

(2012) 12 MP CK 0043
In the Madhya Pradesh High Court
Case No : IT Appeal No. 202 of 2010

Aartech Solonics Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-12-2012

Acts Referred:

Income Tax Act, 1961 — Section 80IC

Citation : (2013) 256 CTR 293 : (2013) ILR (MP) 234

Hon'ble Judges : Vimla Jain, J; Krishn Kumar Lahoti, J

Bench : Division Bench

Advocate : Sumit Nema, for the Appellant; Sanjay Lal, for the Respondent

Final Decision : Allowed

Judgement

1. This writ appeal was admitted on 1st Dec., 2010 on the following substantial question of law:

Whether, the Tribunal, in arriving at a conclusion that the assessee has not assembled any product at all, exceeded its jurisdiction and scope of the proceedings before it by coming to a different factual finding totalling beyond the issue arising out of the first appellate order?

Facts of the case are that the appellant is engaged in the business of manufacturing electrical goods. It is having its one unit at Mandideep, District Raisen and another at Parwanoo, District Solan (HP). The appellant's unit at Mandideep is manufacturing electrical goods which are used in the distribution/transmission of power, while its Parwanoo unit is manufacturing electrical goods which are used in generation of the power. The dispute is in respect of nature of product of Parwanoo unit of the appellant which is manufacturing advanced microprocessor based fast bus transfer scheme for power generation segment. The contention of the appellant is that it is a manufacturing process while the Tribunal has found that it was an assembling process, while the CIT(A) had found that it was a product manufactured by the appellant. Learned counsel appearing

for the appellant at the outset submitted that none of the authorities had examined the matter in proper perspective. Looking to the complex of the product, the authorities ought to have obtained an expert's opinion in this regard or the matter ought to have been referred to a panel of the experts to examine the nature of the product manufactured by the appellant at Parwanoo unit. Reliance is placed by the appellant to three judgments of the apex Court in Commissioner of Income Tax-V, New Delhi Vs. Oracle Software India Ltd., Commissioner of Income Tax, Mumbai Vs. Emptee Poly-Yarn Pvt. Ltd., and recently in Morinda Co-operative Sugar Mills Ltd. Vs. Commissioner of Income Tax, and submitted that this matter may be remitted back to the AO for a fresh decision after obtaining an opinion of the expert in respect of the nature of the product or to refer the matter to a panel of experts of Department who would examine the nature of product.

2. Shri Sanjay Lal, learned counsel appearing for the Department has opposed the aforesaid contention and submitted that in view of the findings recorded by the Tribunal, there is no need to remand the matter and this appeal may be dismissed. He has placed reliance to the order passed by the Tribunal in this regard.

3. To appreciate the rival contentions of the parties, we have gone through the record. Relevant paras of the order Annex. A/4 dt. 23rd March, 2009 passed by the CIT(A) deserve to be referred, which read as under:

4...In my considered view, the appellant is engaged in manufacturing activity, which entitles it to the statutory relief contemplated under the provisions of s. 80-IC. I am fortified in my belief by the letter No. SWCA/PWN/Regn/1272, dt. 29th Dec., 2008 addressed to the AO by Member Secretary, SWCA, Parwanoo, District Solan, HP which is reproduced below for ready reference; please see Annexure.

4.1. Even so, I consider it imperative to dwell on the issue, if only for the satisfaction of the AO. The word "manufacture" has not been defined anywhere in the Act. The "manufacture" has originated from the latin word "manus" which means "hand" and the word "facere" which means "to make". In origin, therefore, the word "manufacture" implied making of anything by hand, but with the passage of time and in the context of industrial development the word has acquired a number of shades of meanings. In connection with industry or an industrial undertaking, two shades of meaning as are given in the Oxford Dictionary, Vol. 6 are important. The first is "the action or process of making articles on a large scale by the application of physical labour or mechanical power. The second is transforming of raw materials into a commercial commodity or a finished product which has a separate identity. The second shade of meaning is more appropriately used in the past participle manufactured.

4.2. The words "make", "manufacture" and "produce" envisage turning out of finished products by the shaping or combination of raw materials or parts. What is manufactured or produced in the undertaking should be a marketable, new

and distinct commercial commodity. According to Corpus Juris Secundum, "manufacturing" is the activity in which the original material undergoes a transformation so that a new and different article or product emerges; but what constitutes a new and different article is a question which has caused considerable difficulty to the Courts. The word "manufacture" as a verb has been defined in Black's Law Dictionary as making of goods or wares by manual labour or by machinery especially on large scale. The word "manufacture" as a noun has been defined therein to mean "the process or operation of making goods or any material produced by hand, by machinery or by other agency; anything made from raw materials by hand, by machinery or by art; the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations whether by hand, labour or machine. In the same book, again, the word "manufacturer" has been described as one who by labour or for skill transforms raw materials into some kind of finished product or article of trade.

4.3. It has to be borne in mind that no person manufactures all the various parts that go into the making the new product, by himself. It is imperative that the manufacture of some components is outsourced. Thus in automobile industry, the manufacturing of the electrical equipment is outsourced to more than one suppliers, tyres are sourced from others, paint is obtained from elsewhere so much so the filters and batteries are also gotten from outside. Viewed strictly, it may look like assembling things, but that is not correct for the simple reason that all these items go into making of a car, a scooter or even a truck, which is an entirely different end-product. Taking the case of a comparatively simpler product like a refrigerator or even an air-conditioner, the main component like the compressor is generally obtained from other manufacturers. Viewed narrowly, one may regard the manufacturing of refrigerators and air-conditioners as mere assembling of parts. Obviously, one should not be guided by narrow considerations in deciding whether an activity amounts to manufacturing or merely assembling. Nor should the facts like the value of machinery or power-driven machines owned by the assessee or the total area of space occupied by the assessee be considered as material factors in deciding the issue as to whether the assessee is a manufacturer or not.

4.4. In the matter under consideration, the AO seems to have been influenced by the considerations like low power bills, low number of employees, lesser expenses under other heads. The fact, nonetheless, remains that the appellant is engaged in producing customized sophisticated equipment for its buyers, which is totally different from the parts used in making the same. In my considered opinion, this activity can be very safely regarded as manufacturing that entitles the appellant to the incentive provided under the provisions of s. 80-IC. In the premise, the impugned disallowance is deleted.

The Tribunal considered this aspect in paras 6 and 7 of the order Annex. A/7 dt. 31st Aug., 2010, which reads thus:

6. We have carefully considered the issue in view of the orders of the lower authorities, rival submissions and material placed on record. In our considered opinion, the submission of the learned CIT-Departmental Representative that the learned CIT(A) has discussed the issue only with reference to the legal aspect as to what constitutes manufacturing, is correct. It is seen from the copies of the balance sheet and P&L a/c placed in the paper book that the assessee had incurred nominal manufacturing expenses of Rs. 34,820 only at Parwanoo unit, of which Rs. 13,955 is on cartage and loading, the electrical consumption is only Rs. 8,360 and the labour charges are shown at Rs. 11,705 only. It is seen from the certificate dt. 29th Dec., 2008 given by the Member Secretary, SWCA, Parwanoo of the Department of Industries that on the date of inspection on 29th Dec., 2008, three technical persons and one office staff were present at the factory site in Parwanoo unit of the assessee. It has also been stated in the aforesaid certificate dt. 29th Dec., 2008, that on enquiry, the three technical persons and one office staff present at the site, informed the Member Secretary, SWCA, Parwanoo that the equipments being assembled were to be supplied to thermal/hydro plants to be used as protective system in the power generation system and the equipment was a big panel (almirah type), fitted with electronic circuit inside.

7. It is very clear that as on 29th Dec., 2008, i.e. nearly 21 months after the end of the financial year 2005-06, relevant to asst. yr. 2006-07 i.e. the year under consideration, the only staff available at Parwanoo unit during the course of inspection were only three technical persons and one office staff. It is also very clear that wages of Rs. 11,705 debited to the accounts for asst. yr. 2006-07 were not even sufficient to make payment to even one person and obviously the three technicians qualified to carry out the highly skilled and sophisticated jobs could not have been employed at Parwanoo with meager cost of less than Rs. 1,000 per month. It can be very well understood that complicated manufacturing or assembling could not have been done by the three technical persons and one office staff even in financial year 2008-09 respect to 29th Dec., 2008 i.e. the date of inspection and the only equipment seen during inspection was a big almirah type panel with electronic circuit. Thus, it is very clear that the certificate given by the authority in any way does not prove that the manufacturing activity of a large scale giving rise to huge turnover and substantial profit in financial year 2005-06 respect to asst. yr. 2006-07 was carried out, or it was going on at Parwanoo unit even on 29th Dec., 2008. The manufacturing expenses and the wages claimed at Parwanoo unit as per the balance sheet and P&L a/c as on 31st March, 2006, as discussed earlier, were too meager to justify any complicated and highly skilled manufacturing or technical process during financial year 2005-06, respect to in asst. yr. 2006-07. It is very clear that the claim of the assessee that the Parwanoo unit had gone into operation at a large scale and was in a position to manufacture or assemble equipment giving rise to sales of Rs. 1,54,53,000 and a net profit of Rs. 96,47,831, which is more than 60 per cent of the total turnover claimed for Parwanoo unit, is not justified. We are, therefore,

of the considered opinion that the claim of the assessee for deduction under s. 80-IC is not justified, in view of the foregoing discussion. In our considered opinion, the equipment shown in the balance sheet, the certificate of the industry authorities, discussion at p. 2 of the assessment order, the machinery shown in the certificate and the manufacturing expenses clearly show that the assessee had made a wrong claim of its turnover and its profit of Parwanoo unit and it was not possible to run the unit by incurring labour expenses of Rs. 11,705 and to manufacture or assemble the sophisticated equipment as per description given by the assessee itself in its written submission. The submission of the learned counsel that the directors were technically qualified and they had guided the process of assembling and manufacturing is also not considered correct, because the total travelling of the director for the Parwanoo unit is shown at Rs. 1,21,957 only and it has been admitted that the directors were stationed at Bhopal and not at Parwanoo. Even if the technically qualified directors would have been supervising and guiding the work, the technical staff was not available at the Parwanoo unit to carry out the manufacturing and assembling by incurring Rs. 11,705 on labour charges and even with the help of three technicians and one office staff as per the inspection report dt. 29th Dec., 2008, it was impossible to carry out manufacturing and assembling of very sophisticated equipment and machinery, which was being produced in collaboration of the US concern and was being supplied to very big technological giants like BHEL, Siemens etc. The decision of the learned CIT(A) cannot, therefore, be sustained. Since the assessee has not carried out any manufacturing or assembling at Parwanoo unit, we do not consider it necessary to go into the legal aspect as to what constitutes manufacturing for the purpose of deduction under s. 80-IC of the IT Act, 1961. The order of the learned CIT(A) is, therefore, reversed and the action of the AO in rejecting the claim of the assessee for deduction under s. 80-IC is sustained in view of the foregoing discussion.

4. It appears that both authorities have not considered the process for manufacture of the product. The CIT(A) had considered the matter in a different aspect while the Tribunal had looked into the expenditure aspect and also in respect of the employment of certain persons. The Tribunal was of the opinion that without assistance of the technical persons, no such product could have been manufactured, while finding of the CIT(A) was based entirely on a different footing but the fact remains that none of the authorities had considered how product namely, fast bus transfer scheme panel is manufactured or assembled. Until and unless some technical expert person examines this aspect, the nature of the product cannot be ascertained whether this is a manufacturing process or is an assembling process. The apex Court in Oracle Software India Ltd. (supra) considering similar questions held that in each case when an issue of this nature arises for determination, the Department has to study the actual process undertaken by the assessee. If an operation/process rendered a commodity fit for use for which it would otherwise not be fit, the operation/process fell within the meaning of the word "manufacture". Therefore, in each case, where an issue

of this nature arises for determination, the Department should study the actual process undertaken by the assessee. In *Emptee Poly-Yarn (P) Ltd.* (supra), the apex Court considering the similar issue held that repeatedly the apex Court has recommended to the Department, be it under Excise Act, Customs Act or the IT Act, to examine the process applicable to the product in question and not to go only by dictionary meanings. This recommendation is not being followed over the years. Even when the assessee gives an opinion on a given process, the Department does not submit any counter-opinion wherever such counter-opinion is possible. The apex Court considering the issue in *Morinda Co-operative Sugar Mills Ltd.* (supra) reiterated the law, held in para 9 thus:

This Court has repeatedly told the Department that, in all such cases, they should have a panel of experts who may be engaged in appropriate cases so that the cases need not be remitted. We do not express any opinion on the merits of the case. We give liberty to the advocates on both sides to cite appropriate judgments of this Court which have laid down the test as to when an operation becomes "manufacture". We have laid down the test in one of the cases, namely, *Oracle Software India Ltd.* (supra).

5. In the light of the aforesaid judgments, if we look into factual aspects in the present matter, we find that as per case of the appellant, it was a hyper-technical process of manufacturing which was placed before the CIT(A). The CIT(A) in para 3.3 of the order referred the process for manufacturing but had not evaluated/got examined aforesaid process through a technical person. Before it, when the matter was before the AO, such process was not followed. Even before the Tribunal, though such issue was raised but the Tribunal had considered the matter in a different perspective and turned down the case of the assessee merely on the grounds that there was no adequate expenditure in the process of manufacturing of the aforesaid product and the persons who were employed were not technical. The Tribunal had only considered that on perusal of the receipts, the expenditure was very low and the profit was high. On these grounds, the order of CIT(A) was turned down by the Tribunal. In our considered opinion, in view of the law laid down by the apex Court in aforesaid three judgments, we find it appropriate that the matter ought to have been examined by the AO through the assistance of technical person or a committee of technical persons, if available in the Department, but it appears that such process was not followed and the product of the appellant was not found to be manufactured. Though the CIT(A) had found that it was a manufacturing process, but the Tribunal has turned it down. In view of aforesaid, we find it appropriate to remand the matter to the AO to call an opinion of the expert in the subject or if panel of experts is available in the Department, to take assistance of such panel and after getting an opinion of the experts, to decide that the product namely "microprocessor based fast bus transfer scheme panel" is a product by manufacturing or only an assembled item and thereafter, to decide the matter in accordance with law. In view of aforesaid, this appeal is allowed and the matter is remanded to the AO. The AO on receipt of this order shall issue a notice to the

appellant and thereafter shall proceed in the matter in accordance with law, as directed hereinabove.

Considering facts of the case, there shall be no order as to costs of the appeal.