CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 10743 of 2019-SM

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-002-APP-589-2018-19 dated 30.01.2019 passed by Commissioner of Central Excise, Customs and Service Tax-Vadodara]

S.E. Power Limited **.... Appellant**

Plot No. 54/B, Pratapnagar, Jarod Salvi Road
Samlaya, Off. Vadodara Halol Highway
Distt. Vadodara 391520

VERSUS

Commissioner of Central Excise & ST, Vadodara .... Respondent

1st Floor, Annex Building, GST Bhavan,
Race Course Circle, Vadodara - 390007

APPEARANCE :

Shri Vivek Bapat, Advocate for the Appellant
Shri Dinesh M. Prithiani, Assistant Commissioner (AR) for the Respondent

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

DATE OF HEARING : 28.04.2022
DATE OF DECISION : 05-05-22

FINAL ORDER NO. A/10409/2022

RAMESH NAIR :

The brief facts of the case are that, during the course of audit for the period April 2016 to June 2017 it was observed that appellant had short paid Central Excise duty amounting to Rs. 7,40,063/- on reconciliation of ER-1 returns with the sales ledgers. The appellant explained to the excise auditors that the difference/ short payment of duty excise duty is on account of sales rejection (material rejected and returned to the appellants by the customers). They also showed copies of debit memo and rejection memo issued by their customers while rejecting the goods. The appellant under the insistence, paid the amount of Rs. 7,40,063/- along with interest amounting to Rs. 82,905/- on 20.12.2017. After such payment, the appellant filed a letter as annexure 'S' dated 22.01.2018 wherein they have accepted the demand and proposed to settle the same in terms of Section 11A (2B) of Central Excise Act, 1944.

2. The Adjudicating Authority rejected the refund on the ground that the appellant has opted for waiver of show cause notice in respect of the demand of duty of Rs. 7,40,063/- which was paid in terms of Section 11A(2B), the Deputy Commissioner also decided the case on merits on the ground that appellant instead of reducing the quantity of clearances referred to the goods rejected and returned, they should have paid duty on the clearances and should have availed Cenvat credit of rejected goods in terms of Rule 16 of Central Excise Rules, 2002. Being aggrieved by order-in-original, the appellant filed appeal before Commissioner (Appeals) which came to be rejected by upholding the order-in-original therefore the present appeal is filed before this Tribunal.

3. Shri Vivek Bapat, learned Counsel appearing on behalf of the appellant submits that excise duty was demanded by the audit department on the ground that the appellant have not followed the procedure of Rule 16 of Central Excise Rules, 2002 for the rejected goods. He also submits that since the appellant was entitled for Cenvat credit in terms of Rule 16, there should not be any demand as the entire exercise is Revenue neutrality. As regards the issue that appellant have waived the show cause notice in terms of Section 11A(2B), he submits that the appellants statutory right cannot be taken away by a letter written by the appellant for waiver of show cause notice. He placed reliance on the following Tribunal decisions :-

(a) *Marcandy Prasad Radhakrishna Prasad Pvt. Limited vs. CCE, Cal – 1998 (102) ELT 705 (Tribunal).*

- Against the said order, the department's Civil Appeal was dismissed by the Hon'ble Supreme Court reported at – 1999 (107) ELT A121 (SC).

(b) Vardhaman Plastochem Pvt. Limited vs. CCE & ST, Daman – 2022 (3) TMI 188 – CESTAT Ahmedabad

(c) R.K. Silk Mills (India) Limited vs. CCE, Jaipur – 2008 (228) ELT 308 (CESTAT-Delhi)

(d) Paras Laminates vs. CCE, Jaipur – 2005 (191) ELT 926 (CESTAT-Delhi)

4. Shri Dinesh M. Prithiani, learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the clearances of the goods cannot be reduced by the rejected goods which were returned back by the customers. All the clearances made by the appellant are chargeable to excise duty and in respect of rejected goods, the appellant should have followed the procedure under Rule 16 of Central Excise Rules, 2002 which the appellant failed to do so. Therefore, the demand of excise duty on the goods admittedly cleared, is sustainable. He placed reliance on the following judgments:-

(a) Amar Engineering Company – 2019 (26) GSTL 116 (Tri. Ahmd.)

(b) Nukay Nufit Nakshatra – 2015-TIOL-607-CESTAT-MUM

(c) ITC Ltd vs. CCE-Kolkata – 2019 (368) ELT 216

(d) Bharat Petroleum Corp. Limited -2017-TIOL-2908-CESTAT-MUM

(e) Boutique Hotel India Pvt. Ltd - 2019-TIOL-1192-CESTAT-DEL

(f) Krishna Cylinders - 2015-TIOL-2923-CESTAT-DEL

(g) Valencia Construction Pvt. Ltd -2015-TIOL-2435-CESTAT-MUM

5. I have carefully considered the submissions made by both the sides. I find that there is no dispute that the appellant have reduced the actual quantity of clearances by the quantity of rejected goods returned back by the customers. The law does not permit the assessee to adjust the clearances by returned goods. Therefore, all the clearances which were

actually made are liable to excise duty. Therefore the demand of excise duty raised on the clearance of goods is sustainable. Moreover, the appellant submitted a letter accepting the demand, which is scanned below:-

(1)

S. E. POWER LIMITED

CIN : L40106GJ2010PLC091880

PHOENIX
RUBBER REBORN

ANNEXURE – S

To,
The Commissioner of Central Excise
Audit Commissionerate,
Vadodara.

Respected Sir,

Subject: Letter given under Section 11 A (2B) for avoiding penalty and non-issuance of show cause notice – reg.

We M/s S E Power Limited, falling under the jurisdiction of Range- I, Division- V, Vadodara-II state and request as under:

2. As per the provisions of Section 11 A (2B), where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the period, chargeable with duty, may pay the amount of duty before service of notice on him under sub section (1) in respect of duty and inform the central excise officer in writing who, on receipt of such information shall not serve any notice under the sub section (1) in respect of the duty so paid;

3. During the course of verification of our records/returns, by the Audit team from the office of Central Excise Audit Commissionerate, Circle V, Group S-I, it is observed that there is short payment / non levy / nonpayment of duty/ wrong availment of CENVAT credit on account of issue /issues mentioned as per the Annexure hereto. We have agreed to the points raised during verification/scrutiny and have paid the said amounts of duty/reversed the CENVAT credit as detailed below:

(a) **SHORT PAYMENT OF CENTRAL EXCISE DUTY:** We agree to the same and have paid up the amount of Duty Rs. 7,40,063/- along with Interest of Rs. 82,905/- vide Challan No. 008 dated 20.12.2017.
(b) **Excess availment of Cenvat Credit:** We agree to the same and have paid up the amount of Rs. 86,878/- along with interest of Rs. 7,849/- vide Challan No. 009 dated 20.12.2017.

4. In terms of the provisions of Section 11 A (2B) of Central Excise Act, 1944, we request that a show cause notice may not be issued to us in this case and no penalty may be imposed on us as the above short levy/short payment/non levy/non-payment/wrong availment of credit are not intentional on our part. We request that the above issues may be treated as closed with this letter since we have complied with the provisions of Central Excise law.

Yours faithfully,
Thanks & Regards,

For S E Power Limited

Authorized Signatory

Date: 22.01.2018
Place: Vadodara

Registered Office & Works :
54/B, Pratapnagar, Jarod - Savli Road,
Samlaya, Vadodara - 391520, Gujarat, India
Phone : +91 2667 251566
Email : info@phoenixrubberreborn.com
Website : www.phoenixrubberreborn.com

Marketing Office :
17, Kamal Kunj Society, Behind Bank of Baroda,
Deluxe Cross Road, Nizampura, Vadodara-390002, Gujarat, India.
Phone : +91 265 2785566

By submitting the above letter, the appellant have prevented the department to issue any show cause notice. With the above letter, the demand of duty attained finality. The judgment relied upon by the appellant is not directly applicable to the facts in the present case, hence are not applicable. I am therefore of the view that appellant by following Section 11A(2B), themselves settled the case to avoid any penalty. If the assessee is permitted to re-open the case, the whole purpose of Section 11A(2B) will become redundant. The department will lose the opportunity to issue any show cause notices at a later stage due to time-bar and other reasons. Therefore, in my view, once the assessee opted for settlement of case in terms of Section 11A(2B), they cannot agitate the same.

6. Having given the above finding I am also of the view that the appellant has prima-facie entitled for Cenvat credit in respect rejected goods returned by the customers in terms of rule 16 of Central Excise Rules, 2002. However, the lower authorities have not properly examined the admissibility of Cenvat credit in respect of rejected-returned goods. Therefore, for this reason, the matter as regards the eligibility of Cenvat credit in terms of Rule 16, needs to be reconsidered.

Therefore, the impugned order stand modified to the above extent and the appeal is disposed of by way of remand in the above terms, to the Adjudicating Authority.

(Pronounced in the open court on 05.05.22.)

(Ramesh Nair)
Member (Judicial)

KL