

Flex Industries Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-11-1999

Reported in : (1999)(113)ELT348TriDel

Appellant : Flex Industries

Respondent : Commissioner of Central Excise

Judgement :

1. The appeal is against Order-in-Appeal dated 22-1-1999 passed by the Commissioner (Appeals), Ghaziabad affirming the Order-in-Original passed by the adjudicating authority on the question of Modvatibility of HSD Oil. The adjudicating authority had disallowed Modvat credit on HSD Oil as input to the tune of Rs. 3,58,448/- holding that HSD Oil was non-Modvatable under Rule 57A of the Central Excise Rules, 1944. The Commissioner (Appeals) in the aforesaid order dated 22-1-1999 affirmed this finding and rejected the appellant's plea that Modvat credit on HSD Oil was admissible under Rule STB by virtue of the non obstante clause of this rule. Appellant is before the Tribunal on the same ground as raised before the lower appellate authority.

2. I have heard Shri A.K. Jain, Authorised Representative of the appellant and Shri Y.R. Kilania, learned }DR for the respondent in the said application.

3. The learned Representative of the appellant submits that the issue involved in the appeal is covered by certain previous decisions of this Tribunal. He cites two decisions viz. decision in the case of Jindal Polymers v. C.C.E., Meerut 1999 (31)

RLT 214 (CEGAT) and decision in the case of Easter Industries v. C.C.E., Meerut 1999 (31) RLT 458 (CEGAT). In the former decision, it is held that non obstante clause in Rule STB of the Central Excise Rules makes the said rule override the provisions of Rule 57A of the Rules *ibid*. I observe that the issue involved in the present appeal revolves around this ruling. In the latter decision reported in 1999 (31) RLT 458 (CEGAT), HSD Oil is seen to have been held eligible for Modvat credit under Rule 57A of the Rules *ibid*. The above decisions are certainly referable to the periods in dispute involved in the respective cases. Therefore, I am not inclined to go into the applicability of these decisions to the facts of the present case. The period in question in the present case is June to November, 1997. I observe that there are certain Notifications, Trade Notices, etc. affecting the tenor of the provisions of Rule 57A and Rule 57B as applicable to the period in dispute. For this reason, I hold, the appellant has an arguable case.

4. I have heard Shri Y.R. Kilania, learned JDR who submits that the provisions of Rule 57B are not applicable to the facts of the appeal.

The further submissions of the learned JDR on the interpretative grounds raised in the appeal and the stay application would also go to suggest that the issues raised in the appeal are arguable. In the circumstances, I proceed to consider the present stay application.

5. One of the grounds raised in the stay application is that the Commissioner (Appeals) has completely disregarded the non obstante clause of Rule 57B. I find that this ground is not without force inasmuch as it appears that the Commissioner (Appeals) has not considered the adjudicating authority's observation in Para 12 of the Order-in-Original that "Rule 57A does not anywhere say that notwithstanding with Rule 57B". It appears that the adjudicating authority did not at all apply his mind to the non obstante clause of Rule STB of the Central Excise Rules and that the lower appellate authority has also failed to note this serious lapse on the part of the adjudicating authority. Since the issue involved in the appeal is very much on the said non obstante clause, the ground raised in the said application that the Commissioner has completely disregarded the non obstante clause contained in Rule 57B appears to be tenable for the present purpose. Learned Representative

for the appellant further submits that the balance of convenience is in favour of the applicant and against the Revenue, and that grave financial hardship would be caused to the applicant if the present application is not granted. It is also stated in the application that the financial position of the applicant is very disastrous. Nevertheless, the application is not accompanied by any documentary proof of such disastrous financial position as at present or at least relating to the Financial Year 1998-99. I am not inclined to rely upon the newspaper cutting produced with the stay application or on the "unaudited financial results (provisional) for three months period ended 30th June, 1998" produced as Annexure 'C' to the stay application. In the absence of cogent documentary proof of difficult financial position for a period of at least the last one year, I am not inclined to hold that the present financial position of the applicant is too bad to be able to pre-deposit the amount involved in the appeal for the purpose of the provisions of Section 35F of the Central Excise Act, 1944. For this very reason, I also observe that the plea of balance of convenience is not sustainable.

6. At this stage of the hearing, the learned Representative of the appellant drew my attention to the ratio of the Tribunal's decision in the case of Jindal Polymers (vide supra) in support of his contention that, in relation to the period in dispute in the present appeal, the issue is squarely covered by the said decision. I have perused the text of the order in the case of Jindal Polymers and I observe that this ruling of the Tribunal lends much support to the applicant's plea of prima facie case for the purpose of the present stay application.

Therefore, though the applicant has not been able to substantiate the plea of undue hardship, I should hold that the applicant has a fair case for a conditional stay on the ground of prima facie case, having regard to the fact that the applicant has not been able to establish that they would be put to undue hardship in the absence of stay. I also note that the provisions of Section 35F of Central Excise Act provides for condition in the interest of the Revenue. In the circumstances, the applicant is directed to pre-deposit the amount of Rs. 50,000/- (Rupees Fifty thousand only) within a period of four weeks from today. The appeal shall be posted for hearing in due course of time, upon the above direction being complied with by the applicant. It is made clear that any non-compliance with this order may

lead to dismissal of the appeal. The stay application stands allowed subject to the above condition, for purposes of the provisions of Section 35F of the Central Excise Act. To come up for reporting compliance on 16-7-1999.

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