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

CENTRAL EXCISE APPEAL NO. 53 OF 2015

Commissioner of Service Tax-V	}	**Appellant**
versus		
Vijay Cotton and Fibre Co.	}	**Respondent**

Ms. P. S. Cardozo with Mr. Vipul A. Bajpayee for the appellant.

Mr. Sachin Chitnis i/b. M/s. Aparna Hirandagi for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- OCTOBER 17, 2016

P.C. :-

1. Having heard both sides, we find that this appeal, which was listed for directions, being fairly old, can be conveniently disposed of.

2. The substantial questions of law on which the appeal is stated to have been filed are to be found at pages 9 and 10 of the paper book. They read thus:

> (a) Whether, in the facts and circumstances of the case and in law, the CESTAT was correct in allowing the refund claim of the assessee without considering the conditions set out in Notification No. 41 of 2007 dated 6th October, 2007 as amended from time to time?
>
> (b) Whether, in the facts and circumstances of the case and in law, the CESTAT was correct in shifting the burden

> of proof on the Revenue without categorically holding that the assessee has discharged the initial burden of proof by producing tangible evidence?
>
> (c) Whether, in the facts and circumstances of the case and in law, the CESTAT was correct in holding that the assessee is entitled for refund of input service credit lying un-utilised in their CENVAT Credit Account while ignoring the fact that the assessee is "merchant exporter" and not "manufacturer exporter"?

3. The facts, which are not in dispute, are that the assessee is an exporter registered with the Service Tax Department. An order was passed on 2nd May, 2014 arising out of three refund claims filed by respondent assessee for various periods. The assessee relied upon Notification No. 41 of 2007.

4. Ms. Cardozo appearing in support of this appeal would submit that the refund claim arises out of several services and they are listed at page 33 of the paper book in the order-in-original. She would submit that the notification can be said to be beneficial, but for availing of the benefits thereof, the assessee must have complied with certain pre-conditions and those pre-conditions having not been complied with, the claim for refund was denied. However, the tribunal found not the assessee, but the Revenue in fault.

5. Upon a perusal of entire paper book with the assistance of Ms. Cardozo, we are unable to agree with her. We are clear in our

mind that the assessee reiterated before the tribunal that the claim pertains to the warehousing charges paid for storage of export goods. When the assessee brought before the authorities the absolute proof that the very goods were all exported, then, the storage charges for the services, which have been rendered, chould have been made subject matter of the claim for refund. The refund of service tax paid on storage warehousing services was the claim and dealt with by the tribunal. There was insurance cover taken. Therefore, it is not a claim based on no material or a claim which does not fulfill the conditions under the notification. It does not mean that the tribunal's order every time mandates the Department to produce the proof in negative and blindly relies on the version of the assessee. It is in the above circumstances that the tribunal faulted the Revenue for not being able to produce a contrary evidence. Secondly, we do not think that the Revenue in this case can raise a plea that the merchant exporter was not entitled to seek refund. That is not the ground on which the claim is objected and before the tribunal by the Revenue. The Revenue cannot introduce something for the first time and terms it as a substantial question of law. We clarify that we do not express any view on that part of the contention of Ms. Cardozo, but finding that the tribunal's order deals with the factual controversy within the parameters of law, then, the appeal need not be entertained. It does not raise any substantial question of law. It is dismissed.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**