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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 183 OF 2019
WITH
CIVIL APPLICATION NO. 1580 OF 2019

WNS Global Services Pvt. Ltd. … Petitioner/Applicant

V/s.

The Union of India and Ors. ... Respondents.

Mr. Vikram Nankani, Senior Advocate a/w. Mr. Prithviraj Chaudhauri I/b. Mr. Mihir P. Deshmukh for the Petitioner/Applicant.

Mr. Sham Walve for the Respondents.

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, JJ.

DATE : 18 SEPTEMBER 2019.

***P.C.* :-**

The Petitioner challenges the Order-in-Original passed by the Assistant Commissioner of Central Goods and Service Tax and Central Excise dated 5 July 2018 in respect of rejecting the refund claimed by the Petitioner.

2. The Petitioner seeks to invoke writ jurisdiction of this Court in spite of an alternate remedy of an Appeal under Section 35 of the Central Excise Act, 1994.

3. The Petitioner is a company incorporated under the Companies Act. It is with the business of providing customer services, data management and back office administration services for the airline, travel and transportation industry. The Petitioner had obtained a registration for taxable service category of business auxiliary services. According to the Petitioner the Petitioner could not utilize a CENVAT Credit availed on input services used in export of business auxiliary services. The Petitioner centralized its registration at Mumbai of all their units and the refund claims were subsequently transferred to the office of the Commissioner at Mumbai. The Petitioner filed refund applications to the Respondent No.2 – Assistant Commissioner of Central Goods and Service Tax and Central Excise. According to the Petitioner the Petitioner submitted all the necessary documents for the purpose of claiming the refund.

4. The Petitioner by a letter dated 8 July 2014 addressed to the Assistant Commissioner, Gurgaon stated that documents relating to refund claims were duly submitted. The Petitioner was granted an opportunity for personal hearing on 13 July 2016 and the authorized

representative of the Petitioner stated that requisite documents to enable the Department to process the refund claims be submitted. Further, another opportunity of personal hearing was given to the representative of the Petitioner. The representative of the Petitioner reiterated that the original documents in respect of the Petitioner's refund claims have been submitted to the Service Tax Office at Gurgaon, Haryana. However, authority which was to process the claim of refund received no document claimed to have been submitted by the Petitioner. The Assistant Commissioner went through the written submissions of the Petitioner and supporting documents. He held that the Petitioner never produced copies of the claims i.e. applications for refund of CENVAT Credit under Rule 5 of the CENVAT Credit Rules. The Commissioner observed that the Petitioner had obtained registration on 28 September 2005 and had filed refund claims pertaining to the period before the date of registration. The Commissioner held that in the absence of original input and output invoices, it is not possible to ascertain authenticity of the claim. He held that copies of all self attested input service invoices as eligible for CENVAT Credit, copies of self attested output service invoices, nexus statement have not been produced. The Commissioner concluded that the Petitioner had not fulfilled the basic condition of Rule 5 of the CENVAT Credit Rules, 2004 and Rule 6A of Service Tax Rules, 1994. Accordingly, the Assistant Commissioner, by the impugned order rejected the claim of refund of the Petitioner of Rs.3,32,77,659/-.

5. We have heard Mr. Nankarni, learned Senior Advocate for the Petitioner and Mr. Walve, learned Counsel for the Respondents.

6. Mr. Nankani submitted that it is an admitted position that the original documents submitted by the Petitioner have lost by the Respondent – Department which has made the Petitioner virtually remediless. He submitted in these circumstances, the Petitioner have no option but to invoke writ jurisdiction of this Court.

7. We have considered this submission. We do not find that the position that the documents have been misplaced by the Respondent – Department, is admitted by the Respondents. An affidavit-in-reply is filed by the Assistant Commissioner, Mumbai to the Petition on 29 August 2019. The Assistant Commissioner states that no details of original documents which were submitted to the Commissioner, Gurgaon has been given by the Petitioner and it cannot be construed that they have submitted original documents. The Commissioner has stated that in absence of original documents, the claim could not have been processed. The list of documents relied upon by the Petitioner in this Petition shows that there were copies and not the original. Apart from this position, it cannot be

said that there is any consensus as regard the fact that the necessary original documents were submitted by the Petitioner and were lost by the Respondent – Department. A factual enquiry will have to be then undertaken to find out whether original documents were submitted by the Petitioner, which were the original documents that were submitted, and assuming such original documents were submitted, whether they were germane for the purpose of the enquiry in respect of refund as contemplated in law. This aspect, in view of the statements in the impugned order and the affidavit-in-reply, is a disputed question of fact.

8. Section 35 of the Central Excise Act provides an appeal to the Commissioner - Appeals. There is no dispute that the impugned order passed by the Assistant Commissioner is appealable under Section 35 to the Commissioner - Appeals. Therefore, this disputed question of fact has to be decided in the statutory appeal provided under Section 35 of the Act. Therefore, on both counts, that the Petition involved disputed question of fact and that a statutory remedy of appeal is available to the Petitioner, we are not inclined to exercise our writ jurisdiction.

9. The Writ Petition is rejected. If the Petitioner files an appeal before the Commissioner of Appeals within 60 days from today, same will be considered on its own merits.

10. In view of disposal of Writ Petition, the Civil Application does not survive and the same is disposed of accordingly.

NITIN JAMDAR, J. **M.S. SANKLECHA, J .**