Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No.13104 of 2018

(Arising out of OIA-VAD-EXCUS-002-APP-258-2018-19 dated 29/08/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I(Appeal))

G E Power India Ltd **……..Appellant**
(Formerly Known As M/S Alstom India Ltd
At Maneja, VADODARA, GUJARAT

VERSUS

C.C.E. & S.T.-Vadodara-ii **…….Respondent**
1st Floor... Room No.101,
New Central Excise Building,
Vadodara, Gujarat-390023

APPEARANCE:
Shri Saurabh Dixit, Advocate for the Appellant
Shri Dharmendra Kanjani, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 12615 /2021

DATE OF HEARING: 09.12.2021
DATE OF DECISION:15.12. 2021

RAMESH NAIR

The brief facts of the case is that during the period Feb-March'2014, the appellant's records were availed wherein an objection was confirmed vide MCM held on 28.05.2014 and consequent Audit Report No. 42 dated NIL.7.2014. The appellant due to the audit objection reversed the amount of Rs. 36,82.020/- and intimated the same vide their letter dated 28 Feb, 2015. Subsequently, when no action was taken by the department the appellant filed a refund claim which was proposed to be rejected by issuing a show cause notice. The said show cause notice was adjudicated vide Order-In-Original dated 17.11.2016 whereby the refund was rejected under Section 11B of the Central Excise Act, 1944. Being aggrieved by the said Order-In-Original appeal filed before the Commissioner (Appeals) was dismissed vide impugned order dated 29.08.2018. Both the lower authorities have rejected the claim. On the ground that since, the appellant have paid the amount the same should be treated as final payment and in terms of Section 11A (2) the case stand closed. Secondly, on the ground that after payment by the appellant the assessment stood final, therefore, without challenging the assessment by way of filing appeal refund is not maintainable in the light of Hon'ble Supreme Court judgment in the case of M/s. Priya Blue Industries Ltd-2004 (172) E.L.T 145 (S.C.) and M/s. Flock India Pvt Ltd-2000 (120) E.L.T 285 (S.C.). Being aggrieved by the Order-In-Appeal the appellant filed the present appeal.

2. Shri. Saurabh Dixit, Learned Counsel appearing on behalf of the appellant submits that the payment made by the appellant is only on the objection of audit party and the same was not agreed upon by the appellant. The appellant also not paid any interest for the delayed payment of Cenvat Credit, therefore, the appellant's case is not covered under Section 11A (2) of Central Excise Act, 1944. In this position, the Revenue was supposed to issue a show cause notice which they failed to do so. He further submits that since the payment of the Cenvat Credit made by the appellant was not finalised either by way show cause notice and adjudication thereof. The said payment cannot be part of assessment. Moreover, in the case of Central Excise there is no need to challenge the self assessment in case any payment is made in excess and refund of the same is sought for. He placed reliance on the following judgments:-

- M/s. Dujodwala Resins Terpenes Ltd.-2020(1) TMI 1095 (Tri-Chandigarh)
- Cheslind Textiles Ltd. - 2007 (209) E.L.T. 99 (Tri.-Chennai)
- M/s. Novapan India Ltd. 1994 (73) E.L.T. 769 (S.C.).
- Sunder Steels Ltd.-2005 (181) E.L.T. 154 (S.C.)
- Thyssenkrupp Industries Pvt. Lid.-2014 (310) E.L.T. 317 (Tri-mumbai).

- Siddhant Chemicals-2014(307) ELT 44(All)
- Binjrajka Steel Tubes V/s. CCE, Hyderabad -1 2019(2) TMI 137 - CESTAT HYDERABAD IOCL 2019(2) TMI 563 - CESTAT AHMEDABAD
- Jayaswals Neco Ltd. 2007(8) S.T.R. 305(SC)

3. Shri. Dharmendra Kanjani, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. I have carefully considered the submissions made by both the sides and perused the records. As regard, the issue that whether the appellant's payment of Cenvat Credit is attained finality in terms of Section 11A (2), I find firstly, the appellant have made the payment on the objection raised by the audit party as per summary of the Audit Report No 42/14/15 dated 20.07.2014 the relevant audit para is extracted below:-

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Government of India

OFFICE OF THE COMMISSIONER
CENTRAL EXCISE, CUSTOMS & SERVICE TAX, VADODARA – II,
AUDIT SECTION, 2ND. FLOOR, NEW CENTRAL EXCISE BUILDING,
SUBHANPURA, VADODARA – 390 023

F.No.V(a)21-302/IA/Gr.-V/ST/13-14

Vadodara, Dtd. 07.20.14

Audit

EA-2000 FINAL AUDIT REPORT No. 42 /14-15

Part -I

Annexure-N (Central Excise)

1	Name of the Unit	M/s Alstom India Ltd., ERDA Road, Maneja, Vadodara-390013
2	Commissionerate/Division/Range	Vadodara II/Division – Makarpura / Range -I
3	Product manufactured	Hydro Turbine & Parts thereof, Generator & Parts thereof, Mechanical Equipments & Parts thereof
4	Tariff item	84100090, 85030010, 73089090
5	Gist of main Exemption/Notfn.	--
6	Date/Period of last Audit	December, 2009 to December, 2010
7	Period of Current Audit	January, 2011 to December, [illegible]
8	Date(s) on which Audit was undertaken	26.02.2014, 27.02.2014, 28.02.2014, 05.03.2014 & 07.03.2014
9	No. of Revenue Paras	CENTRAL EXCISE: 05 SERVICE TAX: 02
10	Name of Auditors	Shri R N Jha – Superintendent Shri K S Bora - Inspector
11	Total Revenue involved in audit paras	TOTAL RECOVERY:Rs. 94,73,305/-

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PART-II

Summary of major objection form Working Papers.

Sr. No	Gist of Objection	Revenue Implication (Rs.)	Assessee's agreement/dis-agreement – YES/NO, If no, reasons thereof	Department's conclusion with reasons.
01	Irregular availment of Cenvat credit on capital goods	Rs.7,13,929/- (Basic Rs.6,93,137/- + Ed. Cess Rs.13,862/- + .SHE Cess Rs.6,930/-) alongwith interest of Rs. 52784/-	Yes. Agreed and paid alongwith interest	Spot Recovery
02	Irregular availment of input Service: Construction of a building or a civil structure.	Rs.47,23,601/- (Service Tax Rs.45,86,013/- + Ed. Cess Rs.91,723/- + SHE Cess Rs.45,865/-) alongwith interest of Rs. 4,11,236./-	Yes. Agreed and paid alongwith interest.	Spot Recovery
03	Interest on late payment of Central Excise duty on Scrap Sales.	Rs.7,819/-	Yes. Agreed and paid.	Spot Recovery
04	Irregular availment of input Service credit on Service Tax paid under 'Intellectual property rights service' in respect of "Trade Mark fee" paid to foreign Service Provider under reverse mechanism and such service used for trading sales.	To be quantified.	Yes. Agreed. But Paid only Rs.22,98,344/.	The JAC/JRO concerned is requested to issue Show Cause Notice for safeguarding the Govt. revenue.
05	Irregular availment of input Service credit on Consulting Engineering service provided in non-taxable territory.	Service Tax of Rs.36,82,020/- (Service Tax Rs. 35,74,774/-+ Ed. Cess Rs.71,495/- + S& Hed. Cess Rs.35,748/-).	Not Agreed and not paid.	The JAC/JRO concerned is directed to pursue the above issue and issue Show Cause Notice for safeguarding the Govt. revenue, if it requires.
06	Short payment of Service Tax on Consulting Engineer service, Intellectual property rights service and Business Support Service provided from non-taxable territory but received in taxable territory (import of Service) under reverse charge mechanism due to foreign exchange rate variation.	Service Tax of Rs.4,60,022/- (Service Tax Rs. 4,46,624/-+ Ed. Cess Rs.8,932/- + S& Hed. Cess Rs.4,466/-) alongwith interest of Rs74794./-	Yes. Agreed and paid alongwith interest.	Spot Recovery
07	Non payment of Service Tax on Renting of immovable property service on reimbursement of lease rent.	Service Tax of Rs.5,60,071/- (Service Tax Rs. 5,43,758/-+ Ed. Cess Rs.10,875/- + S& Hed. Cess Rs.5,438/-) alongwith interest of Rs. 1,70,705/-	Yes. Agreed and paid alongwith interest.	Spot Recovery

4.1 The relevant audit para is at Serial No. 5 above, from the said part it can be seen that there was no agreement by the appellant and in the column of department conclusion is that the Jurisdiction Assistant Commissioner/Jurisdiction Range Officer was supposed to issue show cause notice. As per this para, it is clear that the payment made by the appellant was deemed to be provisional and not final to attract provision of Section 11A (2) of Central Excise Act, 1944. Moreover, the appellant intimated the payment vide their letter dated 28 February, 2015 which is reproduced below:-

RENEWABLE POWER
HYDRO
India

Maneja, Vadodara - 390 013
Gujarat (India)
Phone : +91 265 6613000
Fax : +91 265 6613080/81

(22)

ALSTOM

01c

CEX/AUDIT/2014-15/03

28th February-2015.

To,
The Assistant Commissioner(Audit),
Customs & Central Excise,
Vadodara-II.
Dear Sir,

<u>Sub: Audit Para F.No. V9a)21-302/IA/GR.-V/ST/13-14 dtd.01st August-2014.</u>

This is with reference to EA-2000 Final Audit Report F.No. V(a)21-302/IA/Gr.-V/ST/13-14 dtd. 01st August-2014.

In this connection we have reversed the Service Tax Credit of Rs. 36,82,020/- (Service Tax Rs. 35,74,774 + Education Cess Rs. 71,495 + S&Hed.Cess Rs. 35,748) (refer audit para No. 05) vide Entry No. 10597388 Date 28-Feb-2015.

Kindly acknowledge the receipt of the letter.

Thanking you,

Yours faithfully,

For Alstom India Limited

Alstom India Limited VADODARA

Akash KHANDELWAL
Manager (Indirect Taxation)

CC: 1. The Dy. Commissioner, Customs & C.Ex. Makarpura Division,Vadodara-II.

2. The Superintendent Range-III, Makarpura Division,Vadodara-II.

उप आयुक्त
के. उ. शु. व. सीमा शुल्क,
मकरपुरा मण्डल. वडोदरा-II
3.3.15
Dy. Commr. C. Ex. & Cust.,
Makarpura Division,
VADODARA-II

Received
03.03.15
Inspr., R-III

Alstom India Limited VADODARA

Registered Office :
ALSTOM India Limited
(Formerly known as Alstom Projects India Limited)
CIN - L74140MH1992PLC068379
The International, V Floor,
16, Marine Lines Cross Road, No. 1,
Off. Maharshi Karve Road,
Churchgate, Mumbai - 400 020 (India)
Phone : 022 6639 9255 / 260
Fax : 022 6639 9259
www.alstom.com/India

4.2 From the above letter of the appellant also it is clear that the appellant have made the payment with reference to the audit objection, however, in the said letter it is not mentioned that the case be settled and show cause notice be waived in terms of Section 11A (2) of Central Excise Act, 1944. In view of the above undisputed fact it is clear that the payment of Cenvat Credit made by the appellant is only due to objection by the audit party and same was not agreed upon by the appellant, therefore, the Revenue's contention is that the said payment attained finality in terms of 11A (2) of Central Excise Act, 1944 is absolutely incorrect and illegal.

4.3 As regard, the issue that whether the appellant is required to file appeal with reference to the audit objection and payment made by them. Both the lower authorities have contended that appeal ought to have been filed on the basis of the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. and Flocks India Pvt Ltd. I am of the view that firstly, the payment made by the appellant was not the final payment hence, the same cannot be a part of the assessment. Secondly, there is no assessment by the department which needs to be challenged. As per the audit proceeding as referred above the department was supposed to issue show cause notice which it failed to do so, therefore, there is no occasion and reason for appellant to file appeal before the Commissioner (Appeals). The only remedy is to claim the refund of such payment made as per the objection raised by the audit. As regard, the judgment relied upon by the appellant it is settled that unless and until the payment along with interest is made by the assessee and the same is intimated specifically in writing to the department, the case cannot be closed under Section11A (2) of Central Excise Act, 1944. As regard, the judgments cited by the Learned Authorized Representative, I find that all the judgments are on the fact that after payment of the dues by the assessee, the department has issued the show cause notice and assessee has taken a stand that their case should be settled under Section 11A (2) of {old Section 11A (2B)} of Central Excise Act, 1944. In those judgments it is the assessee who proposed to opt for closer of the case on the basis of payment made by them. Whereas in the present case the appellant has neither proposed nor opted for waiver of show cause notice in respect of the payment made by them under Section 11A (2) of Central Excise Act, 1944. Therefore, the facts of the case cited by the Learned Authorized Representative are different from the fact of the present case.

5. As per my above discussion and findings, I am of the clear view the reasons for which the refund claim rejected by both the authorities are not tenable. Accordingly, the appellant's refund needs to be processed in accordance with law, keeping the above observation into consideration.

6. Accordingly, the impugned order is set aside, the appeal is allowed in the above terms.

(Pronounced in the open court on 15.12.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Prachi