(2014) 02 DEL CK 0156

In the Delhi High Court

Case No : CEAC 12 of 2013

Commissioner of Service Tax — APPELLANT

Vs

Ernst and Young Pvt. Ltd. — RESPONDENT

Date of Decision : 25-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35E 35G 35H 35L
Customs Act, 1962 — Section 111(d) 125 129C 129D 129-D
Finance Act, 1994 — Section 56(105)(r) 65 65(105) 65(105)(r) 65(105)(zzb)
Imports and Exports (Control) Act, 1947 — Section 5

Citation : (2014) 27 GSTR 22 : (2014) 34 STR 3 : (2014) 72 VST 51

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Sonia Sharma, Standing in CEAC 12, 53, 54, 55 and 56/2013, Mr. Satish Kumar, Mr. Harsh Makhija in CEAC 25 and 29/2013 and ST. appL. 1 and 2/2012, Mr. Rahul Kaushik in CEAC 39, 40 and 26/2013, for the Appellant; Tarun Gulati, Rony O. John, Neil Hildreth and Mr. Shashi Mathews, Advocates in CEAC 12/2013, Mr. Niraj Kishan Kaul and Ms. Sonu Bhatnagar, Tarun Jain and Mr. Kshitij Karzee, Advocates in CEAC 39/2013, Mr. M.P. Devnath, Aditya Bhattacharya and Mr. Bhuvnesh Singh Satija, Advocates in CEAC 25/2013 and ST. Appl. 2/2012, Mr. Gajendra Maheshwari, Nameer Khan and Mr. Sachin Jain Advocates in CEAC 40/2013, Mr. P.C. Jain, Rajesh Kumar and Mr. Sandeep Jain, Advocates in CEAC 26/2013, Mr. R. Narain, Advocate and Mr. Ajay Aggarwal, Ms. Mallika Joshi, Ms. Shravani Shekhar, Ms. Neha Malik, Prabal and Mr. Rajan Narain, Advocates in ST. Appl. 1/2012, Mr. P.K. Sahu and Mr. Prashant Shukla, Advocates in CEAC 29, 53, 54, 55 and 56/2013, for the Respondent

Judgement

Sanjiv Khanna, J.—This common order will dispose of preliminary objections raised by the respondent assessees (except BY BSR & Co. respondent in CEAC 40/2013; Ultra Tech Concrete Ltd. respondent in CEAC 25/2013; and Oberoi Flight Services respondent in ST Appeal No. 2/2012). The appellants herein is the Commissioner of Service Tax who has preferred these appeals u/s 83 of the Finance Act, 1994 (F. Act, for short) read with Section 35G of the Central Excise Act, 1944 (CE Act, for short). In order to appreciate the controversy, it would be first appropriate and necessary to reproduce Section 83 of the F. Act and Section 35G & 35L of CE Act, which are as under:

SECTION 83 OF F. Act

Section 83. Application of certain provisions of Act 1 of 1944 -

The provisions of the following section 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: - 9C, 9D, 11, 11B, 11BB, 11C, 11D, 12, 12A, 12B. 12C, 12D, 12E, 14, 15, 33A, 35F to 35-O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D and 40."

SECTION 35G OF CE Act

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, 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 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 the 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 abridge 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.

SECTION 35L OF CE ACT

35L. Appeal to the Supreme Court -- An appeal shall lie to the Supreme Court from -

(a) any judgment of the High Court delivered -

(i) in an appeal made u/s 35G; or

(ii) on a reference made u/s 35G by the Appellate Tribunal before the 1st day of July, 2003;

(iii) on a reference made u/s 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. Section 83 of the F. Act stipulates that Sections 35G & L of the CE Act shall

mutatis mutandis apply and accordingly, appeals would be made to the High Court and Supreme Court against decisions of the appellate tribunal. An appeal in clause (a) to Section 35L of the CE Act would also lie to the Supreme Court against the decision of the High Court rendered u/s 35G, reference made by the appellate tribunal before the first day of July, 2003 or on a reference u/s 35H of the CE Act. Sub-clause (b) stipulates that an appeal before the Supreme Court would lie against the order passed by the appellate tribunal which includes amongst others, question or issue in "relation" to rate of duty of service tax or value of services for the purpose of assessment. Section 35G stipulates that any order passed by the appellate tribunal made on or after first day of July, 2003, is appealable before the High Court on a substantial question of law, except an order which among other things, determines any question relating to duty of service tax or value of a service for the purpose of assessment.

3. The precise and significant issue which arises for consideration is what is meant by the term ''determination of any question having relation to rate of duty (for service tax) or value (of service) for the purpose of assessment''. The contention of the Revenue i.e. the appellant is that the expression "rate of duty" or "value" of service should be construed in a narrow manner, to mean a punctilious dispute as to the rate of duty payable on the service chargeable to tax or the valuation of the services which is chargeable to tax. The words are not broad or wide enough to encompass the question, whether or not the activity is a taxable service under the charging section, Section 65(105) of the F. Act read with the definition clauses u/s 65(95). In other words, it is submitted that when a question or dispute arises as to how the value of the services is to be computed u/s 67 of the F. Act or under the Service Tax (Determination of Value) Rules, 2006, or the dispute or question specifically pertains to rate of tax applicable or classification under two or more headings/categories, an appeal will lie before the Supreme Court and in other cases relating to question of chargeability or very levy of service tax on a particular activity or when the dispute pertains to a single classification, appeal would be maintainable before the High Courts. It is highlighted that unlike the CE Act, rate of service tax is uniform and constant. Thus, it is submitted that there cannot be a dispute as to rate of tax when the question only relates to exigibility or levy of tax.

4. Section 65(121) of F. Act states that words and expressions used but not defined in Chapter V of the F. Act but are defined in CE Act or Rules, then definitions made thereunder shall apply in so far as may be in relation to service tax. In this manner, definitions, clauses or words and expressions used in the CE Act and Rules have been made applicable and apply when we interpret the said words and expressions used in the F. Act.

5. The issue in question has been answered by Division Bench of this Court in Commissioner of Service Tax Vs. Delhi Gymkhana Club Ltd., wherein the Division Bench referred to a similar argument raised by the Revenue, rejecting the same it was held:

13. The submission of Mr. Mukesh Anand, learned counsel appearing for the appellant, however, is that such an appeal is maintainable and to substantiate his contention, he has relied upon the provisions of the Finance Act, 1994 vide which service tax was introduced. His submission was that the question of law raised in this appeal is as to whether the respondent club is liable to pay service tax in allowing its members to use its space as Mandap which is a taxable service in view of Section 65 read with Section 67 and 105 of the Finance Act, 1994.

He submitted that though the present appeal has been filed u/s 35G of the Act but the dispute relates to the levy of the service tax against the respondent under the Finance Act, 1994 which is defined u/s 65(66 & 67) of the said Act. The classification of the taxable service is defined in Section 65A of the Finance Act, 1994. The charge of service tax within India and outside India is provided u/s 66 and 66A of the said Act. According to him, what will be the valuation of taxable service for charging service tax is well-defined u/s 67 as well as the Service Tax (Determination of Value) Rules, 2006 vide Notification No. 12/2006-ST dated 19.4.2006. Thus, he argued that in the present appeal there is no question regarding any right of duty or value of goods for the purpose of assessment of any duty. The only question is as to whether the respondent is liable to pay service tax for the services rendered by it in view of Section 65 read with Sections 67 and 105 of the Finance Act.

14. This argument needs outright rejection. Appeal provision is Section 35G, under which these appeals are filed. Therefore, that provision, along with Section 35L, is to be considered (as already done) to decide the issue of maintainability. Moreover, the aforesaid argument will not change the character of the dispute. As is clear from the order of the Appellate Tribunal, in essence, the question that is decided relates to rate of duty. Whether nomenclature thereof is given as service tax, it is the rate of duty of that tax which would essentially fall for consideration. Against such a decision, appeal is filed by the appellant u/s 35G of the Act which would not be maintainable in view of the decision of the Supreme Court in Naveen Chemicals (supra), as discussed in detail above. The remedy for the appellant is to file appeal u/s 35L of the Act, which lies to the Supreme Court.

6. In paragraph 14 of the said decision reference has been made to the decision of the Supreme Court in Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs, , which relates to appellate proceedings under the Customs Act, 1962. We shall refer to this case subsequently. Submission of the Revenue is that the decision of Delhi High Court in Delhi Gymkhana Club Ltd. (supra) requires reconsideration and the issue should be referred to a Larger Bench as the question of chargeability or levy under a particular provision or Section, is not a matter relating to rate of tax or valuation.

7. We have given due consideration to the contention raised but, after due deliberation do not think that the Delhi Gymkhana Club Ltd. (supra) requires reconsideration and reference to a Larger Bench. At this stage, we would notice and reject the contention of the appellant Revenue that the issue raised in Delhi

Gymkhana Club Ltd. (supra) was relating to rate of tax and not chargeability or very levy of tax. The contesting respondents have produced before us, the appeal paper book and pointed out that the issue raised was whether the said club when offering services to members etc. would fall under the definition of "Mandap Keeper" u/s 65(90) of the F. Act. The contention of the club was that on the principle of mutuality of interest between the club and the members, the activities were not chargeable or exigible to tax as a mandap keeper. In the said case, the issue or contention whether there were two or more provisions under which the said service would be taxable did not arise for consideration and issue of rate of tax or valuation of taxable service was not a subject matter of the original adjudication order.

8. 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 u/s 35G of the CE Act. Referring to the expression "other things" in Section 35G of the CE Act in the case of Commissioner of Service Tax Delhi Vs. Bharti Airtel Limited, , 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 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.

9. This brings us to the decision of the Supreme Court in Naveen Chemicals manufacturing & Tading Co. (supra). In the said case, the assessee had filed an appeal before the Supreme Court against the order of the appellate tribunal. The original adjudication order had directed confiscation u/s 111(d) of the Customs Act, 1962 read with Section 5 of the Imports & Export (Control) Act, 1947 (IEC Act, for short) but had given option u/s 125 of the said Act to the assessee to pay fine of Rs. 10,000/- in lieu of confiscation. The contention of the assessee was that the order of the Customs, Excise and Gold (Control) Appellate Tribunal affirming the direction in the original adjudication order was invalid as it was passed by a single member Bench whereas the appeal should have been heard by a Division Bench of the appellate tribunal. The Supreme Court interpreted Section 129C of the Customs Act, which was as under:

129-C. Procedure of Appellate Tribunal-

(1) The powers and functions of Appellate Tribunal may be exercised and discharged by Benches constituted by the President from amongst the members thereof.

(2) Subject to the provisions contained in Sub-sections (3) and (4) a Bench shall consist of one judicial member and one technical member.

(3) Every appeal against a decision or order relating, among other things, to 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 shall be heard by a Special Bench constituted by the President for hearing such appeals and such Bench shall consist of not less than two members and shall include at least one judicial member and one technical member.

(4) The President or any other member of the Appellate Tribunal authorised in this behalf by the President may, sitting singly, dispose of any case which has been allocated to the Bench of which he is member where-

(a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation u/s 125; or

(b) in any disputed case, other than a case where the determination or any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(c) the amount of fine or penalty involved, does not exceed fifty thousand rupees.

10. It is noticeable that in sub-clause (3) to Section 129C, the words "determination of any question having relation to rate of duty or value for the purpose of assessment" have been used. Sub-section (4) to Section 129C refers to matters wherein the President or a member of the Appellate Tribunal authorized in this behalf by the President may, dispose of any case singly. Under sub-clause (c) the single member could decide a matter of fine or penalty not

exceeding Rs. 50,000/-. The Supreme Court observed that the phrase "relation to" ordinarily is of wide import but in the context of the Section, must be read as meaning a direct and proximate relationship to rate of duty or value for the purpose of assessment. It was accordingly observed:-

13. The order of the Additional Collector under appeal before CEGAT in the present case did not have any direct or proximate relation, for the purposes of assessment, either to the rate of duty applicable to the said goods or to the value thereof. All that the Additional Collector''s order did was to confiscate the said goods allowing to the appellant the option of redeeming them upon payment of fine of Rs. 10,000/-. That the appellant might avail of the option, pay the fine and clear the said goods, when questions as to the rate of duty and value for purposes of assessment might possibly arise, is far too remote a contingency to satisfy the test that is laid down.

11. Submission of the Revenue is that the said judgment refers to sub-section (5) to Section 129D which was added by Customs & Central Excise Laws Amendment Act, 1988. It is submitted that the sub-section had influenced the ratio and finding of the Supreme Court as explanation to the said Section for the purpose of Section 129D had by deeming fiction defined the expression "rate of duty". It was submitted that provisions of Customs Act are not applicable to F. Act.

12. In fact sub-section (5) to Section 129D was never enforced and stands deleted from the said statute by Act 25 of 2004 w.e.f. 21st December, 2004. Explanation to Section 129D was as under:

Explanation; For the purposes of this subsection, the determination of a rate of duty in relation to any goods or valuation of any goods for the purposes of assessment of duty includes the determination of a question-

a) relating to the rate of duty of excise for the being in force, whether under the Central Excise Tariff Act, 1985 or under any other Central Act providing for the levy and collection of any duty of excise, in relation to any goods on or after the 28th day of February, 1986; or

b) relating to the value of goods for the purposes of assessment of any duty in cases where the assessment is made on or after the 28th day of February, 1986, or

c) whether any goods are excisable goods or whether the rate of duty of excise on any goods is nil; or

d) whether any goods fall under a particular heading or sub-heading of the Schedule to the Central Excise Tariff Act, 1985, or the Additional Duties of Excise (Goods of Special Importance) Act, 1957 or the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, or that any goods are or not covered by a particular notification or order issued by the Central Government or the Board, as the case may be, granting total or partial exemption from duty; or

e) whether the value of any goods for the purposes of assessment of duty of excise shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in this Act

13. Drawing analogy, Revenue has submitted that clause (c) to explanation where the goods were excisable or where the rate of duty on any of the goods was NIL is not applicable as Section 35E is not one of the Sections which have been made applicable to CE Act or to the F. Act. Thus, the legislature did not want to broaden and expand scope of appeals before the Supreme Court by referring to Section 35E, which was identically worded as Section 129D of the Customs Act. In any case, the explanation to Section 35E of the EC Act has been deleted.

14. We have considered the said contention but do not think it supports the view or contention of the appellant Revenue. Section 35E of the EC Act relates to power of the Board or the Collector of Central Excise to pass such an order. Sub-section (1) stipulates that the Board can direct Collector to apply to appellate tribunal for determination of points arising out of the decision or order of the Collector. Sub-section (2) relates to power of the Collector to call for and examine any record of any adjudicating authority subordinate to him and pass orders; or to apply to Collector (Appeals) for determination of such points. The said provision as noticed was inserted by Customs and Central Excise Laws (Amendment) Act, 1988, but was never enforced. Explanation to sub-section (5) to Section 34E and sub-section (5) to Section 129D were made in the context of Customs, Excise and Revenue Tribunal Act, 1986 which provided for appeals to the new tribunal in relation to matters relating to rate of tax and valuation instead of the appellate tribunal i.e. CEGAT.

15. Another contention raised on behalf of the Revenue is that Section 66 is a charging Section but also stipulates the rate of tax. Thus question of rate of tax does not arise in service tax. The contention in fact supports the stand of the contesting respondent assessees as chargeability, valuation and rate of tax are interconnected.

16. Reference was made by the counsel for the Revenue to paragraph 11 in the judgment in the case of Naveen Chemicals Manufacturing (supra) which reads as under:-

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 Subsection 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.

17. On reading of the said paragraph, it is lucid and clear that Supreme Court had stated that questions relating to rate of duty and valuation for the purpose of assessment as defined in the explanation to sub-section (5) to Section 129D of the Customs Act, would include question relating to classification of goods under the tariff, whether or not they are covered by exemption notification; whether value for the purpose of assessment should be enhanced or reduced etc. It was further observed that statutory definition accords to the meaning given to the expression above. For the purpose of present controversy, we are inclined to ignore and not take into consideration explanation 5 to Section 129D or sub-section 5 to Section 35E. However, inspite of the said position, we do not think that the decision in the case of Delhi Gymkhana Club Ltd. (supra) is required to be referred to a Larger Bench. Determination of any question relating to rate of tax would necessarily directly and proximately involve the question, whether activity falls within the charging Section and service tax is leviable on the said activity. The said determination is integral and an important injunct to the question of rate of tax. In case service tax is not to be levied or imposed and cannot be imposed under the charging Section, no tax would be payable. The said determination would be direct or proximate to the issue of rate of tax, which will include nil tax, when no tax is chargeable.

18. If the reasoning given by the Revenue is to be accepted, it will lead to anomaly and substantial confusion. All assessments necessarily have to determine and decide the rate of tax after determining and deciding whether or not activity is chargeable or tax can be levied. Assessments against the assessee would decide the rate of tax applicable once it is held that the activity is chargeable to tax under the F. Act. The words ''rate of tax'' in relation to rate of tax would include the question whether or not the activity is exigible to tax under a particular or specific provision. This will be a reasonable and appropriate interpretation and will not cause or result in confusion or ambiguity regarding the appellate forum. Line between exigibility and rate of tax as propounded can be

rather thin and superfluous in the present statutory context.

19. The Supreme Court has been entertaining and deciding appeals under the CE Act when questions have arisen whether the assessee had manufactured marketable goods and was accordingly liable to pay excise duty [see Metlex (I) Pvt. Ltd. Vs. Commissioner of C. Ex., New Delhi, ; Commissioner of Central Excise, Jaipur Vs. Mahavir Aluminium Ltd., ; Nestle India Ltd. Vs. Commnr. of Central Excise, Chandigarh, . Similar question had also arisen in Civil Appeal No. 17877/2011, Commissioner of Central Excise vs. Jetlite (India) Limited, where the preliminary objection was raised on maintainability but the said objection was rejected vide order dated 8th September, 2011.

20. Mr. Dev Nath, Advocate appearing in CEAC 25/2003 and ST. APPL. 2/2012, had relied upon judgment of the Gauhati High Court in Commissioner of Cus. and C. Ex., Shillong Vs. Dharampal Satyapal Ltd., , wherein a Division Bench dissented and did not agree with the view expressed by the Jammu and Kashmir High Court in Commr. of Customs and C.E. Vs. Bharat Box Factory, and held that whether Education Cess was leviable on duty exempted goods under a notification and whether CENVAT Credit could be utilized for payment of the said Cess, was not a matter relating to rate of tax. It was held that Education Cess was applicable at flat rate of 2% of the aggregate of all duties of excise levied and collected by the Central Government. The rate of tax being fixed, the matter did not pertain to rate of tax or valuation for the purpose of assessment. It was submitted that rate of service tax was also fixed u/s 66 of the F. Act and the provisions do not postulate different rates of tax unlike CE Act and the Customs Act. We do not think that the aforesaid argument or ratio can be applied to the appeals under the two provisions of the F. Act as the Gauhati High Court has observed that levy and calculation of excise duty was separate from education cess which was only a surcharge levied on a flat rate of aggregate of all dues of excise levied. It was held that surcharge did not have direct or proximate relation for the purpose of assessment to the rate of duty applicable.

21. Mr. Dev Nath had also relied upon the two decisions of Obeetee Textiles Pvt. Ltd. Vs. Commissioner of Central Excise, and Videocon Industries Ltd. Vs. The Commissioner of Customs, on the issue whether the appeal or writ petition would be maintainable against an order of pre-deposit passed by the appellate tribunal. The said question does not arise for consideration in the present appeals.

22. In view of the aforesaid discussion, we reject the prayer of the Revenue to refer the matter to Larger Bench.

23. We are bound by the decision of the Division Bench of this Court in the case of Delhi Gymkhana Club Ltd. (supra) and respectfully following the ratio for the reasons set out above. We shall now examined facts of each of the present appeals to decide and determine whether they are maintainable u/s 83 of the F. Act read with Section 35G of the CE Act. Accordingly, we proceed to deal with the issue or issues, which were the subject matter of original assessment/

adjudication order, which is the determining factor and the question(s) of law raised in each case, arising out of the adjudication by the tribunal.

CEAC 12/2013, CST v. Ernst & Young Pvt. Ltd.

24. The substantial questions of law raised by Commissioner read as under:-

Whether providing assistance required for complying with regulation of services like RBI, FIB, IEC fling and taxation compliance like filing of income tax returns, filing of returns with the office of Registrar of Companies, filing of Sales Tax returns and other returns under Sales Tax/Central Sales Tax Act and providing compliance, assistance under various laws will fall within the ambit of "Management Consultancy Services" which are taxable u/s 65(105)(r) of the Finance Act, 1994 as applicable during the period from 2001-02 to 2004-05?

Whether extended period of five years can be invoked in the present case under provisions of Section 73(1) of the Finance Act, 1994 as amended?

25. The respondent-assessee is registered and rendering "management consultancy/manpower recruitment/consultancy engineering services and management consultancy services" under the ambit of service tax. During the course of audit, Revenue claims that it was observed that the respondent-assessee had not paid service tax on some of the services rendered, which should be classified under ''management consultancy services''. Adjudication proceedings were initiated.

26. The respondent-assessee contested the adjudication proceedings on the ground that it had provided ''regulatory services'' like compliance in filing of income tax, sales tax returns, returns with the office of the Registrar of Companies and compliance and providing assistance under various laws. The assessee claims that these services were non-taxable and not ''management consultancy services'' as defined in Section 65(105)(r) of the F. Act as the said provision only applied to services in connection with the management of any organisation. Further, the notice/demand was time barred as the assessee had not intentionally or willfully suppressed facts. Therefore, the extended period u/s 73(a) or 73(1) was not applicable. Thus, the primary issue and question is whether Section 65(105)(r) was applicable in respect of the said activities and in case it was not applicable, no service tax was payable. The rate of tax would be ''Nil''. As held above, Section 83 of the F. Act read Section 35G of the CE Act is not applicable and, therefore, the present appeal is not maintainable before the High Court.

CEAC 40/2013, CST v. M/s. BSR and Co.

27. Substantial questions of law raised by the Revenue read:-

Whether the respondent herein is liable to pay service tax on fees charged for services rendered for complying with different types of laws in the country and also on representational service u/s 56(105)(r) read with section 65(65) of the

Finance Act, 1994?

28. The issues involved in this case are identical and similar to the issues involved in CEAC 12/2013. In fact, the tribunal has followed the judgment in the case of Ernst & Young Pvt. Ltd. The present appeal accordingly will not be maintainable before the High Court u/s 83 of the F. Act read with Section 35G of the CE Act.

CEAC 53/2013, 54/2013, 55/2013, 56/2013, CST v. Interocean Shipping (I) Pvt. Ltd.

29. The substantial question of law raised in the present appeal by the Revenue reads:-

Whether providing the services acting as ship brokers can be treated Commission Agents of the ship owner or ship charterer and thus are covered by the definition of Business Auxiliary Service as defined u/s 65(19) read with Section 65(105)(zzb) of the Finance Act, 1994 as applicable during the period October, 2003 to September, 2009?

30. As per Revenue, during audit it was noticed that the assessee had income from brokerage, but was not paying service tax on the same. In the adjudication proceedings, the assessee contested and had submitted that the said activity was not taxable under the head ''business auxiliary services'' as the assessee was not a commission agent u/s 65(105)(zzb) of the F. Act. The assessee was acting as an advisor to both the vessel owner and the charterer. The stand of the assessee has been accepted by the tribunal.

31. The question raised is whether the assessee was liable to pay service tax u/s 65(105)(zzb) of the F. Act. Case of the assessee is that they were not liable as the activities undertaken were non-taxable.

32. In view of the interpretation given above, the dispute would fall in the category of ''rate of tax''. Hence, the present appeals would not be maintainable before the High Court u/s 83 of the F. Act read with Section 35G of the CE Act.

CEAC 25/2013, CST v. M/s. Ultratech Concrete Ltd.

33. The substantial question of law raised in the present appeal by the Revenue reads:-

Whether the contract between the parties for supplying Ready Mix Concrete (RMC) along with transporting, pumping, pouring, placing, spreading, laying of RMC at the construction sites is a taxable service under the Finance Act, 1994?

34. The assessee had supplied ready-mix cement to third parties-purchasers. Stand of the appellant-Revenue is that the assessee had rendered and was engaged in construction service or commercial or industrial construction service as defined in Section 65(30a)/65(25b)/65(105)(zzb). The question raised in the present appeal would also relate to rate of duty as the assessee claims that the

activity undertaken was not taxable. Thus, the appeal would not be maintainable before the High Court u/s 83 of the F. Act read with Section 35G of the CE Act.

CEAC 29/2013, CST v. M/s. GMK Concrete Mixing Pvt. Ltd.

35. The substantial question of law raised in the present appeal by the Revenue reads:-

Whether the contract between the parties for supplying Ready Mix Concrete (RMC) along with transporting, pumping, pouring, placing, spreading, laying of RMC at the construction sites is a taxable service under the Finance Act, 1994?

36. The question of law or the issue raised is identical to the question/issue raised in CEAC 23/2013, CST v. M/s. Ultratech Concrete Ltd. The present appeal, therefore, would not be maintainable. The subject matter of adjudication relates to rate of duty.

CEAC 39/2013, CST v. M/s. Bharti Televentures Ltd.

37. The substantial question of law raised in the present appeal by the Revenue reads as under:-

Whether the "Liaison charges" charged by the party for the "Liaison work" would merit to be considered as taxable services under the ambit of "Management Consultancy Services" which are taxable u/s 65(105)(r) of the Finance Act, 1994?

38. The question raised is whether liaison charges/management support charges were taxable and fall under the ambit of the management consultancy service'' defined u/s 65(105)(r) of the Act. The question relates to rate of tax as no tax would be payable in case the stand of the respondent-assessee is accept. The present appeal u/s 83 of the F. Act read with Section 35G of the CE Act is not maintainable before the High Court.

CEAC 26/2013, CST v. Aryan Cool Beneficiation Pvt. Ltd.

39. The substantial questions of law raised in the present appeal by the Revenue reads as under:-

Whether the beneficiation/washing of coal activity carried out by the party prior to period 1.06.2007 is covered by the category of "Business Auxiliary Services?

Whether the activity of loading/unloading of the coal carried out by the party for bringing the coal into washer would fall under the category of "Cargo Handling Services?

40. The respondent-assessee is engaged in the activity of washing of coal, which they claim amounts to manufacturing and, therefore, was not covered under the head ''business auxiliary service'' or ''cargo handling service''. Loading and unloading of coal was done by the respondent-assessee and they were not providing services to a third person. For the purpose of beneficiation of coal, raw coal had to be brought to their washeries, washed and re-supplied and for this

purpose coal was loaded and unloaded. In this appeal again, the issue relates to rate of tax i.e. whether the said activities were taxable as ''business auxiliary service'' or ''cargo handling service''. Hence, the present appeal also would not be maintainable before the High Court u/s 83 of the F. Act read with Section 35G of the CE Act.

ST Appeal 2/2012, CST v. Oberoi Flight Services

41. The substantial question of law raised in the present appeal by the Revenue reads:-

Whether services rendered by the assessee would be taxable under the category of "Airport Services" or "otherwise?

42. The respondent-assessee operates an executive lounge at the Indira Gandhi International Airport, New Delhi under a licence granted to them by the Airport Authority of India. Bonafide passengers of the airlines, who produce lounge card, were allowed to use the lounge. The question raised is whether the said services were covered u/s 65(105)(zzm) and, therefore, taxable as ''airport service''. Tribunal decided the issue in favour of the assessee and has held that the activities were not covered under the head ''airport service''. Observations on whether the said service falls under the head ''business auxiliary service'' have been made, but it was observed that the said aspect was not relevant as it was not the subject matter of the adjudication order. The question raised in the present appeal also relates to rate of tax as the issue is whether the respondent-assessee was providing ''airport services'' u/s 65(105)(zzm) of the F. Act or "services" could have been taxed otherwise.

ST. Appeal 1/2012, CST v. ITC Welcome Group Port Lounge

43. The substantial question of law raised in the present appeal by the Revenue reads as under:-

Whether services rendered by the assessee would be taxable under the category of "Airport Services" or otherwise?

44. The issue raised in the present appeal is identical to the issue involved in ST Appeal No. 2/2012 in the case of Oberoi Flight Services. Accordingly, the present appeal too would not be maintainable as it relates to rate of duty.

45. In view of the findings recorded above, the aforesaid appeals are not maintainable before the High Court u/s 83 of the F. Act read with Section 35G of the CE Act. The preliminary objection raised by the contesting respondents is, therefore, accepted. Consequently, orders/observations made in any earlier order in these appeals, will stand recalled and treated as cancelled/annulled. It is held that the appeals are not maintainable before the High Court. In the facts, there will be no order as to costs.

