

**Flex Laminators Vs. Commissioner of C. Ex.**

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

**Decided On :** Aug-10-2006

**Judge :** M Ravindran

**Appellant :** Flex Laminators

**Respondent :** Commissioner of C. Ex.

**Judgement :**

1. This appeal is directed against the Order-in-Appeal dated 13-5-2004 which upheld the order-in-original confirm the demand and imposing penalty.
2. The relevant facts that arise for consideration are that the appellants are manufacturers of plastic granules and they stopped the manufacturing of plastic granules. The appellants had availed Modvat credit on the capital goods purchased by them in the year 1994-95 for such manufacturing activity. Somewhere in September, 2000, the appellants decided to close down the section and shift the same to their another factory at Malanpur. They intimated to the Department vide their letter dated 16-9-2000 regarding the removal of such capital goods without payment of duty under the provisions of Rule 173 read with Rule 156A of the erstwhile CER, 1944. Having not received any response from the authorities, the appellant on their own removed the capital goods on 4-10-2000 and 6-10-2000 by using the AR-3A given by the Superintendent of Central Excise, Malanpur Range. The appellant was issued show cause notice on 24-1-2001 for the demand of the amount of credit availed by them on such capital goods. The adjudicating authority confirmed the demand vide its ex parte order-in-original

dated 29-11-2001 and imposed penalty. On an appeal, the Commissioner (Appeals) also upheld the said order. Hence this appeal.

3. The learned Advocate appearing on behalf of the appellants submits that the appellant had sought adjournment of the personal hearing which was not granted to them and the adjudicating authority confirmed the demand without following the procedures of principles of natural justice. It is also his submission that there was no violation of Rule 57AB inasmuch as that there is no procedure to clear the warehoused capital goods from the factory. It is also submitted that even if it is so, the value which has been worked out by the authority demanding the duty is not correct and should have been worked out according to the circular issued by the Board for adjustment of the depreciation from the original value. It is also his submission that even if the amount of duty is paid by them, the same is eligible for availment of Modvat credit in other unit at Malanpur.

4. The learned DR submits that the appellant had not intimated the closure of the section in those very words. It is his submission, that for shifting of the capital goods without payment of duty from the appellant's unit at Noida. there are no provisions for such clearances of capital goods on which Modvat credit is availed.

5. Considered the submissions made at length by both the sides and perused the records. I find from the records that it is not in dispute that the capital goods were removed from the appellant's unit to their own sister concern at Malanpur. The appellant had availed the Modvat credit in the year 1994-95 and confirmation of the demand of duty on the credit availed would be incorrect, It is a common knowledge that the capital goods which are used over a period of time get worned out and value gets depreciated as such the amount of duty sought to be demanded and confirmed against the appellants is incorrect, as the value of such capital goods is to be depreciated as per the Board's circular dated 26-5-93. Further, the whole issue is regarding the removal of the goods from the one unit to another unit. It is incorrect on the part of the Revenue to contend that the appellant could not have removed the goods under Rule 173N read with Rule 156A of the Central Excise Rules. These rules are for export and re-ware housing and not for clearance of the capital goods from one unit to another. I find that, in this case it is

not disputed that the appellants had removed the goods to their own unit in Malanpur. The question of application of Rule 57AF will come into picture. I find that it is not disputed by both the sides that the unit which was manufacturing the granules in the appellants' factory has been closed. The provisions of Rule 57AF reads as under: Transfer of credit. - (1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific proviso for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilised in his accounts to such transferred, sold, merged, leased or amalgamated factory.

(2) The transfer of the CENVAT credit under Sub-rule (1) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Commissioner.

6. It can be seen that the provisions of Rule 57AF may squarely apply in this case, as they provide for the transfer of credit if the assessee or manufacturer shifts his factory to another unit if that be so, the lower authorities have not considered this aspect while passing the orders. I also find strong force in the appellant's contention that if duty reversal of Cenvat credit is to be done, they are eligible to avail the Modvat credit in their unit at Malanpur, and I find that these are the very provisions in Rule 57AF.7. Since the lower authorities have not considered the application of provisions of Rule 57AF in this case, to my mind, in the interest of justice, the matter has to be remanded back to the original adjudicating authority to consider the provisions of Rule 57AF and pass an appropriate order after granting the appellants an opportunity of personal hearing.

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