(2014) 10 DEL CK 0088

In the Delhi High Court

Case No : Central Excise Act Case No. 91/2014

Commissioner of Service Tax APPELLANT

Vs

Transcorp International Ltd. RESPONDENT

Date of Decision : 31-10-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G, 35L
Finance Act, 1994 — Section 65(105)(zzb), 65(19), 83

Citation : (2016) 41 STR 822 : (2015) 80 VST 68

Hon'ble Judges : V. Kameswar Rao, J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Sonia Sharma, Sr. Standing Counsel and Vijay Chandra, Advocate for the Appellant

Judgement

Sanjiv Khanna, J.—The Commissioner of Service Tax has filed the present appeal under Section 83 of the Finance Act, 1994 read with Section 35G of the Central Excise Act, 1944 against order dated 27th February, 2014 passed in appeal No.ST/206/2010 by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT, for short) .

2. Appeals against the decisions of the CESTAT can be filed under Section 35G the Central Excise Act, 1944 before the jurisdictional High Court and before the Supreme Court under Section 35L of the Central Excise Act, 1944, but the Supreme Court and the jurisdictional High Court do not enjoy concurrent appellate jurisdiction. Section 35L of the Central Excise Act, 1944 in clause (b) to sub-section (1) states that an appeal shall lie before the Supreme Court against any order passed by the CESTAT relating to, among other things, determination of any question having a relation to rate of duty/tax or value of goods/services for the purpose of assessment. Sub-section (2) to Section 35L inserted by Finance (No. 2) Act of 2014 with effect from 6th August, 2014 states that for the purpose of the said Chapter, determination of any question having a relation to rate of duty/tax shall include determination of taxability or exigibility of goods to

tax. In the case of service tax adjudication, it means that the question/issue of chargeability of service to tax under the Finance Act 1994 read with the relevant provisions, notifications or exemptions, is amenable to challenge under Section 83 of the Finance Act, 1994 read with Section 35L of the Central Excise Act, 1944 before the Supreme Court.

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

4. In the present case, the order-in-original passed by the Commissioner (Adjudication) dated 29th September, 2009 confirmed the recovery of Service Tax of Rs.2,89,63,568/-, Education Cess of Rs.5,77,592/-, and a Secondary and Higher Education Cess of Rs.94,819/-, along with interest under Section 75 of the Central Excise Act, 1944 and penalty of Rs.2,96,35,979/- under Section 78 and Rs.1000/- under Section 77 of the Central Excise Act, 1944. The order rejected the claim of the respondent assessee of being covered under the benefit of Export of Services Rule, 2005. In other words, it was held that the respondent assessee could be subjected to payment of service tax on account of the services rendered which were held not to be an export. The respondent, however, succeeded before the CESTAT, which by the impugned order dated 27th February, 2014 inter alia held that the services rendered by the respondent-assessee were not taxable being in the nature of export services.

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

6. We do not agree with the submission of the counsel for the appellant- Revenue that the issue raised in the order-in-original and in the appellate orders did not relate to the question of levy of duty or rate of duty/tax. The precise issue, which had arisen was whether the assessee was engaged in export of services and, therefore, whether service tax was payable. In these circumstances, we do not think this appeal is maintainable before the High Court and the same is accordingly directed to be returned. The appellant, if aggrieved and desirous, can take appropriate steps as per law.

