

Flex Engineering Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-03-2006

Reported in : (2006)(111)ECC677

Judge : R Abichandani

Appellant : Flex Engineering Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. When this matter was called out, an application was placed on record by the authorised representative of the appellant stating that the Deputy General Manager dealing with the matter was not coming to office because of illness and therefore, it was not possible to argue the matter today. The appellant is a public limited company and merely because the Deputy General Manager was not attending the office, that would not be a sufficient ground for adjourning this matter. Moreover, the learned authorised representative is present and had handled the matter before the Commissioner. When informed that, no adjournment can be granted, he has assisted the Court by raising appropriate contentions after going through the record.

2. The appeal is directed against the order of the Commissioner (Appeals) allowing the appeal filed by the revenue by setting aside the order-in-original, by which the Assistant Commissioner, Central Excise had allowed the modvat credit to the tune of Rs. 2,04,123/- in favour of the present appellant.

3. It appears from the record that the Tribunal had earlier by order dated 3.5.2001 made in three cognate appeals remanded the matters for fresh decision on each and every disputed item in accordance with law.

It was observed in paragraph 5 of that order that there was dispute regarding nature of use of some of the items and since there was no finding by the adjudicating authority specifically on some of the items, and the impugned order did not deal with all the items in dispute, the matters were remanded to the jurisdictional Assistant Commissioner for a fresh decision.

4. In the present case, the show cause notice was issued on 10.6.96 to the appellant, who was availing the modvat credit, alleging that the items listed from S. No. 1 to 32 of Annexure I, did not qualify as capital goods as per the explanation 1(a) to 1(e) of Rule 57Q of Central Excise Rules, 1944 as they neither produce, process or bring about any change in any substance used in or in relation to the manufacture of the final products nor were they specifically covered under the Tariff Headings of capital goods mentioned in the explanation to Rule 57Q of the Central Excise Rules, 1944. There was no allegation in the show cause notice that modvat credit was claimed, even though the goods were not used. However, since a common order was made by the Tribunal in remanding the matters on the ground that there was dispute about the use of the items in question, the Assistant Commissioner took into consideration the information furnished by the appellant in their reply dated 21.11.03 and held that the goods in question were covered under the definition of "capital goods" and, therefore, the party was eligible for the credit in question. It appears that personal hearing was given and Shri Kailash Chandra, Joint Executive Manager (Excise) appeared and reiterated the submissions made in reply dated 21.11.03.

The Assistant Commissioner simply decided the question about the case being covered by the definition of "capital goods". In fact, the Tribunal while remanding the matter had already held that most of the items were eligible to modvat credit as capital goods and that the dispute was regarding nature of use of some of these items.

5. The learned authorised representative for the appellant has submitted that after the remand, proper explanation was given in reply dated 21.11.03 and it was pointed out that the items namely, shape and section, joist, R.S. joist, MS channel, channel and angles were used as accessories of the EOT crane, rail of EOT crane and stand of EOT crane and these were part of the EOT crane. It was submitted that these were essential accessories of the plant without the use of which, EOT crane cannot be functional and hence the plant cannot be operational. As regards the GI sheets, it was stated that they were used for ducting of chilling plant and ducting was an accessory of chilling plant. For copper sheets, it was contended that they provided "electricity earthing" for protecting the various machineries and safeguarding human lives. He argued that there was no allegation in the show cause notice that the items were not actually used and that the Assistant Commissioner was satisfied with the explanation given by the appellant and had allowed the modvat credit in accordance with the law.

6. The learned authorised representative for the department supporting the reasoning and findings of the Commissioner (Appeals) contended that even though the items in question may be admissible for modvat credit, it was not incumbent on the appellant to prove that they were infact used by the appellant. He submitted that since the actual user was not proved despite an opportunity being given by the Commisioner (Appeals), the appellant was not entitled to avail modvat credit as claimed. He pointed out from the order of the Commisioner (Appeals) that during hearing, Shri A.K. Jain and Shri Kailash Chandra, were asked to provide consumption records and assets generated from the inputs as shown in their accounts but the assessee failed to provide any evidence on the manner in which these goods were used.

7. It is evident from the show cause notice that the only allegation made in respect of the goods for which modvat credit was claimed was that they were not capital goods. This aspect is by now given a complete go by, by proceeding on the footing that they may be capital goods under the provisions of item 5 of Column 3 of the table below of Rule 57Q(1) of the said rules. The emphasis is shifted on the question as to whether the appellant had proved that these items were actually used by the appellant. It is evident from the record that there was no allegation in

the show cause notice nor any issue earlier involved as regards the use of accessories etc. in the capital goods. However, the question of use became important in view of the directions given by the Tribunal and that is why the appellant had furnished information in the reply dated 21.11.03, which was reproduced in the order-in-original.

The Assistant Commissioner did not discuss the question of use at all and decided the matter in favour of the appellant by simply saying that after carefully going through the show cause notice, order-in-original, order-in-appeal and order of the Hon'ble Tribunal as well as party's submission, and the definition of the "capital goods" as also various decisions cited, he found that the goods in question fell within the definition of the "capital goods" and therefore, the party was entitled to the credit in question. He did not discuss about the veracity of information furnished by the party in their reply dated 21.11.03 by which they had indicated that the uses of each of these items. The Appellate Commissioner, however, while observing that the adjudicating authority had simply allowed modvat credit on the basis of citation in the defence reply without recording his views on the applicability as well as on the nature of usage and coverage of goods under the statutory provision under Rule 57Q, has chosen to decide the matter finally by holding that the appellant did not provide any evidence of the manner in which these goods were used. The Commissioner also did not consider the information which was furnished by the appellant in their reply dated 21.11.03. If any evidence was required despite the fact that there was no allegation in the show cause notice challenging the user of the goods, then the appellant ought to have been put to notice for furnishing particulars which were needed, and it was incumbent on the Assistant Commissioner, in view of the directions given by the Tribunal, to have taken such evidence on record and decide the question of the user of goods as per the directions of the Tribunal. It appears from the facts on record that majority of the items enumerated in the annexure to the show cause notice never doubted to have been used.

8. In the facts and circumstances of this case, it would have been appropriate for the Commissioner to remand the matter to the Assistant Commissioner for examining whether the items were actually used and at the appellate stage without

indicating any formal stage of recording any additional evidence. The Commissioner overlooked the fact that the Assistant Commissioner had not disputed the correctness of the information furnished in the reply dated 21.11.03 by the appellant, and if at all, proof was needed, other than what was filed by the Assistant Commissioner, to question its correctness, he should have called upon the appellant to furnish the necessary evidence. The Commissioner ought to have kept in mind the supplementary instructions issued by the Board on the aspect of production of additional evidence before the Commissioner (Appeals). In the facts and circumstances of the case, it appears that there has been denial of adequate opportunity of hearing to the appellant by catching the appellant on wrong foot at the appellate stage, when the Assistant Commissioner had not doubted in the order-in-original, the information furnished by the appellant.

Therefore, the evidence, if at all required in support of the facts stated by the appellant in the said reply dated 21.11.03, ought to have been insisted upon at the initial stage.

9. The impugned order of the Commissioner (Appeals) is, therefore, hereby set-aside and the matter is remanded to the concerned Assistant Commissioner for deciding the limited question as to the user of the relevant items in question and the admissibility of modvat credit in that context. The appeal is allowed, and the matter remanded, accordingly,

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