

**C.C.E. Vs. Travancore Electro Chemical**

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

**Decided On :** Oct-26-1994

**Reported in :** (1994)(74)ELT936TriDel

**Appellant :** C.C.E.

**Respondent :** Travancore Electro Chemical

**Judgement :**

1. This is an appeal filed by the department (Collector of Central Excise, Cochin) against the order of Collector of Central Excise (Appeals), Madras No. 47/88, dated 27-4-1988.

2. The Respondents have sent a telegraphic request for adjournment on the ground that the concerned Executive Director was ill.

3. It is however, observed that the matter has come up on Board several times and on the last two occasions it was adjourned on the request of the appellants on mention by the Ld. Counsel Shri Lahoty and today's date was fixed after taking note of the convenience of both the sides as a whole day matter. Therefore, we are surprised to see that the Ld.

Counsel has not appeared and the request has been sent on above ground.

We do not consider it as sufficient ground as it was open to the Ld.

ST. Counsel to appear and argue.

4. We therefore, reject the request for adjournment and allow the Ld.

D.R. to proceed with the matter. While doing so we also taken note of the fact that the Respondents have also filed a voluminous paper book, besides their reply to the Show Cause Notice which contains a list of documents relied by them in support of their contention.

5. Ld. D.R. stated that the main issue in this case relates to excisability and classification of the acetylene gas produced by the appellants and consumed captively in their plant for manufacture of acetylene black.

6. In the Order-in-Original the Assistant Collector has held that the acetylene gas manufactured and consumed by the firm does not confirm to ISI specification or trade nomenclature and was highly impure and explosive and was not capable of being bought and sold hence it was not goods and therefore it was not necessary to classify it under old Tariff Item 14H.7. The department had filed an appeal against this order but the Collector (Appeals) rejected the department's application observing inter alia that the Tariff Item 14H does not include all gases and it does not say anything above. marketable condition. He further observed that no evidence has been brought whether impure acetylene gas was capable of being marketed.

8. Therefore, holding it as not capable of being marketed he rejected the application.

10. The Respondents in their reply to Show Cause Notice mainly emphasised that the acetylene produced by them was so produced in continuous process and was impure, explosive and unmarketable and could not be considered goods in view of the Hon'ble Supreme Court's judgment in the case of Delhi Cloth & General Mills Co. Ltd., 1980 (6) E.L.T. 383 (SC).

11. They had also relied upon judgment of Hon'ble Supreme Court in the case of South Bihar Sugar Mills, 1978 (2) E.L.T. (J 336) (SC) in respect of carbon dioxide

12. They had also mentioned that the acetylene gas produced by them was not dissolved in water and it was distinguishable from the marketable acetylene in

view of the ISI Specifications No. 308/1977. They had emphasised that their process of manufacture was different from the conventional process of manufacture of dissolved acetylene gas and stated that the acetylene gas produced by Bharat Heavy Electricals and Steel Authority of India Ltd. were also not subjected to any excise duty. They had also referred to the judgment of Union Carbide v. Union of India, 13. It was also their contention that the disputed substance is not pure acetylene gas but a mixture or combination of different gases namely phosphine, arsine and ammonia and this mixture or composite substance has no name in commercial parlance and technically also it is not a single well defined gas. As such it does not conform to description in Tariff Item 14H.14. It was their contention that since the material is not 'goods' therefore, the question of its removal with reference to Rules 9 & 49 also does not arise and they are not liable to pay any duty with reference to Tariff Item 14H or otherwise.

15. In support of their contention the Respondent have mainly relied upon the ISI specifications and a certificate issued by Essen & Co.

dated 17-9-1979 which indicates the composition of their products and they have relied heavily upon it to show that in view of the ingredients mentioned therein the substance was crude and impure.

16. They have also included in the list of their documents a report of the Chemical Examiner of the Customs House, Cochin and the Board's letter (CBEC Tariff Advice No. 68/81, dated 15th July, 1981 and certificates from Union Carbide, Eastern Air Products and Indian Oxygen.

17. The Respondents have also included a lot of technical literature and excerpts from various books including Encyclopaedia of Chemical Technology by Kirk-Othmer.

18. Ld. D.R. further submitted that he would like to draw attention to the Memorandum of Appeal and in particular to the grounds of appeal mentioned therein. It was his submission that in this case the acetylene gas is produced by reacting Calcium Carbide with water and transmitted by a pipeline for captive consumption within the factory for production of acetylene black.

19. There is no dispute about the process of manufacture. There is also no dispute that the acetylene gas so produced is in gaseous state and is not dissolved in water.

20. There is also no dispute that the gas so produced contains a very small percentage or traces of impurities.

21. There is no dispute that the gas is produced in a continuation process and utilised as such.

21(a). There is also no dispute that at one stage the CBEC had issued the Tariff Advice No. 68/81 and therein mentioned that the ISI specification and trade nomenclature of the commodity are required, to be kept in view and in the case of impure acetylene gas emerging in a continuous and uninterrupted process of manufacture; and the board consider such a case as not classifiable under 14H. However, it had revised this advice and issued another Advice No. 25/82 dated 11th May, 1982 in which it has been mentioned that it may not be necessary that the gas should conform to the relevant ISI specifications and whether in a given case it was assessable to duty may be decided on the basis as to whether it could be considered as goods.

22. Even otherwise the Tribunal is not bound by opinion or advice of the departmental officers or CBEC and is free to take its own view.

23. It was therefore his submission that the grounds of appeal indicated by the Collector may be considered on their own merits.

24. It was his submission that the acetylene gas produced by the Respondents is not a mixture of gases and the lower authorities have erred in not taking this fact into consideration.

25. In this connection, he would draw attention to the Certificate of Essen and Co. produced by the Respondents themselves. This certificate shows that apart from moisture the other compounds are presented only in a negligible quantity, the phosphine being only 0.21% by volume and H<sub>2</sub>S, ammonia and arsine being only in traces by volume. It was his submission that the product remains acetylene gas

inspite of presence of these impurities in miniscule quantities or traces. In fact the commercial acetylene is recognised to have such .impurities and yet is treated, marketed and used as acetylene commercially. In this respect he would draw attention to the literature filed by the Respondents themselves and in particular to the extracts from Encyclopaedia of Chemical Technology by Kirk-Othmer and the extract from Compressed Gas Association Inc. The later indicated therein at para 2.2, the physical and chemical properties and refers to acetylene gas of ordinary commercial purity and gives in para 2.4 its commercial uses. In the extract from the Kirk's book, it is mentioned that it has [sic] industrial applications and the practice established during the last decade of transporting large volumes of compressed acetylene through pipe lines from central producing station to industrial users in the context of handling problem due to its explosive nature. The excerpts from Dangerous Properties of Industrial Material also refer to the presence of impurities in commercial acetylene and go on to mention that in general industrial practice however, acetylene does not constitute a serious hazard.

26. The excerpt from Micropaedia-Encyclopaedia Britannica mention that the acetylene prepared from Calcium Carbide usually contains traces of phosphine.

27. It was his submission that thus it will be seen from the excerpts of technical and other literature filed by the Respondents themselves that acetylene gas containing a bit of impurities continues to be recognised commercially as acetylene. This also shows that in view of its explosive nature what the persons concerned have to do is to take some extra precautions and transmitting through pipe line is one of the modes of transport adopted.

28. The literature filed by the Respondent also proves that it is a-commercial commodity i.e. it is marketable or capable of being marketed albeit with a bit of precaution.

29. It was therefore his contention that the lower authorities have erred in not considering it as goods. Since it satisfies the test of marketability laic down by the Hon'ble Supreme Court, therefore, it should be considered as goods. In this connection, he would also like to mention that merely because a product does not

confirm to ISI specification it does not mean that it is not marketable or is not goods. In this respect he would rely upon Tribunal's order in the case of ILAC Limited v. CCE, Bombay reported in 1985 (21) E.L.T. 532 which specifically refers to dutiability of Calcium Carbide and Acetylene not confirming to ISI. It mentions that ISI Certification is not a regulation of quality but only a certificate of quality and it is not meant to say that goods not marketed with ISI specifications are not goods of that name. If Calcium Carbide and Acetylene produced by the appellants does not meet ISI specification it only shows that they are not of this quality but that is not to say that the products are not calcium carbide or acetylene.

30. Goods can be of various qualities and purity even among standard goods which are marketed as such. Therefore, it was his contention that excisability or dutiability cannot be determined merely on the basis of ISI specifications.

31. It was also his submission that the purity is also not the criterion laid down in the Tariff Item 14H for the purposes of classification under that heading.

32. Even otherwise the Tribunal has itself held in the case of Ugar Sugar Works Limited, 1993 (68) E.L.T. 224 that carbon dioxide (raw/impure) was classifiable under Tariff Item 14H, duty not being restricted to technically pure carbon dioxide and that ISI norm was only for quality control and not conclusive of classification.

33. It was also his submission that it was immaterial as to whether the gas was produced in a continuous process or not and in this connection he Would like to rely upon Tribunal's order in the case of Verma Industries reported in 1984 (18) E.L.T. 403.

34. It was his contention that the acetylene gas produced by the appellant was therefore, excisable in the condition in which it was produced and the process by which it was produced.

35. It was also his submission that since the tariff as it stood at the relevant time specifically mention acetylene (whether in dissolved condition or holt) under Item No. 14H therefore, acetylene was classifiable under this heading and dutiable as such.

36. We have considered the above submissions. We have also gone through the Respondents' contentions including submissions made in the reply to the Show Cause Notice and also perused the documents filed by them in {he paper book.

38. We note in this connection that there is no dispute on facts relating to either the process of manufacture, the mode of its transmission or captive consumption by the appellant. There is also no dispute about the results of the test analysis and the Ld. D.R. has proceeded on the basis of the test analysis filed by the Respondents themselves.

39. We also note that the Ld. D.R. has referred to the excerpts from the technical literature (again filed by the Respondents themselves) and rightly so.

40. It is apparent from a perusal of this technical literature that the acetylene even if it is slightly impure continues to be recognised as commercial acetylene that is to say the presence of other ingredients in miniscule quantities or traces notwithstanding.

41. The literature also shows that such acetylene is also capable of being transported and marketed and is actually so transported and marketed for industrial application and other uses. The material produced before us and referred to by the Ld. D.R. above is sufficient to show that the acetylene gas produced by the Respondents satisfies the marketability test and is 'goods'. The fact that it is not dissolved in water is immaterial as the tariff entry itself mentions specifically acetylene (whether in dissolved condition or not). The ISI specification produced by the Respondent is for dissolved acetylene gas and not for undissolved acetylene. In any eventuality it has already been held by the Tribunal in the cases cited by D.R. above that the ISI specification is merely indicative of quality and is not a conclusive proof by itself of something being goods or not.

42. The percentage of purity is also immaterial as it is not a criterion for the purpose of classification under Tariff Item 14H. Even otherwise as we have seen the acetylene gas containing other ingredients in miniscule quantities or traces continues to be recognised commercially as acetylene.

43. In these circumstances the fact that the gas is produced in continuous process also does not make any difference.

44. Further more in view of above position the fact that the CBEC had thought otherwise at one stage does not make any difference to the situation factually or legally.

45. We, therefore, are of the considered opinion that in view of technical and other literature filed before us by the Respondents themselves and relied upon by the Ld. D.R. as well in support of department's contention and the ratio of the orders cited before us by the Ld. D.R., the acetylene gas produced by the appellants was excisable and classifiable under Tariff Item 14H and dutiable accordingly. We therefore allow the appeal.

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