

**Jaypee Rewa Plant Vs. Cce**

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

**Decided On :** Mar-10-2003

**Reported in :** (2003)(88)ECC503

**Judge :** K Usha, N T C.N.B., P Chacko

**Appellant :** Jaypee Rewa Plant

**Respondent :** Cce

**Advocate for Pet/Ap. :** Shri. B.L. Narasimhan

**Judgement :**

1. The issue referred to us is whether CENVAT credit was admissible under Rule 57AA of the Central Excise Rules 1944 to Welding Electrodes and gases (Oxygen & dissolved Acetylene) which were used by the appellants during April to September 2000 for repairs and maintenance of machines, equipments, structurals etc. in their factory. There are conflicting decisions on similar issue by co-ordinate 2-Member Benches of this Tribunal as noted in the referral order, The East Zonal Bench, in Associated Cement Co. Ltd. v. CCE, 1991 (55) ELT 415, disallowed MODVAT credit to the assessee under Rule 57A of the Central Excise Rules, 1944 in respect of Oxygen gas and Dissolved Acetylene gas which were used for repairs of their Cement manufacturing plant. It was held that the said gases were not eligible 'inputs' as they were not used in or in relation to the manufacture of cement (final product). In the case of K.L. Rathi Steels Ltd. v. CCE, 2000 (121) ELT 843, a co-ordinate Bench at New Delhi denied MODVAT credit to

the appellants therein under Rule 57A ibid in respect of Welding electrodes used for the purpose of repairs and maintenance of machinery in their factory.

In the present case, the Commissioner of Central Excise has followed the ratio of the above decision, to deny CENVAT credit (Rs. 1,49,101) under Rule 57AA ibid to M/s Jaypee Rewa Plant (appellants) in respect of their Welding electrodes and gases for the period April to September 2000. The contrary decision of the Tribunal; noted by the Referring Bench, is the one rendered by the South Zonal Bench (Chennai) in ACC Ltd. v. CCE, 1999 (108) ELT 477 wherein it was held that Oxygen and Dissolved Acetylene which were used for repairs and maintenance of 'Raw Mill' and 'Cement Mill' in the assessee's factory were eligible inputs for MODVAT credit under Rule 57A.2. Heard Shri B.L. Narasimhan, counsel for the appellants and Shri A.S.Bedi, Sr. Departmental Representative. Learned counsel, apart from relying on the SZB's decision on ACC Ltd. v. CCE, 1999 (108) ELT 477, cited CBEC Circular No. 31/90-CX-8 dated 31.5.90 [F. No. 267/108/89-CX 8] wherein the Board had directed that MODVAT credit for inputs be allowed "on the Oxygen and Acetylene gases used for cutting runners and risers in the castings and for welding purposes and similar process of cutting and welding". He also submitted that the Supreme Court had, by dismissing the department's appeals (CAs 3489-3492 of 2001) on 17.10.2001 as reported in 2002 (139) ELT A-93, affirmed the Tribunal's decision in CCE v. Birla Jute & Industries Ltd., 2001 (135) ELT 280 wherein the Tribunal had allowed MODVAT credit on Welding electrodes under Rule 57A. Referring to the provisions of Rule 57AA, learned counsel argued that the definition of "input" under the rule was wide enough to cover the Welding electrodes and gases used for the repairs and maintenance, of the capital goods used for the manufacture of final product. In this connection, reliance was placed on the Supreme Court's judgments in J.K. Cotton Spinning and Weaving Mills Co Ltd. v. Sales Tax Officer,(SC) and Member, Board of Revenue v.Phelps and Co. (P) Ltd., 3. Learned SDR defended the order of the Commissioner by drawing support from the Tribunal's decision relied on by the Commissioner. He also relied on the Tribunal's decision in Hindustan Petroleum Corporation Ltd. v. CCE,CCE v. Samtel Colour Ltd., 2001 (135) ELT 288 and argued that the activity of repairing machinery did not amount to 'manufacture' and therefore anything used for such repairs could not be held to have been used 'in or in relation to the manufacture of

final product'. The DR also quoted from S.B.Sarkar's Words & Phrases of Central Excise & Customs (2001) Vol. 2 to explain the terms/expressions "repair and maintenance of machinery", "welding" etc. Anything used only for repairing and maintaining the machinery in a factory was not used "in or in relation to the manufacture of final product". The DR claimed support to this contention from the Tribunal's Larger Bench decision in Shri Ramakrishna Steel Industries Ltd. v. CCE, 1996 (82) ELT 575 and Union Carbide (India) Ltd. v. CCE, 1996 (86) ELT 613 as also from the Supreme Court's judgment in J.K. Cotton Spinning & Weaving Mills (vide supra).

It was also submitted that the Board's circular was not applicable to the issue under consideration.

4. We have examined the records and the submissions. The show-cause notice (SCN) issued by the department of M/s Jaypee Rewa Plant, proposing inter alia, to disallow the aforesaid credit of Rs. 1,49,101 on the Welding electrodes and gases, had alleged that these goods had been used for repairs and maintenance of various machines, machinery, equipment structural etc. and could not be said to have been used in or in relation to manufacture of cement and clinker (final products). The proposal was to deny input credit to the party. Clause (d) of Rule 57AA defined "input" as follows: "Input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production, and also includes lubricating oils, greases, cutting oils and coolants." (emphasis supplied) In their reply to the SCN, the party also treated the Welding electrodes and gases as inputs only. They never claimed capital goods credit on the goods. Nevertheless, the adjudicating authority examined as to whether the Welding electrodes (falling under Sub-Heading 8311.00 of the Central Excise Tariff (Schedule), Oxygen (SH 2804.19) and Acetylene (SH 2901.90) qualified to be capital goods for CENVAT credit.

The authority (rightly) ruled out this question and proceeded to adjudicate on the real dispute in the case.

5. The party had, in their reply, submitted that a major part of the Welding electrodes and gases had been used in the fabrication/manufacture of capital goods for captive consumption and the rest for repairs and maintenance of plant and machinery. Capital goods manufactured within the factory for captive consumption was exempt from payment of duty as per Notification No. 67/95-CE dated 16.3.95. It was contended that under the CENVAT Scheme, it was permissible to take credit on inputs used in the manufacture of capital goods for captive use, as under the MODVAT scheme, Learned Commissioner rejected this plea on valid grounds. He found that the party had not shown that they had filed the necessary declaration under Rule 173B for the manufacture of any capital goods (for captive consumption). They had also not adduced any evidence of any declaration having been filed under Rule 57G prior to 1.4.2000 for availing MODVAT credit on Welding electrodes and gases to be used in the manufacture of capital goods (for captive consumption). They had not even furnished the details of any capital goods (for captive consumption) to enable the adjudicating authority to ascertain whether the such goods were covered by the definition of capital goods under Rule 57 AA (a). Concurring with Commissioner, we find that there is no evidence on record to show that any part of the Welding electrodes and gases was used in the manufacture of any capital goods for captive consumption. The entire quantity of Welding electrodes and gases will be held to have been used only for repairs and maintenance of plant and machinery.

6. Now, on the question whether the Welding electrodes and gases used for repairs and maintenance of plant and machinery during the period of dispute were eligible inputs for CENVAT credit -- which has been answered in the negative by the adjudicating authority, both the sides have advanced extensive arguments and relied on decision of the Tribunal on similar question under the erstwhile MODVAT Rules. Much of the debate has been on the amplitude of the expression "used in or in relation to the manufacture of final products", which is a part of the definition of "input" under Clause (d) of Rule 57AA (CENVAT Scheme).

This expression was a part of the meaning of "input" under the erstwhile Rule 57A (MODVAT Scheme) also. The 'CENVAT' rules replaced the 'MODVAT' rules on 1.4.2000. The period of dispute in the present case is April to September 2000. We shall read the above expression, for our purpose, as "in or in relation to the manufacture of cement/clinker" (hereinafter referred to as the said expression), Ld.

Counsel has argued that the said expression is wide enough to cover the Welding electrodes and gases used for repairs and maintenance of plant, machinery and equipments in the appellants' factory. The argument is that if, in the case of Phelps and Co. (supra), the hand gloves used by factory workers for handling corrosive substances in the course of manufacture of goods for sale could be said to have been used in the manufacture of goods for sale" within the meaning of Section 5(2) (a) (ii) of the Bengal Finance (Sales Tax) Act 1941, then the Welding electrodes and gases used by the appellants in their factory for repairs and maintenance of machinery should be held to have been used "in or in relation to the manufacture of cement/clinker" within the meaning of Rule 57AA (d) of the Central Excise Rule 1944. We are unable to persuade ourselves to accept this argument which, in our view, is not supported by the ruling of the Apex Court in J.K. Cotton Spinning & Weaving Mills (supra) which was applied by the Court in Phelps & Co (supra). In J.K. Cotton Spinning & Weaving Mills, the court had interpreted the expression "in the manufacture of goods" [occurring in Section 8(b) of the Central Sales Tax Act, 1956] and, ruled as under: "The expression in the manufacture of goods should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression 'in the manufacture of goods.'" According to the above ruling, goods used in any particular activity in the course of the entire process of converting raw materials into finished goods would be held to have been used "in the manufacture of goods. Repairs and maintenance of machinery are not normally done when the process of manufacture of goods with such machinery is under way.

They are not a part of, or integrally connected with, the process of manufacture of final product. The Welding electrodes and gases used by the appellants for repairs and maintenance of machinery cannot be considered to have been used "in relation to the manufacture of final products" as they were not used co-extensively with the process of manufacture of cement/clinker and hence not integrally connected with the manufacture. We, therefore, hold that the Welding electrodes and gases used for repairs and maintenance of machinery in the appellants' factory during April-September 2000 were not eligible inputs for CENVAT credit under Rules 57 AB and 57 AC.7. It has not been shown to us that the welding electrodes in the case of Birla Jute & Industries considered by the Tribunal were used for repairs and maintenance of capital goods. Therefore, the appellants do not stand to gain anything by submitting that the Tribunal's decision in Birla Jute & Industries has been affirmed by the Supreme Court. We have also perused the Board's circular cited by the counsel. The circular deals with Oxygen and Acetylene gases actually consumed in the process of manufacture of final products and not to the gases used for repairs and maintenance of capital goods. It does not help the appellants before us.

8. Having answered the referred issue in favour of the Revenue, we affirm the Commissioner's order in relation to CENVAT credit on Welding electrodes and gases for the period April to September 2000 and reject the appeal on merits. However, in the facts and circumstances of the case, we set aside the penalty of Rs. 2000 imposed by the lower authority.

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