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

CENTRAL EXCISE APPEAL NO.105 OF 2019

Central Warehousing Corporation ...Appellant
vs.
Commissioner of Service Tax, Mumbai-VII ...Respondent

Mr. Sanjay Dwivedi, for the Appellant
Mr. P.S. Jetly a/w. Mr. J.B. Mishra, for the Respondent

CORAM : M.S. SANKLECHA &
M. S. SONAK, JJ.

DATE : JULY 08, 2019

P.C.:

. This Appeal under Section 83 of the Finance Act, 1994 read with section 35 G of the Central Excise Act, 1944 challenges the order dated 27th July, 2017 passed by the Customs, Excise & Service Tax Appellate Tribunal (Tribunal). By the impugned order the Appellant's refund claim was rejected on the ground of being barred by limitation and unjust enrichment.

2. Mr. Dwivedi, learned counsel appearing for the Appellant urges the following re-framed questions of law for our consideration:

(1) Whether on the facts and circumstances of the case and in law the Tribunal was justified in rejecting the claim for refund on

the ground of unjust enrichment ?

(2) *Whether on the facts and in the circumstances of the case and in law, was the Tribunal justified in not considering and not recoding any finding on the specific pleading of the Appellant that "payments made by the Appellant during investigation ought to be treated as made under protest", while holding the refund claim for the period prior to April 2004 barred by limitation ?*

(3) *Whether on the facts and in the circumstances of the case and in law, was the Tribunal justified in omitting to decide the question of limitation for the refund claim for the period from 2002 to 2004, and in confining the issue of limitation only to the period covered by the show cause notice ?*

3. Ref:- Question No. (1) :-

(a) The impugned order dated 27th July, 2017 of the Tribunal rejected the refund application for the period 2002 to 2006 *inter alia* on the ground of unjust enrichment. It records the finding of the Commissioner (Appeals) that the Appellant had not produced any evidence of not having passed on the service tax element to its customer on the auction sale done by it. In fact, the Appellant had before the Commissioner (Appeals) sought time to produce the C.A. certificate and bills etc. in support of the claim but the same was not done leading the Commissioner (Appeals) to dismiss the Appeal for failure to submit any evidence of not having passed on the service tax burden to its customers.

(b) Even before the Tribunal the impugned order records that no certificate/evidence in support of the Appellant's claim of no unjust enrichment on its part was produced. It was in these circumstances that the impugned order dated 27th July, 2017 upholds the findings of the lower authorities that the refund cannot be granted on account of unjust enrichment.

(c) In the above facts, the view taken by the Tribunal cannot be said to be perverse. It is possible view. This is particularly so as burden of establishing that there is no unjust enrichment is on the assessee as the facts pertaining to it are in exclusive knowledge of the assessee. This the Appellant has miserably failed to even attempt to establish.

(e) Therefore, this question does not give rise to any substantial question of law. Thus not entertained.

4. Ref:- Question Nos. (2) & (3) :-

(a) These questions are on the issue of the refund claim being barred by limitation are rendered academic. This in the absence of the Appellant failing to establish the absence of unjust enrichment.

(b) In the above view, question Nos. 2 and 3 also do not give rise to any substantial question of law being academic in nature. Thus not entertained.

5. Accordingly, the Appeal stands dismissed.

(M.S. SONAK, J.) **(M. S. SANKLECHA, J.)**