

Collector of Central Excise Vs. Standard Alkali

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-11-1991

Reported in : (1992)(59)ELT127Tri(Mum.)bai

Appellant : Collector of Central Excise

Respondent : Standard Alkali

Judgement :

1. The aforesaid four appeals from the Department involve consideration of the common issue - namely eligibility of Modvat Credit on graphite anodes and titanium metal anodes used in the electrolysis of brine solution for obtaining caustic soda lye. The common issue involved is whether, they come under the excluded category of item figuring in the explanation to Rule 57A. Hence both the sides preferred to advance common arguments. They were heard together and all the Appeals are proposed to be disposed of by this common order.

2. E. 479/90 is directed against the order in appeal passed by Collector (Appeals) bearing No. GSM. 284/90 B. III dated 20-9-1989 allowing the appeal of the respondents and permitting availment of modvat credit in respect of Titanium metal anodes. The other three appeals listed at S. Nos. 2 to 4 above have been filed by Collector of Central Excise, Baroda against the common order of the Collector (Appeals) bearing No. 208/90 dated 16-4-1990, under which he allowed the three appeals of the respondents, thereby holding that duty paid on graphite anodes used in the electrolytic cell for manufacture of caustic soda is eligible for modvat credit.

3. Heard the elaborate arguments of Shri Mondal, the Id. S.D.R., on behalf of both the Collectors. At the outset, he was fair enough to concede that this Bench as well as the South Regional Bench have held that Titanium metal anodes are eligible inputs for modvat credit. Even the reference application brought forth by the Department was dismissed by this Bench. He also agreed that in the case of graphite electrodes, the Board themselves have clarified that they, being consumables, are eligible for modvat credit. However, certain aspects, which should have been looked into by the Bench, as is reflected from the subsequent decisions in similar cases, appear to have been missed by the Bench, while deciding the issue in favour of the assesseees in the earlier decision. He pleaded that it would be his endeavour to refer to them.

(i) The Board's clarification contained in letter M.F.D.R. No. 822/51/86-TRU, dt. 21-10-1986 (reproduced in pages 174-175 of E.L.T. dt. 15-12-1986) has not looked into this question as to whether they go with the functioning of the electrolytic cell (which is an equipment) or go into the product stream for the manufacture of caustic soda lye. It only says that graphite electrodes are a consumable used in the manufacture of metal. Moreover, that clarification is with regard to graphite electrodes used in the manufacture of iron or steel products and carbon electrodes used in the manufacture of aluminium. The issue involved in the present appeals relates to graphite anodes, which are admittedly terminals of electrolytic cell, which is an equipment used in the manufacture of caustic soda lye. The function of graphite anodes in electrolytic cell is only to conduct electricity and it goes as part of the equipment as terminal of the electrolytic cell.

(ii) He referred to the McGraw Hill Dictionary of Scientific and Technical Terms. According to this dictionary, A cell is a cup jar or vessel containing electrolytic solutions and metal electrodes to provide an electric current (conductometric or potentiometric) or for electrolysis (electrolytic). 'Electrolysis', according to the dictionary means a method, by which chemical reactions are carried out by passage of electric current through a solution of an electrolysis or through a molten salt. 'Electrolytic Cell' means a cell consisting of electrodes immersed in an electrolytic solution, for carrying out electrolysis. 'Electrolyte' means a chemical compound, which, when molten or dissolved in certain solvent - usually water will

conduct an electric current. From the above, it is evident that graphite anode or Titanium metal anode is an electrode for conducting electricity for the process of electrolysis and it is a part and parcel of the electrolytic cell, which is an equipment.

(iii) He also referred to the respondent's own write-up to show that such anodes are identified as parts of cell plant.

(iv) Relying on the decision of the Bench in the case of Collector of Central Excise, Bombay-II v. Poysha Industrial Ltd. - Order No. 179-180 dated 22-2-1991, whereunder, the scheme of Modvat, the principles laid down for applying Rule 57A have been set out by the Bench, he pointed out that the Tribunal has taken note of the fact that there are many items - such as Rubber blankets, Conveyor Belting, lithographic plates, which are functionally identifiable as part of the machine and such items have been held to be not eligible for Modvat Credit, even though they get consumed either after one use or after repeated usage. Likewise, the Tribunal has observed that materials such as refractories, ramming mass etc. go as constructional materials in the furnace and they are to be replaced often for the upkeep and maintenance of the furnace. Hence they cannot be held to be used in or in relation to the manufacture of.

"The question to be looked into, is not whether they get consumed or otherwise. The question is whether they function as a part of the machine for the intended purpose for the functioning of the machine.

If the answer is 'Yes', they cannot be input eligible for modvat benefit." Applying the same criterion, in this case, either graphite electrode (anode) or Titanium metal anode, which functionally go with the electrolytic cell, cannot be held to be input under Rule 57A. (v) He also referred to the decision of South Regional Bench in the case of Rapsri Engg. Industries Ltd. - 1991 (17) ETR 580, wherein it has been held that graphite rods used for stirring molten metal only performs a mechanical function and is therefore an apparatus, extended for modvat benefit.

(vi) The Special Bench decision in the case of Gwalior Rayon Silk Mfg. (Wvg.) Co. - 1988 (35) E.L.T. 227 (Tri.) have held that Titanium metal anode is eligible for

benefit under Notification No. 201/79. He also agreed that an appeal taken against that order by the Department has been dismissed by the Supreme Court. But he contended that the decision of the Special Bench is on the interpretation of Notification No. 201/79 and not in regard to its eligibility for Modvat credit in terms of Rule 57A, where there is a specific exclusion against machinery, equipment, instrument, tools etc. Hence it is distinguishable.

(vii) Finally, he pleaded that the Tribunal should not be carried away by the instructions of the Board in regard to graphite electrodes. It can independently judge on the validity of these instructions on the basis of the legal provisions contained in Rule 57A. In other words, if the aforesaid instructions of the Board do not fit in with the provisions of Rule 57A, that should not be binding on the Tribunal and it should not come in the way of the Tribunal deciding that graphite electrodes used for electrolysis in the manufacture of caustic soda lye is not eligible for modvat benefit. The Board is bound to change its stand, once the legal position is decided by the Bench.

5. Heard S/Shri Srinivasan and Mehta in reply. For the sake of brevity, we do not intend setting out their arguments in detail but would consider them in the course of our findings at the appropriate stage.

6. We have decided the issue relating to the eligibility of modvat credit in respect of Titanium Metal anode against the Revenue, in M/s.

Gujarat Alkalies & Chemicals - 1989 (41) E.L.T. 424. We have also rejected a reference application on this issue. However, the issue relating to eligibility of modvat credit for graphite anodes, which also perform the same function as Titanium metal anode, is coming up before us for the first time. In fact, while dealing the case relating to Titanium metal anode, the admitted position before us from both the sides was, that while graphite anodes are eligible for modvat credit, titanium metal anode is not entitled. The Department's objection then was that titanium metal anode, though performing the same function as graphite anodes, is of more durable nature and is not consumed as graphite anode and hence is not a consumable. It is a plant item. We rejected this contention on the ground that Rule 57A does not talk of raw materials or components or consumable. It refers to

goods "used in or in relation to the manufacture of final product". Hence, when graphite electrode performing an identical function has been held to be an eligible input by the Department, Titanium metal anode, which is reported to be a better substitute, cannot be denied only on the ground that it does not get consumed as quickly as graphite electrode. Such a distinction cannot be drawn from the Rule 57A. Now, the eligibility for graphite electrode also (in the three appeals before us) has been challenged by the Department. In view of shift in the Department's stand, it has become necessary for us to consider all the elaborate arguments of Shri Mondal for determining the eligibility of modvat credit on not only graphite electrodes but also on Titanium metal anodes (decided earlier by us). This is what we propose to do in the following paras: 7.1 Taking the arguments with regard to the Board's instructions contained in M.F.D.R.NO. 822/51/86-TRU dated 21-10-1986, we agree that these instructions have been given in respect of graphite electrodes used in the manufacture of iron or steel and carbon electrodes used in the manufacture of Aluminium. But the Board have also clarified that similar consideration would hold for other electrodes also, which are used in the manufacturing process - (vide para 5 of the said instruction). The Board have observed that modvat credit is being denied on the ground that graphite electrodes are classified under Chapter 85, as per Section Note XVI Note 5 and the contention is not correct, since Note 5 is only for purposes of Section Notes 1 to 4.

Hence, graphite and carbon electrodes are to be treated as consumables, irrespective of whether such electrodes, in part or full, form part of the finished product. This, in nutshell, is the clarification of the Board. From the above, it is evident that though the clarification is in the context of graphite/carbon electrodes used in the manufacture of iron or steel/aluminium respectively, it will hold good for other electrodes also, which are used in the manufacturing process. The objection raised by Shri Mondal on this ground does not find support even from para 7 of the Board's letter. That was presumably the reason why it was admitted by the Department before us earlier, while considering the eligibility of modvat credit on titanium metal anode, that graphite anode used in electrolytic cell for production of caustic soda lye is eligible for modvat credit, because it gets consumed, while titanium metal anode, performing the same function cannot get the credit, because it does not get consumed as quick as graphite anodes.

We, therefore, are to take it that it must be the practice in other Collectorates to extend modvat credit for graphite anodes based on this Board's letter. This, being the position, is it correct on the part of the appellant Collector to deviate from this and take a different view Administratively and also on ground of equity consideration of maintaining uniformity of practice to avert discrimination in tax incidence, such a step is not required to be encouraged. Moreover, the Board also draw the legal powers for issuing such instructions for purposes of ensuring uniformity. Hence, we would be well justified in rejecting such a contention; all the same since we deal with a quasi-judicial order of the lower authority, where the binding nature of the executive clarification is debatable and the adjudicating authority is to take an independent view based on the legal provision, we propose to consider the other arguments of Shri Mondal on merits.

7.2 Despite repetition, we are to observe that the question to be looked into, in the context of Rule 57A, is not the one whether it is consumed wholly or partly or the longer duration for repeated usage or whether it is consumable or otherwise. The first pertinent question to be raised is whether the item claimed as input is used in or in relation to the manufacture of final product. If the answer is 'yes', the next question is whether both namely the item claimed as 'input' and the final product where it is claimed to be used, are notified under modvat scheme. If they are so notified, they become eligible for modvat credit subject to the important provision namely - whether the said input comes or does not come under the excluded category listed in the explanation to Rule 57A. These are the three acid tests prescribed under Rule 57A and nothing else. Hence, in the present appeals, there is no dispute that graphite/titanium metal anodes are used in the manufacture of caustic soda lye. They are also notified under the modvat scheme. The area of dispute is whether they come under the category of plant items - functionally identified with electrolytic cell - an equipment and hence are hit by the explanation to Rule 57A.⁷³ For considering this dispute, in greater detail, we are to take note of the following factors: 2. Even as per the definition of McGraw Hill Dictionary Electrolytic Cell is a cell consisting of electrodes immersed in an electrolytic solution, for carrying out electrolysis. Electrolysis is a method by which chemical reactions are carried out by passage of electric current through a solution of an electrolytic or through a molten salt.

From the above, it is clear that even electrolyte solution is to be present in the cell for purposes of electrolysis, apart from electrode.

Unless both are present, process of electrolysis cannot be effected.

This, being the technical position as reflected from the said dictionary, we find that the Department cannot take objection against modvat being given to materials going into electrolyte solution for being reacted upon. Objection is taken with regard to anode being a part of the cell. This approach does not carry conviction, because, technically a cell should consist not only of anode but also of electrolyte compound of materials.

7.4 Moreover, in the arguments pleaded before us by the respondent's counsels, it is evident that both graphite/titanium metal anodes participate directly in the chemical reaction process to generate caustic soda, chlorina and hydrogen. It is not a mere conductor of electricity. It also inducts chemical reaction and directly results in production of caustic soda. This technical aspect revealed by the learned Counsels for the respondents, has not been challenged by SDR. In view of this, even on technical grounds, they go with the electrolytic chemical reaction process and can be held to be directly used as an input in generating caustic soda.

7.5 We also had a look at the question from the criterion laid down in the case of Poysha Industrial Ltd. (Order No. 179-180 dated 22-2-1991).

We find that in that case considered by us, the items involved were rubber blankets and lithographic plates claimed by the manufacturers to be components in relation to metal containers. We held that these items are components of printing machinery and they go with the functioning of printing machinery. They are the components for doing the physical and mechanical process of printing on the metal sheets. Lithographic plate acts as printing media and rubber blanket as transfer media and hence are components of the machine. Here electrodes, though are terminals, do not stop with mere conducting electricity but directly participates in the electrolysis process and chemical reaction inducted over the electrolytic solution resulting in production of caustic soda.

The technical and factual position in the two cases are distinguishable. Even going by the principle laid down in our aforesaid judgment, functionally the electrode in this case can be held to be a direct input in the electrolysis process, which results in production of the final product by chemical reaction. Hence, it cannot be treated on par with a printing media or transfer media fitted as a component in a printing machine.

7.6 Shri Mondal's reference to the decision of the Southern Regional Bench - 1991 (17) ETR 580 - in our opinion, is not relevant. In that case, graphite rods used in the mechanical process for purposes of stirring molten metal was considered and not graphite electrodes or titanium metal anodes, which directly participate in electrolysis inducing chemical reaction.

3. We, however, find that the S.R.B. in the case of T.C.C. Ltd. [1990 (50) E.L.T. 172] and also in the case of 1990 (50) E.L.T. 289 have approvingly adopted the decision of the Bench in 1989 (41) E.L.T. 424 in the case of Gujarat Alkalies & Chemicals and they have also extended the benefit of modvat credit in respect of titanium metal anodes.

Hence, we do not find any merit in Shri Mondal's relying on the judgment of South Regional Bench in the case of Rapsri Engg. Industries Ltd. - 1991 (17) ETR 580 passed in the case of graphite rods used as stirrer in the molten metal.

7.7 Shri Mondal argued that the Special Bench decision in the case of Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. - 1988 (35) E.L.T. 227 (Tri.), which has been upheld by the Supreme Court, by rejecting the Department's appeal, is in relation to benefit under Notification No.201/79 for Titanium metal anode and not in relation to its eligibility for Modvat credit. This argument is mentioned for rejection for the reasons below. As seen from the judgment of the Special Bench, the question considered by that Bench was the Department's objection that titanium metal anode is used as part of electrolytic cell and hence being a part of the plant cannot be termed as input used in manufacture of caustic soda lye. This was the basic objection of the Department, which was negated by the Special Bench. The said finding of the Special Bench has been upheld by the Supreme Court. We also observe that the Department's appeal before Supreme Court was also on this

ground that Titanium anode is more durable and is a plant item. Hence, even apart from our independent consideration of the technical issues on merits, this position as input has been upheld by the Supreme Court directly in the case of Titanium anodes by rejecting the Department's appeal on the above ground. This ratio is also equally available for graphite electrodes performing the same function.

8. Thus viewed from all the angles, however, diligently attractively, the arguments were presented by Shri Mondal, we could not persuade ourselves to deviate from the stand, we had taken earlier in 1989 (41) E.L.T. 424 in the case of Gujarat Alkalies & Chemicals Ltd.

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