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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 02nd July, 2025

\+ **SERTA 5/2025**

COMMISSIONER OF SERVICE TAX DELHI II .....Appellant

Through: Mr. Atul Tripathi, SSC with Mr. Gaurav Mani Tripathi & Mr. Shubham Mishra, Advocates.

versus

SHYAM SPECTRA PRIVATE LIMITED .....Respondent

Through: Mr. J. K. Mittal with Ms. Vandana Mittal & Mr. Mukesh Choudhary, Advocates.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE RAJNEESH KUMAR GUPTA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

SERTA 5/2025 & CM APPL.30788/2025 (for recalling the order dated 24th April, 2025)

2. The present appeal has been filed by the Appellant - Commissioner of Service Tax Delhi II under Section 35G of the Central Excise Act, 1944, *inter alia*, challenging the final order bearing no.56196/2024 (hereinafter, '*impugned order')* of Customs Excise & Service Tax Appellate Tribunal, New Delhi (hereinafter, 'CESTAT') dated 31st July, 2024 passed in ***Service Tax Appeal No. 50583/2017***.

3. *Vide* the said impugned order, the CESTAT has allowed the appeal filed by the Respondent and has set aside the Order-in-Original bearing no.DLISVTAX002COM0441617 dated 30th December 2016 passed by the

Office of the Commissioner of Service Tax, Delhi-II (hereinafter, '*Order-in-Original'*).

4. According to Mr. Tripathi, ld. Counsel for the Appellant, the CESTAT had allowed the appeal on the ground that the Show Cause Notice (hereinafter, '*SCN*') dated 19th October 2011 was barred by limitation.

5. In the present appeal, notice was issued *vide* order dated 24th April, 2025. Thereafter, an application *i.e.*, the present application being ***CM APPL.30788/2025***, had been moved by the Respondent. The prayer in the present application reads as under:

> *"A) allow the present application by recalling the order dated 24.04.2025 passed by this Hon'ble court in SERTA 5 of 2025 and dismiss the present Appeal in SERTA 5 of 2025 filed by the Appellant/Revenue as not maintainable before this Hon'ble Court.*
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> *B) pass such further order(s) as this Hon'ble Court may deem just and proper in the facts and circumstances of the case."*

6. Mr. J. K. Mittal, ld. Counsel appearing on behalf of the Respondent submits that the present appeal is not maintainable before this Court as the issue of taxability would arise in this matter and, therefore, the appeal would lie under Section 35L of the Central Excise Act, 1944 to the Supreme Court. Ld. Counsel relies on the following decisions-

- ***Commissioner of Service Tax v. Ernst & Young Pvt Ltd., 2014(34) S.T.R. 3 (Del.),***
- ***Sunshine Steel Industries v. Commissioner of CGST. Customs & Central Excise, Jodhpur (2023) 8 Centax 209 (Tri.-Del)***
- ***Commissioner of Service Tax, New Delhi v. Menon Associates***

(CEAC No. 93/2014).

7. Mr. Tripathi, ld. Counsel for the Appellant submits that the CESTAT has merely adjudicated on the question as to whether the appeal was barred by limitation or not. According to Mr. Tripathi, ld. Counsel, since the CESTAT has not gone into the merits, the appeal against the impugned order would lie before this Court.

8. Heard. The issue, which arises in the present appeal, is no longer *res integra*. Even if the question of limitation has been raised, the Court has to go into the merits of the matter after a decision on the question of limitation is made. The maintainability of the appeal would have to be examined on the said benchmark.

9. In the present case, a perusal of the Order-in-Original dated 30th December, 2016 would reveal that the question is whether the Respondent, which is an Internet Service Provider and is providing Lease Internet Broadband services on its optical fibre network and Wireless Radio to various STPIs, Embassies, etc. who are exempted organizations, is entitled to the exemption under the ***Notification No. 4/2004-ST*** dated 31st March 2004 or not. The Order-in-Original has directed the recovery of service tax to the tune of Rs.3,13,01,189/- along with interest.

10. The said Order-in-Original was challenged by the Respondent, which was before CESTAT. The CESTAT has allowed the appeal on the ground that under Section 73(1) of the Finance Act, 1994, the extended period of limitation of five years could not have been invoked as there was no suppression of material facts. Thus, the SCN itself has been set aside on the ground that the same is barred by limitation. Moreover, the CESTAT has not gone into the aspect of the delay in adjudication, but has only examined the

delay in issuing the SCN.

11. The obvious conclusion would be that if this Court holds that the SCN was within the limitation, the issue of taxability would have to be gone into. In a similar matter *i.e.* ***SERTA 2/2024 titled 'Commissioner of CGST and Central Excise Delhi South v. M/s Spicejet Ltd.'*** , this Court considered all the judgments cited by Mr. Mittal and has recently taken a view that even if the impugned order has dealt only with the issue of limitation, the appeal would lie under Section 35L of the Central Excise Act, 1944 to the Supreme Court. The relevant portion of the said order is extracted as under:

> *"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:*
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> *" **35G. Appeal to High Court**. -*
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> *(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.*
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> *(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 -*
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> *(a) filed within one hundred and eighty days from the*

date on which the order appealed against is received by 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.
[4] [(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.

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***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. T****he 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 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.*
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> *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 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 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:*

"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 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 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."

12. The above decision applies squarely to the present case. Accordingly, the present application deserves to be allowed and the present appeal is rejected as being not maintainable.

13. However, the Appellant is free to avail of its remedy in accordance with law under Section 35L of the Central Excise Act, 1944.

14. 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.

15. The present appeal is dismissed as being not maintainable. The pending application also stands disposed of.

16. The next date of hearing stands cancelled.

PRATHIBA M. SINGH
JUDGE

RAJNEESH KUMAR GUPTA
JUDGE

JULY 2, 2025/*dk/sk/ck*