2010 the provisions of notification dated 7/7/2009 were also extended to the area specified in column 2 of table stated in the said notification in the continental shelf of India and exclusive economic zone of India for the purpose mentioned in the column No.3 of the table.

4 It is not in dispute that the service tax for the services provided by the appellant for drilling on the installations of ONGC

has already been paid. It is also not in dispute that in the continental shelf and exclusive economic zone of India which is beyond 12 nautical miles and within 200 nautical miles in the open sea, service tax has been paid in respect of services provided on the installation of the ONGC. The only dispute that falls for consideration in the present Appeal is as to whether within the continental shelf of India and exclusive economic zone of India, services provided by the appellant for drilling so as to explore whether there are oil reserves in the open sea, are liable to the service tax between 7/7/2009 to 27/2/2010 or not.

5 In this background, the present appeal has been filed for the substantial questions of law, as raised in the appeal.

6 The preliminary objection has been raised by the Revenue, that in view of Section 35 G and 35 L of the Central Excise and Salt Act, 1944 (hereinafter referred to as "the said Act), the appeal would

lie before the Hon'ble Supreme Court of India and not before this Court.

7 We have heard Shri V. Shridharan, learned Senior Counsel appearing on behalf of the appellant and Shri Pradeep Jetly, learned Counsel appearing on behalf of Revenue/respondent.

8 Shri V. Shridharan, learned Senior Counsel submits that the issue in the present Appeal does not involve any question with regard to either classification or taxability or excisability of the service or the rate at which service tax is to be paid. He submits that only when the aforesaid issues are involved, the appeal would lie before the Hon'ble Apex Court and in all other cases the appeal would lie before this Court. Learned Counsel submits that the Judgment of the Hon'ble Apex Court in the case of **Navin Chemical Manufacturing and Trading Company Ltd. v/s. Collector of Customs** reported in **1993(68) E.L.T. 3(S.C.)** would make the position clear.

9 Per contra, Shri Pradeep Jetly submits that as per the correct interpretation of section 35 G and 35 L of the said Act, it will have to be construed that the present appeal involves question regarding taxability and therefore would fall within the term "a question having a relation to the rate of duty". The learned Counsel submits that the department rightly construing the aforesaid provisions has proposed to file an appeal before the Hon'ble Supreme Court with regard to that part of the impugned order, by which the Revenue is aggrieved, regarding setting aside the order of penalty and also on merits. Learned Counsel therefore, submits that the proper remedy available to the appellant is to approach Apex Court by way of an appeal under Section 35 L of the said Act and the present appeal deserves to be dismissed on the ground of tenability.

10 Learned Counsel Shri Jetly relies on the Judgment of the Apex Court in the case of **Navin Chemicals Mfg. & Trading Co. Ltd.**

(cited supra) and following Judgments of the Division Benches of this Court.

(i) **Union of India v/s. Auto Ignation Ltd**., reported in 2002 (142) E.L.T. 292(Bom.)

(ii) **Commissioner of Custom & Central Excise, Goa v/s. Primella Sanitary Products (P) Ltd.,** reported in 2002(145) E.L.T. 515(Bom.)

(iii) **Sterlite Optical Technologies Ltd. V/s. Commissioner of Central Excise, Aurangabad,** reported in 2007(213) E.L.T.658.

(iv) **Commissioner of Central Excise, Nagpur v/s. Universal Ferro & Allied Chemicals Ltd.,** reported in 2009 (234) E.L.T. 220 (Bom.).

(v) **The Commissioner of Central Excise & Service Tax, Pune v/s. M/s. Credit Suisse Services (I) Pvt. Ltd**., bearing Central Excise Appeal No. 5 of 2014 & other connected matters decided on 23/2/2015.

11 For appreciating the rival controversy, it will be necessary to refer to Subsection 1 of Section 35 G and Section 35 L of the said Act, which read thus :

> "35-G. **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.
>
> 35L. **Appeal to 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 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."

12 Upon a conjoint reading of aforesaid provisions, it would thus be seen that an appeal shall lie to this Court against every order passed in appeal by the Appellate Tribunal, if the Court is satisfied that the case involves a substantial question of law. The only exception that is carved out is that an appeal shall not lie before this Court against an order relating amongst other things to the determination of any question having relations to the rate of duty of excise or to the value of goods for purpose of assessment.

13 Subsection 2 of Section 35 L of the Act provides that the term "determination of any question having a relation to the rate of duty" shall also include "the determination of taxability or excisability of goods for purposes of assessment". It would thus be clear that if any question having a relation to the rate of duty is involved in an appeal or when it is relating to value of goods for the purposes of assessment, then such an appeal would not lie before this Court. Similarly, if a question with regard to the determination of taxability or excisability of the goods for the purposes of assessment arises, then also appeal would not lie before this Court.

14 However, the issue is no more integra. In the catena of Judgments beginning from the Judgment of the Apex Court in the case of **Navin Chemicals Mfg. & Trading Co. Ltd. (cited supra),** the position has been clarified. We may gainfully seek guidance from the observations of the Apex Court in the case of **Navin Chemicals Mfg. & Trading Co. Ltd. (cited supra).** It will be appropriate to refer to paragraph-6, 7 and 11 of the said Judgment, which reads thus :

"6. It is, upon a plain reading of the section, clear that appeals against orders which involve 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment' are specially treated and are required to be heard by a Special Bench. This is what Sub-section 3 of Section 129-C provides. Appeals in other matters are to be heard by a Bench consisting of one Judicial Member and one Technical Member, subject to the provisions of Sub-section (4). Sub-section (4) carves out an exception to the general provisions of Sub-section (2) and provides that a member of CEGAT sitting singly can hear appeals in the matters enumerated therein provided that they are not cases where the 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment' is in question.

7. The controversy, therefore, relates to the meaning to be given to the expression 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment'. It seems to us that the key lies in the words 'for purposes of assessment' therein. Where the appeal involves the determination of any question that has a relation to the rate of customs duty for the purposes of assessment that appeal mast be heard by a Special Bench. Similarly, where the appeal involves the determination of any

question that has a relation to the value of goods for the purposes of assessment, that appeal must be heard by a Special Bench. Cases that relate to the rate of customs duty for the purposes of assessment and which relate to the value of goods for the purposes of assessment are advised treated separately and placed before Special Benches for decision because they, more often than not, are of importance not only to the importers who are parties thereto but also to many other importers who import or propose to import the same or similar goods. Since the decisions of CEGAT in such matters would have wide application they are, by the terms of the statute, to be rendered by Special Benches. The phrase 'relation to" is, ordinarily, of wide import but, in the context of its use in the said expression in Section 129-C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.

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 Explanation expressly confines the definition of the said expression to Sub-section 5 of Section 129-D, 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."

15 The Apex Court while considering the pari materia provisions of Customs Act has held that where an appeal involves determination of any question that has relation to custom duty for the purpose of assessment, or where the appeal involves determination of any question that has relation to the value of goods for the purpose of assessment, then such case have to be treated separately and given special treatment.

16 Perusal of paragraph-11 would reveal that the Apex Court has carved out following categories of cases, to which the legislature has given special treatment -

(i) determination of a question relating to a rate of duty;

(ii) determination of a question relating to the valuation of goods for the purpose of assessment;

(iii) determination of a question relating to the classification of goods under the Tariff and whether or not they are covered by an exemption notification;

(iv) 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.

The aforesaid interpretation placed by the Apex Court is interpreting the words "determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment". In view of amendment to Section 35 L, following category of cases would also be required to be added to the said categories.

"determination of disputes relating to taxabaility or excisability of goods for the purpose of assessment."

17 We will now deal with the various Judgments of this Court which are referred to by Shri Pradeep Jetley.

18 In the case of **Union of India v/s. Auto Ignation Ltd. (cited supra),** Writ Petition was filed by assessee before this Court challenging show-cause notice issued by Revenue. The contention raised in that Writ Petition was that the unit of the assessee was

located in rural area and as such was entitled to claim exemption in terms of the Exemption Notification No. 88/88-C.E, dated 1/3/1988. The Petition was basically dismissed by the Division Bench on the ground that the Petitioner had an alternate remedy in view of Section 35 L of the said Act. However while dismissing the Petition, the Division Bench observed thus in paragraph-23 :

> "it is not possible for us to accept the contention of the Revenue that the question of rate of duty is not an issue involved in the present case. The Supreme Court clearly laid down that the dispute as to the classification of goods and as to whether or not they are covered by the exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Applying the said dicta, the question whether or not the respondent-assessee is well within exemption notification is a question directly involved in this dispute relates directly and proximately to the rate of duty of excise for the purposes of assessment. In other words, the issue raised in these petitions directly relates to dispute whether or not they are covered by the exemption notification, which can conveniently be gone into in an appeal filed under Section 35L of the Act."

The Division Bench relying on the judgment of the Apex Court in the case of **Navin Chemicals Mfg and Trading Co.** (cited supra) rejected the contention of the Revenue that the question of rate of duty was not an issue involved in the said case. The Division Bench held that the dispute as to the classification of goods and as to whether or not they are covered by the exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. The Division Bench therefore held that the question whether or not the respondent-assessee is within exemption notification or not, is a question directly involved in the said dispute which relates directly and proximately to the rate of duty of excise for the purposes of assessment.

19 In the case of **Primella Sanitary Products (P) Ltd.** (cited supra), miscellaneous civil application was filed by the Commissioner of Customs and Central Excise for directing the Appellate Tribunal to refer the questions of law to this Court. The question related as to whether the assessee was eligible to claim benefit of the exemption

notification dated 1st March, 1986 as amended by notification dated 28th February, 1993. The Division Bench observed thus in paragraph-7 :

> "the issue relates to the determination of the question having relation to the rate of duty of excise or to the value of goods for the purpose of assessment and, therefore, no reference to the High Court under Section 35H of the Central Excise Act is tenable."

The Division Bench observed thus in paragraph-9 :

> "Thus, the question was whether the respondent was entitled to claim the benefit of the exemption notifications or to pay the excise duty at the rate chargeable for concerns denied the exemption."

It could thus be seen that the question before the Division Bench was as to whether the respondent was entitled to claim exemption notifications or to pay the excise duty at the rate chargeable for the concerns which were not entitled to the exemption. It could thus be seen that the question that fell for consideration was as to whether

the assessee was entitled to the benefit of exemption notification or was entitled to pay at the rate of chargeable who were not entitled for exemption. It could thus be seen that the question as to whether the assessee was entitled to benefit of exemption notification or not directly fell for consideration before the Division Bench and as such it was directly related to the rate at which duty was payable. In that view of the matter, the Division Bench held that reference to this Court under Section 35 H was not tenable.

20 In the case of **Sterlite Optical Technologies Ltd.**(cited supra), the question that arose for consideration, was as to what should be the rate of duty for the goods cleared to the Domestic Tariff Area. The Division Bench observed thus in paragraph-23 :

> "23. Considered on the above backdrops, the question of determination of status of the subject Unit will be one of the steps in the process of assessment. This exercise would be an exercise; which can be said to be part of the assessment. In this view of the matter, in our view, the dispute involved in the appeal and the substance thereof is : what should be rate of duty on the goods cleared to the Domestic Tarrif Area (D.T.A.).

> We have, thus, no hesitation to hold that the direct and proximate issues involved in the appeal for the purposes of assessment relate to the rate of duty applicable to the goods and the value thereof and the issue requiring determination of the status of the subject Unit would be one of the incidental issues. The contentions raised by the appellants, catalogued in Para (19) supra, also revolve around the rate of duty and valuation of goods for the purpose of assessment."

The dispute involved in the said appeal in substance was as to what should be rate of duty on the goods cleared in the Domestic Tariff Area. The Division Bench thus held that the direct and proximate issues in the appeal was related to the rate applicable to the goods and the value thereof. It held that the issue involving the status of the subject Unit was one of the incidental issues and not the main issue.

21 In the case of **Universal Ferro & Allied Chemicals Ltd.** (cited supra), question that arose for consideration was as to whether the assessee was liable to pay duty as per notification No. 8 of 1997 or whether the duty was payable in accordance with the provisions of

proviso to Section 3(1) of the Act of 1944. The Division Bench observed thus in paragraph-3 :

> "3. It is submitted on behalf of the respondents that on a combined reading of provisions of Section 35(G) and 35(L) of the Act of 1944, it is clear that the jurisdiction to hear an appeal against an order of the Tribunal which relates, among other things, to the determination of any question having a relation to the rate of duty of Excise would lie before the Hon'ble Supreme Court and not before the High Court. It is submitted on behalf of the respondent no.1 that in the present case, the issue in question relates to the rate of duty i.e. 16% which is held to be payable by the respondent no.1 under Notification No.8/1997 as held by the CESTAT or whether it is payable in accordance with the provisions of Proviso to Section 3(1) of the Act of 1944. According to the counsel for the respondent no.1, there is also a dispute regarding the value on which the duty is paid. The counsel for the respondent no.1 took this Court to the memorandum of appeal filed by the appellant, in this appeal, to point out that the main issue which is sought to be agitated by the appellant in this case relates to the applicability or otherwise of the Notification No.8/1997 and the Proviso to Section 3(1) of the Act of 1944. It is submitted on behalf of the respondent no.1 that it is the case of the appellant that the

benefit of Notification No.8/1997 would not be applicable to the goods cleared by the respondent no.1 to the Domestic Tariff Area and full duty under the proviso of Section 3(1) of the Act of 1944 is payable on the said goods."

It could thus be seen that the question which was involved was as to at what rate the duty was payable. Whether at 16% as per notification No. 8/1997 or in accordance with the provisions of Proviso to Section 3(1) of the Act of 1944. Apart from that there was also a dispute regarding the value on which duty was payable.

22 In so far as the Judgment of the Division Bench in the case of the **Commissioner of Central Excise & Service Tax, Pune v/s. M/s. Credit Suisse Services (I) Pvt.Ltd.** (cited supra), the question that arose for consideration was as to whether the services wholly in SEZ area are taxable or not in view of the notification dated 3rd March, 2009 and amended on 29th May, 2009. The Division Bench observed thus in paragraph-20 :

> "The taxability of the services and the rate at which they could be subjected to tax are matters which would have to be gone into by this Court in the present appeal."

It could thus be seen that the question as to whether taxability of the services and the rate at which they could be taxed, was required to be gone. In that view of the matter, the Division Bench held that the appeal would lie before the the Apex Court and not before this Court.

23 It could thus be seen that in all the aforesaid cases, the issues involved were as to at what rate duty is payable or as to whether the assessees were entitled to pay lower rate of tax in view of exemption notification or higher rate and as to whether goods or services were taxable or not.

24 In the present case, there is no dispute that the services which are provided by the appellant, in view of its contract with ONGC are taxable or not. It is not even contention of the appellant that the services are not taxable. There is no dispute regarding the

rate at which the tax on the services in question is to be levied. On the contrary, the appellant agrees that the services are taxable and also does not dispute the rate at which it is to be levied. The only question that falls for adjudication is as to whether prior to notification dated 27/2/2010, for the services rendered by the appellant between the period of 7/72009 and 27/2/2010 in the Continental Shelf of India and the Exclusive Economic Zone of India, service tax was payable on services rendered by the appellant for drilling for the purpose of exploration of oil reserves or not.

25 It will also be relevant to refer to relevant part of the notification dated 7/7/2009, which reads thus :

> "Service Tax provision extended to designated area in the continental shelf and exclusive economic zone. In exercise of the powers conferred by clause (a) of the sub-section (6) of section 6, and clause (a) of sub-section (7) of section 7, of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976), the Central Government hereby extends the provisions Chapter V of the Finance Act (32 of 1994) to the [instalations, structures and

vessels in the continental shelf of India and the exclusive Economic Zone of India]"

It could thus be seen that from the said date the service tax provisions were extended to designated areas in the continental shelf and exclusive economic zone. The provisions of Chapter V of the Finance Act were extended to the installations, structures and vessels in the continental shelf of India and exclusive economic zone of India. Undisputedly, the service tax for the services rendered on installations, structures and the vessels in the continental shelf of India and the exclusive economic zone of India has been paid after 7th July, 2009.

26 The notification dated 27/2/2010 reads thus :

"In exercise of the powers conferred by clause (a) of the section (6) of section 6, and clause (a) of sub-section (7) of section 7, of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976), and in supersession of the Government of India in the Ministry of Finance (Department of Revenue) notification No. 1/2002-

Service Tax, dated the 1st March, 2002, published in the Gazette of India, Extraordinary, vide number G.S.R. 153 (E), dated the 1st March, 2002, except as respects things done or omitted to be done before such supersession, the Central Government hereby extends the provisions of Chapter V of the Finance Act, 1994 (32 of 1994), to the areas specified in column (2) of the Table below, in the continental shelf and exclusive economic zone of India for the purposes as mentioned in column (3 of the said Table :-

Sl. No.	The areas in the Continental Shelf and the Exclusive Economic Zone of India	Purpose
1	2	3
1	Whole of continental shelf and exclusive economic zone of India	Any service provided for all activities pertaining to construction of installations, structures and vessels for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof.
2	The installations, structures and vessels within the continental shelf and the exclusive economic zone of India, constructed for the purpose of prospecting or extraction or production of mineral oil and natural gas.	Any service provided or to be provided by or to such installations, structures and vessels and for supply of any goods connected with the said activity.

It could thus be seen that vide said notification, provisions of Chapter V of Finance Act, 1994 were also extended to the areas specified in column No. 2 of the table in the said notification in the continental

shelf and the Exclusive Economic Zone of India for the purposes mentioned in table 3. The table refers to any service provided for all activities pertaining to construction of installations, structures and vessels for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof. The table also refers to any service provided or to be provided by or to such installations, structures and vessels and for supply of any goods connected with the said activity.

27 Undisputedly from 27/2/2010 service tax, even for drilling activities for the purposes of exploration has been paid by the Appellant.

28 We are of the view that the present appeal does not involve an issue regarding the rate of duty in as much as even the assessee does not dispute the rate of duty i.e. payable for the services rendered. The present case also does not involve an issue regarding valuation of goods or services for the purpose of assessment. It also

does not involve the issue regarding classification of goods under the tariff. It also does not involve the question as to whether or not services rendered by the appellant are taxable or not. It also does not involve the question as to whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters, which the said Act provides for. The issue regarding the services being rendered by the appellant being taxable and the rate at which service tax is to be paid are not disputed by the appellant. The issue regarding taxability and excessibility of the goods is also not involved in the present appeal.

29 The only issue, that is involved in the present appeal as to whether the notification dated 27/2/2010 which for the first time brings the drilling activities for the purpose of exploration of oil in the continental shell and economic zone of India can be made retrospectively applicable in respect of the said services with effect from 7/7/2009. In that view of the matter, we find the objection raised by the Revenue is not sustainable.

30 In so far as the contention of the Revenue that it has proposed to file appeal before the Apex Court is concerned, we have come across a case yesterday wherein the Revenue had initially filed an appeal before the Apex Court, but subsequently withdrawn the same and filed an appeal (CEXAL No. 53 of 2015 alongwith Notice of Motion (L) No. 613 of 2015) before this Court with an application for condonation of delay. We have condoned the delay holding that the appellant Revenue was entitled to have benefit of Section 14 of the Limitation Act, for having prosecuted remedy before other forum. We had also admitted the appeal after hearing Shri Pradeep Jetly. In case, the appeal preferred by the Revenue is entertained by the Hon'ble Apex Court, then Lordship of the Apex Court can very well also call for papers of present appeal before them. However, when we prima facie find that the present case is not covered by the term "determination of any question having relation to the rate of duty or to the value of goods for the purpose of assessment", we cannot nonsuit the appellant only because the Revenue has proposed to file

an appeal before the Hon'ble Apex Court. In that view of the matter, the preliminary objection is rejected.

31 The Appeal is admitted on substantial questions of law as raised in Ground (a) to (c). The Appeal be posted for hearing on 18th April, 2015 peremptorily.

(A.S. GADKARI, J) **(B.R.GAVAI,J)**