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Delhi High Court

Case No: Writ Petition (C) 2118 of 1985

Grasim Industries Ltd. (Formerly Gwalior Rayon Silk MFG. WVG. Co. Ltd.)		APPELLANT
	Vs	
The Secy., Deptt. of Science and Technology, Govt. of India and Others		RESPONDENT

Date of Decision: March 7, 2013

Acts Referred:

- Companies Act, 1956 - Section 617
- Income Tax Act, 1961 - Section 32A(2B), 32A(2B)(ii)
- University Grants Commission Act, 1956 - Section 3

Hon'ble Judges: R.V. Easwar, J; Badar Durrez Ahmed, J

Bench: Division Bench

Advocate: S. Ganesh, with Mr. Ajay Bhargava, Mrs. Vanita Bhargava and Ms. Gauri Rishi, for the Appellant; Jatan Singh, CGSC with Mr. Tushar Singh and Mr. Soayib Qureshi, for the Respondent

Judgement

Badar Durrez Ahmed, J.

This writ petition seeks the quashing of the orders dated 10.10.1979, 21.01.1980 and 18.05.1985 whereby the respondent Nos. 1 and 2 have refused to issue certificates to the petitioner u/s 32A(2B)(ii) of the Income Tax Act, 1961 in respect of the relevant assessment years. The petitioner has also prayed for the issuance of a writ of mandamus directing the respondent Nos. 1 and 2 to grant the certificates in terms of the provisions of section 32A(2B)(ii) of the said Act to the effect that the petitioner has manufactured or produced caustic soda, liquid chlorine and hydro-chloric acid by using the technology (including the process) and other know-how developed by Central Electrochemical Research Institute (CECRI), which is a unit of National Research and Development Corporation of India (NRDC). It is the case of the

petitioner that CECRI is a specified laboratory and, therefore, the certificate ought to have been issued for the assessment years 1979-80 to 1983-84. A writ of mandamus is sought in this regard. The petitioner has also prayed for issuance of a writ of mandamus directing the respondent No. 3 to admit and take on record the said certificates for assessment years 1979-80 to 1983-84 and to grant investment allowance at the higher rate of 35% as claimed by the petitioner as against the rate of 25% already granted by the income tax department to the petitioner.

2. The facts are that the petitioner manufactures inter alia caustic soda at its plant at Nagda, Madhya Pradesh. Most of the caustic soda produced by the petitioner is captively used for production of viscose staple fibre/Rayon. Earlier, the petitioner was using graphite anodes in its process of electrolysis for production of caustic soda. However, the use of graphite plates as anodes had several disadvantages which had been pointed out by the petitioner at the time of filing the application for the grant of the said certificates. The disadvantages were as under:-

1) The graphite plates get eroded and have to be replaced after a fixed interval (say about 10-12 months).

2) The voltage drop across the cell using graphite plates is high as the chlorine gas produced in the cell does not escape through the graphite anode fast enough and bubbles of chlorine gas get deposited on graphite surface which offer resistance to the flow of current from anode to cathode. This phenomenon is called "Bubble effect".

3) The Graphite particles which fall due to erosion of graphite plates get mixed with brine and mercury and cause process trouble.

4) The cell gas is contaminated by gases like carbon dioxide and carbon monoxide and increased level of hydrogen gas.

5) The voltage drop across the cell goes on increasing as the graphite anodes get older and older which further increases the power consumption.

3. It was also indicated in Annexure-G to the application filed for the grant of certificate that as a result of prolonged research and experimentation, CECRI at Karaikudi, Tamil Nadu, attached to NRDC, developed and evolved the technology for the manufacture of caustic soda by employing Titanium Substrate Insoluble Anodes (TSIA). The use of TSIA in the production of caustic soda actually reduced the disadvantages which existed when graphite anodes were used.

4. TSIA consists of ''fingers'', that is, circular rods of a small diameter welded in a frame-like configuration and bound by a super-structure of longitudinal and cross ribs. The material of construction is titanium. The anode surface (facing the electrolyte) is coated with a super thin coating of rare earth metal oxides. This coating participates actively in the electrolysis. Unlike graphite anodes the metal anodes do not lose their shape or dimensions, hence they are referred to as

"permanent type" anodes. After a reasonably long service life of 20 to 24 months, the coating wears off and at this stage, the anodes are sent in for re-coating. Due to its unique characteristic of maintaining constant dimensions, it had become possible to obtain a reduced (and most optimum) gap between the anode and cathode. Graphite anodes in worn out condition offered a very rough and uneven surface for electrolysis and due to this the gap between the graphite anode and flowing film of mercury cathode could not be reduced in practice to less than 5 to 6 mm. In case the gap was reduced beyond this level, there was every possibility of the anodes touching the cell bottom containing the flowing film of mercury at certain places, thereby resulting in a short circuit which would damage the anodes, disturb the mercury flow and stop the electrolysis. Metal anodes having smooth surface have a great advantage over graphite anodes in this respect. With proper anode adjustment devices it has been possible to continuously maintain a gap of 2 to 3 mm between the two electrodes, without risking a short circuit. Reduced electrode gap (sometimes called as brine gap) results in lower voltage and a lower power consumption. With the Titanium Substrate Insoluble Anodes (TSIA) the other disadvantages of graphite anodes stated herein-above are also eliminated. Loss of graphite is eliminated. Chlorine gas remains free of Carbon Dioxide and Carbon Monoxide. Apart from a reduced brine gap, the bubble effect is negligible. This results in a reduction in cell voltage which entails a further reduction in power consumption which is a major raw material in the manufacture of Caustic Soda. It was also pointed out by the petitioner that alongwith the new technology and process which had been developed by CECRI with the use of TSIA, the petitioner had installed an electrolyser suitable for the purpose which operated on the new technology and which had entirely new features, appliances and instruments. The new electrolyser installed by it was totally different from the old electrolyser. The petitioner pointed out as under:-

The most important part of the electrolyser system viz. anodes are supported by the top frames and the frames in turn are supported by jacks. The top frames are supported by special type of jacks manufactured for the purpose. The main top supporting anode frames is also specially designed and manufactured implementing the major changes to incorporate motorized drive mechanism. The top rubber cover serving as a lining to the top cover is also re-designed to suit the operation of the Titanium Substrate Insoluble Anodes. Configuration of the electrolyser system is completely re-designed with new devices, machineries, appliances and instruments necessary for adopting the new technology and process and for effecting all possible improvement in the operation and functioning of the electrolyser system.

Presently graphite anodes are adjusted manually by raising and lowering of the jacks which support the frames holding these anodes. However, with the installation of Titanium Substrate Insoluble Anodes, a motorized anode adjustment system is required to be provided along with these anodes so as to obtain very uniform and

precision anode adjustment. If this is not done, one main purpose of obtaining a minimum electrode gap would be defeated. When one talks about an electrode gap of 2 to 3 mm, the anode adjustment has to be very much mechanized and uniform.

5. We may also point out that in the application made by the petitioner for each of the years, the petitioner had, in response to the query at serial No. 7 of the form with regard to filing the details of engineering assistance/services rendered by the laboratory to utilize the know-how, had given the following answer:-

The Scientists of Central Electro-Chemical Research Institute, who have developed the new technology and process of manufacturing Caustic Soda and Engineers of Titanium Equipment and Anode Manufacturing Co. Ltd., which has been licensed to use the technology and know-how for manufacturing Titanium Substrate Insoluble Anodes visited our factory and provided us the necessary technique and guidance for designing and installing the electrolyser suitable for the new technology and process and assisted us in commissioning the same. They also advised us regarding adoption of suitable process conditions. They still continue to advise and guide us whenever we approach them.

6. However, the said applications of the petitioner were rejected. The first rejection came by virtue of the impugned order dated 10.10.1979 which is to the following effect:-

I am directed to refer to your letter No. GRCN/79/2795 dated 10th July, 1979 and discussions which Dr. R. Vaidyanathan, your representative had in this Department on 20th Aug., 1979 regarding the issue of certificate u/s. 32-A(2B) of the income tax Act and to say that your application has been carefully examined in this Department. The clarification sent by you vide your letter No. GR/ND/79 dated the 31st Aug., 1979 have also been examined. It is seen that M/s. Titanium Equipment and Anode Manufacturing Co. Ltd., Madras is commercializing CECRI''s technology and producing anodes which have been installed by your company for the manufacture of Caustic Soda, Liquid Chlorine Hydrochloric Acid. Such anodes are being installed at various caustic soda plants. The use of anodes for manufacture of caustic soda which is utilisation of the product based on indigenous technology is not covered u/s. 32-A(2B) of the income tax Act for the issue of a certificate.

(Underlining added)

7. The second order of rejection is dated 21.01.1980 which is as under:-

I am directed refer to your letter No. GRCN/ACCTS/6161 dated the 30th Nov., 1979 regarding issue of certificate u/s. 32-A(2B) of the income tax Act. The matter has been re-examined in this Department, but it is regretted for the reasons already mentioned in our letter of even number dated 10th Oct., 1979 it is not possible for this Department to issue a certificate in question.

8. And, finally, the third order which is impugned before us is one dated 18.05.1985 which reads as under:-

I am directed to refer to your letter No. GR/DO/85 dated 6th April, 1985 regarding the issue of a certificate u/s 32A (2B) of Income Tax Act. It is noted that M/s. Titanium Equipment and Anode Manufacturing Co. Ltd., Madras is commercialising CECRI''s technology of producing Titanium Substrate Insoluble Anodes (TSIA). It is also noted that you have installed plant and machinery for the manufacturing of caustic soda and not for TSIA. In the light of above, it is regretted that it has not been found possible to issue a certificate u/s 32A (2B) of the Income Tax Act as communicated to you earlier vide our letter No. 9/21/79-RA dated 10th October, 1979.

(Underlining added)

9. On going through the said orders it is apparent that the reason for rejection was that while M/s. Titanium Equipment and Anode Manufacturing Company Ltd., Madras (TEAM) was utilizing the technology to manufacture TSIA, the petitioner was only using the said TSIA for manufacture of caustic soda and, therefore, such use was not covered u/s 32A (2B) of the income tax Act, 1961 and, therefore, a certificate under that provision could not be issued. The same stand has been taken by Mr. Jatan Singh, the learned counsel appearing on behalf of the respondent Nos. 1, 2 & 5. He has contended that the technology that was developed by CECRI was for the manufacture of TSIA. That technology has already been utilised by TEAM for manufacture of TSIA. Furthermore, while TEAM would be entitled for a certificate u/s 32A (2B) of the Income Tax Act, 1961, in the utilisation of the technology to manufacture of TSIA, the petitioner would not be entitled to the issuance of a certificate as it only uses the TSIA for the manufacture of caustic soda. It was also pointed out by Mr. Jatan Singh that such a certificate had been issued to TEAM and they have availed of it. However, Mr. Ganesh, the learned senior counsel appearing on behalf of the petitioner, contended that this approach is erroneous because of improper understanding of the technology which was developed by CECRI. CECRI had developed not only the technology to manufacture the TSIA but also the know-how or the process for use of TSIA in the manufacture of caustic soda through electrolysis. He submitted that the technology was a composite technology both for the manufacture of TSIA and for the utilisation of TSIA in the process of manufacture of caustic soda. Furthermore, he pointed out that the license which was granted by NRDC to TEAM was for the manufacture of TSIA for ''the use in the manufacture of caustic soda''. In other words, TSIA manufactured by TEAM could not be sold to any manufacturer other than a manufacturer of caustic soda. Mr. Ganesh, had also drawn our attention to the paragraph 17 of the petition which reads as under:-

17. The petitioner says that TEAM simultaneously permits the right to use the said new technology developed by CECRI and sells the metal anodes to enable the

practical application of the said technology as part of the same transaction. It charges royalty for the former and price for the latter. TEAM does not separately sell the metal anodes. It only sells the metal anodes only to one who has agreed to pay royalty for the use of the new technology evolved by CECRI. The right to use the said new technology and the sale of metal anodes are combined into one transaction. The petitioner further says that the said royalty of Rs. 12/- per tonne is paid by it for using the new and improved technology and process developed by CECRI. The said royalty is charged and collected by NRDS through the medium of TEAM for the purpose of their own convenience. Thus, TEAM collects royalty from the petitioner and pays it to NRDC. It is the petitioner who is charged the royalty for the right to use the new technology and process for the manufacture of caustic soda. It needs to be appreciated that the new technology based on the use of metal anodes developed by CECRI was for the chlor-alkali industry and it is for this reason that NRDC has been recovering royalty calculated on the production of caustic soda.

10. On going through the above extract, it is apparent that the petitioner has set up the case that TEAM simultaneously licenced the right to use the said new technology developed by CECRI and also sold TSIA to enable the practical utilization thereof, as a part of the same transaction. While it charged royalty for the former it charged a price for the latter. It is not in dispute that part of the royalty which is recovered by TEAM from the petitioner is passed on to NRDC, which again, bifurcates the same, one part for itself and the other part for CECRI. Mr. Ganesh, stated that these averments made in the petition have not been specifically denied by the respondents in their counter affidavit. The reply given by the respondent Nos. 1, 2 and 5 to the said paragraph 17 of the writ petition is as under:-

I say that C.E.C.R.I. had developed the technology for metal anodes (TSIA). The petitioner manufactures caustic soda and not the TSIA.

The payment of royalty by the petitioner is by virtue of the agreement, NRDC has made with the TEAM for the manufacture of anodes.

On going through the above extract, we agree with the submission made by Mr. Ganesh, that the submissions of the petitioner have not been specifically denied. In other words, it will have to be accepted that what TEAM provided to the petitioner was a composite facility. One part being the supply of TSIA and the other part being the licence to use the technology whereby the TSIA was to be employed for the manufacture of caustic soda. Mr. Ganesh, had also drawn our attention to a communication issued by CECRI, which was circulated by the Alkali Manufacturers'' Association of India on 27.01.1978. The said communication reads as under:-

Sub-Titanium substrate insoluble anodes (TSIA) in chlor-alkali cells.

Sir,

You may already be aware that this Institute has developed TSIA for chlor-alkali industry. We are glad to inform you that these anodes have been working successfully (in diaphragm/mercury cells) at D C M Chemical Works, Delhi since March 72, and in Orient paper Mills in Orissa from February 76.

Recently we have installed TSIA in Hindustan Heavy Chemicals Ltd., Khardah, and Ballarpur Industries Ltd., Ballapur, and the latest at Dhrangadhra Chemical Works, Sahupuram, Tamilnadu. We furnish below performance data for your kind information.

Installed	TSIA cell	Av. graphite
Hindustan Heavy Chem. Khardah	Mercury Cell 20 KA 28.3.77 3.9	4.5 v
Dhrangadhra chemical Works, Sahupuram Cell	Mercury 72 KA (rated 62 KA) 29.12.773.75	4.4 to 4.5
Ballarpur Industries Ballarpur	Diaphragm Cell 33 KA 24.9.77 3.3	3.95

This proves the successful performance of TSIA and the technology developed by us.

Thanking you,

Yours faithfully,

Sd/- V.K.M. Menon

Secretary General

(Underlining added)

11. Based upon the said communication, Mr. Ganesh, pointed out that CECRI itself acknowledged the fact that it had developed TSIA for the Chlor-Alkali Industry and that the data disclosed the successful performance of both TSIA and ''the technology'' developed by CECRI.

12. We may now advert to the relevant provisions of the Act. Section 32A (2B) reads as under:-

(2B) Where any new machinery or plant is installed after the 30th day of June, 1977, but before the 1st day of April, 1987, for the purposes of business of manufacture or production of any article or thing and such article or thing-

(a) is manufactured or produced by using any technology (including any process) or other know-how developed in, or

(b) is an article or thing invented in, a laboratory owned or financed by the Government, or a laboratory owned by a public sector company or a University or by an institution recognized in this behalf by the prescribed authority, the provisions of sub-section (1) shall have effect in relation to such machinery or plant as if for the words "twenty-five per cent", the words "thirty-five per cent" had been substituted, if the following conditions are fulfilled, namely:-

(i) the right to use such technology (including any process) or other know-how or to manufacture or produce such article or thing has been acquired from the owner of such laboratory or any person deriving title from such owner;

(ii) the assessee furnishes, along with his return of income for the assessment year for which the deduction is claimed, a certificate from the prescribed authority to the effect that such article or thing is manufactured or produced by using such technology (including any process) or other know-how developed in such laboratory or is an article or thing invented in such laboratory; and

(iii) the machinery or plant is not used for the purpose of business of manufacture or production of any article or thing specified in the list in the Eleventh Schedule.

Explanation-For the purposes of this sub-section,-

(a) laboratory financed by the Government" means a laboratory owned by any body including a society registered under the Societies Registration Act, 1860 (21 of 1860) and financed wholly or mainly by the Government;

(b) "public sector company" means any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(c) "University" means a University established or incorporated by or under a Central, State or Provincial Act and includes an institution declared u/s 3 of the University Grants Commission Act, 1956 (3 of 1956), to be University for the purposes of that Act.

13. On going through the said provisions it is apparent that the higher rate of investment allowance @ 35% would be available where any new machinery or plant is installed after 30.06.1977 but, before 01.04.1987 for the purpose of its business of manufacture and production of "any article" or "thing" provided such article or thing was manufactured or produced by using any technology including any process or other know-how developed in or was an article or thing invented, inter alia, in government or public sector laboratory. Three conditions were necessary before the higher rate of 35% could be claimed. Those conditions were, first of all, the right to use such technology (including any process) or other know-how or to manufacture or produce such article or thing must have been acquired from the owner of such laboratory or from any person deriving title from such owner. Secondly, the assessee was required to furnish, alongwith his return of income for the assessment

year for which the deduction was claimed, a certificate from the prescribed authority to the effect that such article or thing was manufactured or produced by using such technology (including any process) or other know-how developed in such laboratory or was an article or thing invented in such laboratory. And, thirdly, the machinery or plant was not used for the purpose of business of manufacture or production of any article or thing specified in the list in the 11th schedule.

14. It is an admitted position that the third condition has no applicability in the present case. The second condition is the issue in dispute as to whether such a certificate ought to have been issued or not. In so far as the first condition is concerned, we find that, in our view, the same seems to have been satisfied. This is because the technology had been invented and developed by CECRI which was a unit of NRDC and had been licenced to TEAM and, in turn, TEAM had licenced that technology to the petitioner and, therefore, the right to use that technology had been acquired from TEAM, which was a licensee of NRDC. The only question that remains to be considered is whether the petitioner employed the technology which was developed by CECRI for the manufacture of its product, that is, caustic soda. We have already pointed out above that the petitioner had entered into a composite transaction with TEAM. One component was the purchase of TSIA and the other component was the right to use the technology whereby the said TSIA was used in the manufacturing of caustic soda. Both, the technology for the manufacture of TSIA and the process whereby the TSIA so manufactured was employed for producing caustic soda were developed by CECRI. One component has been utilised by TEAM for the manufacture of TSIA and the other component which relates to the know-how as regards the practical application of TSIA in the manufacture of caustic soda was employed by the petitioner. Therefore, it cannot be said that the petitioner did not employ new plant or machinery for the manufacture or production of caustic soda by using technology or process developed by CECRI.

15. Thus, in our view, the impugned orders are liable to be set-aside. It is ordered accordingly. As a result, respondent Nos. 1, 2 & 5 are directed to issue the appropriate certificates u/s 32A(2B). On the issuance of such certificates, the same may be presented by the petitioner to the income tax authorities for consequential reliefs in accordance with law. The writ petition is allowed as above. There shall be no order as to costs.