

**Smithklime Beechem Consumer Vs. C.C.E.**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Dec-08-2000

**Reported in :** (2001)(127)ELT64TriDel

**Appellant :** Smithklime Beechem Consumer

**Respondent :** C.C.E.

**Judgement :**

"Thus the disputed issue in this case boils down to the point as to whether the merger of Unit No. 1 with the unit No. 2 is shifting of the plant or factory to another site or not. On this point, I observe that it is not the case of even appellants that they have merely shifted the plant or factory of unit No. 1 to another site.

They do clearly admit that they have shifted the plant or factory to another factory belonging to them. There is difference between the word 'site' and 'factory'. But the appellants arguments are for eliminating this substantial difference between 'site' and 'factory'. It is obvious that their arguments are not correct and tenable since 'site' cannot be equated with the factory. In view of the above, I, therefore, find no merits in the appellants' contentions warranting any interference with adjudication order in this case. The appeal is, therefore, rejected".

"Here it is true that both the plants belong to the same manufacturer being same partners but Rule 57F(6) allows transfer of unutilised credit balance on account of shifting of the plant or factory to another site. Here the case is not of shifting to another site but the case is of Merger/amalgamation. Here the unit 1 have lost

their identity whereas for availing benefit of Rule 57F(6) the plant/unit should not have lost their identity. As per discussion above 1 hereby reject the request of the party for transfer of accumulated Modvat credit".

3. Being aggrieved by this order, the appellants have filed the cap-tioned appeal.

4. The facts of the case in brief are that the appellants are engaged in the manufacture of Horlicks in bulk at their Rajamundry factory. The bulk product is cleared on payment of duty to the appellants packing station at Bangalore. At the packing station, the bulk product is repacked into smaller consumer packs. Such smaller consumer packs are cleared on payment of duty. Modvat credit of duty paid on bulk Horlicks is taken at Bangalore packing station. This credit is utilised for payment of duty on Horlicks cleared at Bangalore packing station.

Initially the assessment of clearances, at Rajamundry factory was done on a provisional basis. These assessments were subsequently finalised, Consequent to which Rajamundry factory paid Excise Duty of Rs. 18,34,599/-. The Supdt. of Central Excise issued a certificate under Rule 57E of the Central Excise Rules to this effect. The packing station at Bangalore was closed down as a result of which the packing materials in stock and the machinery etc. were shifted to the packing station at Madras. Packing station at Bangalore took Modvarcredit of differential duty amounting to Rs. 18,34,599/- on the strength of the certificate issued by the Jurisdictional Supdt. on 29-8-94. The appellants applied for transferring of the credit of Rs. 18,35,018.73 inasmuch as in addition to Rs. 18,34,599/- an additional credit of Rs. 419.73 was lying in balance in R.G. 23A Part I at Bangalore packing station on the date of its closure. This request was made in terms of Rule 57F(7) of the Central Excise Rules. In the alternative, it was requested that cash refund as admissible under Rule 57E of the Central Excise Rules may be allowed. This request was turned down. Central Excise Registration Certificate at Bangalore was surrendered on 27-12-95. The appeal was filed before the Tribunal which remanded the matter for de novo adjudication with the direction to examine the request of the appellant under the provisions of Rule 57F(7) and Rule 57E of the Central Excise Rules, 1944. The Commissioner in de novo proceedings rejected the request of the appellants for transfer of credit under Rule 57F(7) or refund in

cash under Rule 57E of the Central Excise Rules.

5. Arguing the case for the appellants Shri G. Shiv Das, Id. Counsel with Shri M.P. Devnath, Id. Counsel submits that the sole reason for rejection of the request for transfer/refund of the amount was that no inputs/processed inputs were lying in stock equivalent to the credit sought to be transferred and that the provisions of Rule 57F(7) stipulated such a condition. It was argued for the appellants that Rule 57F(7) contemplated no condition for transfer of credit excepting that the transfer of the unutilised credit would take place on account of shifting of the plant or the factory belonging to the same manufacturer to another site; Rule 57F(7) was amplified by Notification No. 34/95 dated 16-8-95. It was argued by the Id. Counsel that the condition regarding the transfer of the inputs along with the transfer of the credit, came into effect on 16-8-95 whereas their demand pertains to the period prior to 16-8-95 and hence amended provisions of Rule 57F(7) will not be applicable in their case.

6. It was contended that the transfer of inputs lying in stock is a benevolent provision; that it has been introduced to provide for the transfer of inputs without payment of duty; that when the transfer of credit is permitted in different situations like sale, merger, etc., this provision was enacted to get over the statutory condition of payment of duty when there is a clearance of the inputs which would take place in the case of shifting of the factory from one site to another. It was argued by the Id. Counsel that the interpretation placed by the Revenue that the quantum of credit that could be transferred would be restricted to the quantity of inputs lying in stock was incorrect inasmuch as there is no one to one correlation between the utilisation of inputs; that credit could be utilised without utilisation of inputs and vice versa that there is no condition stipulating that credit sought to be transferred would be restricted to the stock of inputs in question; that it only provides for transfer of the inputs as such and the inputs that are in process. It was submitted for the appellants that the Id. Commissioner has placed reliance on *N.K. Chemical Industries v. CCE 1998 (100) E.L.T. 495*. It was argued that in this case the Tribunal had allowed the appeal and remanded the matter for reconsideration. It was submitted for the appellants that the decision in the case of *N.K. Chemical Industries* does not lay down the principle of law that the credit sought to be

transferred has to be restricted to the quantum of inputs lying in stock. Ld. Counsel submitted that a reading of the order shows that the attention of the Tribunal was not drawn to the fact that Rule 57F(7) as it stood during the relevant time did not contain any condition that the inputs in stock are also to be transferred or that the credit to be transferred is to be restricted to the quantum of inputs, it was also contended that in the case of N.K. Chemical Industries the Tribunal was not called upon to decide whether even if the rule provided for such a transfer of input, the interpretation could be that the credit sought to be transferred has to be restricted to the quantity of inputs. It was argued that it is a well settled position of law that a decision is precedent for what it decides. In support of his contention the Id.Counsel cited and relied upon the decision of the Hon'ble Supreme Court in the case of Mittal Engineering Works Ltd. v. CCE reported in 1996 (88) E.L.T. 622. He, therefore, submits that the decision in the case of N.K. Chemical Industries is distinguishable.

7. Ld. Counsel also submitted that the appellant is entitled to refund of Modvat credit under Rule 57E; that this rule is a self-contained code by itself. In support of his contention he cited and relied upon the decision of the Larger Bench of this Tribunal in the case of Ltkal Asbestos Ltd. v. CCE reported in 2000 (38) RLT 573. He submitted that if in their case adjustment in the credit account is not possible.

Therefore, in such a situation, Rule 57E contemplates cash refund of the subsequent credit varied as a result of payment of duty by the manufacturer of inputs. It was submitted by him that Bangalore packing station had closed down its operations in June '94 and that the adjustment of the credit taken by Bangalore factory of the differential duty paid, credit of which was taken on 29-8-94 is not possible. In such a situation the cash refund of the excess duty paid by Rajamundry factory of the appellant was permissible. The appellant, therefore, submitted that the appeal may be allowed.

8. Shri S.K. Das, Id. DR submits that where as credit can be taken under Rules 57A, 57F and 57E, the provisions relating to transfer of credit are confined to Rule 57F; that Rule 57F as it stood at the relevant point of time permitted transfer of credit lying unutilised in account in form RG 23A on account of shifting of the plant

or the factory to another site; that only unutilised credit lying in R.G. 23A account on account of shifting of the plant or the factory can be transferred; that apart from this provision, there is no other provision of transfer of credit lying in R.G. 23A; that the legal position is that the Commissioner may accord the requisite permission subject to any condition and limitations provided that the inputs/processed inputs lying in stock/final products lying in stock are also transferred to the new site. Ld. DR submitted that Rule 57F provides only for transfer of credit lying unutilised on account of shifting of the plant, or the factory; that in this case the unutilised credit lying in the account of form R.G. 23A has already been transferred and hence there is no question of allowing transfer of any credit once again. First of all transfer of credit is already effected; secondly there is no other provision in Modvat rules to allow transfer of such credit; that same reasoning also applied to credit taken in RG 23A part II account on the strength of the certificate issued in terms of Rule 57E. Ld. DR submits that in the instant case Bangalore packing station closed its operations in June '94 whereas credit was taken on 29-8-94. He submits that this shows that there was no credit of this amount lying in the account in form R.G. 23A in regard to this differential duty. Ld. DR submitted that Id. Commissioner has clearly brought out the provisions of Rule 57F(7) in his order. He, therefore, prayed that the appeal may be rejected.

9. We have heard the rival submissions. We find that there are two issues brought out in the submissions for our determination. The first issue is whether the credit taken on the strength of 57E certificate on 29-8-94 can be transferred when the factory had closed its operations in June '94. The second issue for determination is whether cash refund of the amount of credit on the strength of 57E certificate issued by the Jurisdictional Supdt. can be paid.

10. In so far as the first issue is concerned, we find that in the instant case Rule 57F(7) was amended by Notification No. 34/95 CE. on 16-8-95. Here in the instant case we are concerned with the credit which was taken on 29-8-94 and thus, the provisions of the amended Rule 57F(7) will not be applicable to the facts of the present case.

Therefore, we will have to examine whether the credit was correctly taken on 29-8-94 when the Bangalore unit had closed its operations in June '94. From the records placed before us, we find that whatever credit was available on the date of closure i.e. June '94 it was permitted to be transferred. Therefore, the question arises further that whether credit taken on 29-8-94 can also be permitted to be transferred. For answering this question, we shall have to examine the provisions of Rule 57F(7) as it was in June, 1994. Rule 57F(7) provides that the Commissioner may permit a manufacturer having credit in his account in form RG 23A and lying unutilised on account of change in ownership or change in the site of the factory resulting from sale, merger, amalgamation or transfer to a joint venture, etc. Thus, this credit should be lying unutilised in the books on account of change in the site of the factory. In the instant case the operations closed down in June, 1994. Records placed before us showed that whatever credit was lying unutilised in form RG 23A was permitted to be transferred. In the instant case credit of differential duty was taken on 29-8-94 which is subsequent to the date when the Bangalore factory closed its operations in June. Thus, the credit taken on 29-8-94 cannot be treated as credit lying unutilised on the date of closure or change in site of the Bangalore operations. Thus, we find that there is force in the analysis done by the Id. Commissioner and brought out by the Id. DR, we, therefore, hold that the appellant was not entitled to transfer of the credit taken on 29-8-94 when the factory had closed its operations in June, 1994 and when credits lying unutilised on the date of change in site were already permitted to be transferred.

11. Insofar as paying the refund in cash is concerned, we will have to examine the provisions of Rule 57E. We find that there is a provision in Rule 57E(2). Rule 57E(2) reads as "If a manufacturer of the final product has not taken any credit or has taken credit on any inputs and subsequently it so happens that any additional amount of duty is recovered by the manufacturer of such inputs or importer of such inputs in respect of such inputs, then manufacturer of the final product shall be allowed an additional amount equal to the amount of duty so recovered, if the manufacturer or importer of such input has passed on the incidence of the additional amount of duty to the manufacturer of final products." 12. Thus, we find that there is no provision for refund of duty in cash under Sub-rule (2) of Rule 57E.

This fact is further supported by the subsequent Sub-rules (3), (4) and (5).

13. In so far as taking of credit is concerned, we note that the Bangalore operations closed in June, 1994 and since the operations closed and transfer of credit on the date of closure was allowed, there is no question of taking credit in R.G. 23A on 29-8-94. Thus, this question also is answered in the negative.

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