

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

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10273 of 2020

(Arising out of OIA-VAD-EXCUS-002-APP-509-2019-20 dated 30/12/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

WINDAR RENEWABLE ENERGY PVT LTD

.....Appellant

3/B, Gidc Phase-Iii, Chandrapura, Halol
Panchmahal, 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
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 11046 /2022

DATE OF HEARING: 04.05.2022
DATE OF DECISION: 29.08.2022

RAMESH NAIR

The brief facts of the case are that the appellant was made to pay certain service tax during the course of EA 2000 audit by the audit party, even the interest and penalty was also collected from the appellant. After such payment the appellant have submitted a letter dated 28.01.2019 wherein, they have given in writing that the proceedings to be concluded under Section 73(3) of the Finance Act, 1994. As per the appellant since, such tax along with interest and penalty was never payable but was collected from the appellant, they sought refund of the same which has been denied primarily on the ground that once the appellant paid such tax and issued letter to close the issue under Section 73(3) of the Finance Act, 1994 and also informed that they will not seek refund thereof proceedings are concluded and no refund can be sanctioned under the circumstances. Against the rejection order of the refund passed by the Deputy Commissioner. The appellant filed an appeal before the Commissioner (Appeals) who also concurring with the view of the adjudicating authority

that once the appellant accepted the liability and paid the same and informed the department in writing opting for the provision of Section 73(3) of the Finance Act, 1994, the appellant cannot claim the refund. Being aggrieved by the Order-In-Appeal, the appellant filed the present appeal.

02. Heard both the sides and perused the records. We find that the appellant's main contention is that even though the appellant have given in writing to close the matter in terms of Section 73(3) of the Finance Act, 1994 but the service tax was not at all payable. It is also the submission of the appellant that since in the present case the department has collected penalty under Section 78, the case otherwise not fall under Section 73(3) of the Finance Act, 1994. We find that since the penalty under Section 78 was also collected by the department, the entire process is not in conformation to the provision of Section 73(3) for the reason that Section 73(3) does not provide for payment of penalty under Section 78 therefore, the present case cannot be said to have been covered by Section 73(3). However by giving the letter to the department by the appellant for closing of the matter, the revenue could not issue any show cause notice as regard the service tax payable, if any, in the present case.

2.1 Considering the peculiar facts of the present case, we are of the view that the revenue has liberty to dispose of the refund considering the merit of the case that the service tax, interest and penalty paid by the appellant is whether legally payable or otherwise. For deciding the refund on merit non issuance of show cause notice shall not be determined. The revenue can dispose of the matter deciding the merit of the case. Accordingly, we set aside the impugned order and remand the matter to the adjudicating authority for passing a fresh order considering the merit of the case.

03. Appeal is allowed by way of remand to the adjudicating authority.

(Pronounced in the open court on 29.08.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)