
(2011) 04 MAD CK 0506
In the Madras High Court
Case No : Tax Case (Appeal) No. 955 of 2004

CIT

APPELLANT

Vs

Apollo Hospital Enterprises

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

Income Tax Act, 1961 — Section 115J, 143(1), 143(2), 32, 32A

Citation : (2011) 04 MAD CK 0506

Hon'ble Judges : P.P.S. Janarthana Raja, J; Chitra Venkataraman, J

Bench : Division Bench

Advocate : K. Subramaniam, for the Appellant; C. Manishankar, for the Respondent

Final Decision : Dismissed

Judgement

P.P.S. Janarthana Raja, J.—The revenue has come on appeal as against the order of the income tax Appellate Tribunal, Madras "B" Bench, Chennai, made in ITA No. 1440/MDS/95, dated 20-4-2004.

2. The above appeal was admitted on 2-12-2004 on the following question of law :

Whether on facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is entitled to investment allowance in respect of X-ray, ultra sound, angiography, gamma camera, stress analysis equipment etc.?

3. The assessee is a public limited company engaged in the business of running hospital. The assessment year is 1989-1990 and the corresponding accounting year ended on 31-3-1989. The assessee filed a return of income on 29-12-1989 showing total income of Rs. 82,36,600 as per section 115J of the Act. Later the Assessing Officer made prima facie adjustment u/s 143(1)(a) of the Act and sent an intimation dated 30-6-1990 to the assessee. In the course of the assessment proceedings, notice u/s 143(2) of the Act was issued and the Assessing Officer completed the assessment as per the normal provision and made addition and

disallowed the investment allowance claimed u/s 32A of the Act and in respect of 115J computation, there has been certain disallowances. The assessee claimed investment allowance to the extent of Rs. 41,63,858 in respect of the equipment such as x-ray machines, ultrasound scanner, angiography, Gamma camera, stress analysis equipment, etc. The Assessing Officer was of the view that the hospital is not engaged in manufacture or production of any article or thing, which is a pre-requisite for grant of investment allowance. Aggrieved by that order, the assessee filed an appeal before the Commissioner of income tax (Appeals). The Commissioner of income tax (Appeals) allowed the claim of investment allowance in respect of the plant and machinery, i.e., x-ray machines, ultrasound scanner, angiography, Gamma camera, stress analysis equipment etc., by following the assessee's own case relating to the assessment year 1986-1987. Aggrieved by that order, the revenue filed an appeal before the income tax Appellate Tribunal. The income tax Appellate Tribunal held that the assessee is entitled to the investment allowance by following the decisions of Rajasthan High Court in the case of Commissioner of Income Tax Vs. Trinity Hospital, , Kerala High Court in the case of Commissioner of Income Tax Vs. Upasana Hospital, and Gujarat High Court in the case of Natvarlal Ambalal Dave Vs. Commissioner of Income Tax, . Aggrieved by that order, the revenue filed the present appeal raising the above question of law.

4. The learned counsel appearing for the revenue contended that the order passed by the Tribunal is wrong, illegal, without basis and justification. He further contended that the Tribunal erred in holding that the assessee is entitled to investment allowance on x-ray machine, ultra sound, angiography, Gamma camera and stress analysis equipment and it ought to have appreciated that unless and until the assessee engaged in the manufacture or production of any article or thing, the assessee is not entitled to investment allowance. Further it was vehemently contended that the assessee is not an industrial undertaking and also not engaged in the business of manufacture or production of any article or thing and the claim of investment allowance on the x-ray machines, ultra sound scanner, angiography, Gamma camera, stress analysis equipment, etc., is not in accordance with law. He further contended that section 32A of the Act is an incentive provision and it gives incentive only to industrial undertaking, engaging in manufacture or produce article or thing. In the present case, these machineries did not manufacture or produce any article or thing. Therefore, the assessee is not entitled to the investment allowance u/s 32A of the Act and also relied on the decision of Bombay High Court in the case of The Insight Diagnostic and Oncological Research Institute Private Limited Vs. The Deputy Commissioner of Income Tax, Special Range-I, and also the decision of Delhi High Court in CIT v. Dr. Yogendera Sharma (2009) 311 ITR 37 (Del) and further contended that the Madras High Court in the assessee's own case in The Assistant Commissioner of Income Tax Vs. Apollo Hospitals Enterprises Limited, while considering the scope of section 72A of the Act, held that the assessee is not industrial undertaking and hence the assessee is not entitled to investment allowance u/s 32A of the Act. He

further contended that the assessee has not produced or manufactured any article or thing. Further the learned counsel relied on the decisions of Supreme Court in *The Indian Hotels Company Ltd. and Others Vs. The Income Tax Officer, Mumbai and Others*, *Sterling Foods v. State of Karnataka* (1996) 3 SCC 469 (SC) and *Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc.*, to support his proposition. Further, it was contended that the Hospital provides only health care services and it cannot be said that the hospital manufactures or produces any article or thing and therefore, the order passed by the Tribunal is not in accordance with law and the same has to be set aside.

5. The learned counsel appearing for the assessee contended that the Commissioner of income tax (Appeals) allowed the claim of the assessee by following the assessee's own case relating to the assessment year 1986-1987 and as against the said order, the revenue has not preferred any appeal and the said order for the assessment year 1986-87 reached finality. He further contended that the other High Courts have considered other hospital cases and granted investment allowances on X-ray, ultrasound, ECG, ICCU scanners and the same are as follows :

- (1) *Trinity Hospitals case* (supra);
- (2) *Upasana Hospitals case* (supra) and *Mar Gregorious Memorial Muthoot Medical Centre v. CIT* (2003) 261 ITR 4436 (Ker.);
- (3) *Commissioner of Income Tax Vs. Dr. M.L. Agarwalla*, and *Commissioner of Income Tax Vs. Down Town Hospital Pvt. Ltd.*, ;
- (4) *Natvarlal Ambalal Daves case* (supra);
- (5) *Commissioner of Income Tax Vs. Dr. S.K. Ohri*, Prop. *Ohri Maternity Hospital*, ;
- (6) *Commissioner of Income Tax Vs. Shri R.M. Malhotra*, Pro. *Malhotra Nursing and Maternity Home*, ;
- (7) *Commissioner of Income Tax Vs. Dr. S. Surender Reddy*, and
- (8) *CIT v. Dr. L.C. Mitra* (1998) 234 ITR 805 (Pat.)

In the above cases, some assessee's are hospitals and others are individual assessee's i.e., Doctors. The High Courts held that such hospitals and individual assessee's are industrial undertakings/Small scale industries and also were of the view that they are engaged in manufacture or production of articles or thing. The learned counsel also contended that the revenue has not filed any appeal as against those judgments. He further contended that the word "manufacture" and "production" should be given wider interpretation and relying on the decision of the Madras High Court in the case of *The Commissioner of Income Tax Vs. Jamal Photo Industries (I) Pvt. Ltd.*, and the decision of Supreme Court in the case of *India Cine Agencies Vs. Commissioner of Income Tax, Madras*, , and *ITO v. Arihant Tiles & Marbles (P.) Ltd.* (2010) 320 ITR 79 (SC), contended that the view taken by the Tribunal as well as the Commissioner of income tax (Appeals)

is in conformity with law and the same has to be confirmed.

6. Heard the learned counsel on either side and perused the documents available on record. The assessee claimed investment allowance in respect of X-ray, ultra sound, angiography, gamma camera and stress analysis equipment u/s 32A of the income tax Act. The said provision was introduced by the Finance Act, 1976 with effect from 1-4-1976. The said section is akin with the provision u/s 33 of the income tax Act relating to the development rebate and the same was discontinued with effect from 1-6-1974. The claim of investment allowance is on the lines of the development rebate scheme. The section provides investment allowance equal to 25 per cent of the actual costs of the ship, aircraft machinery and plant installed by the assessee. The relevant provision of section 32A is as follows :

32A. Investment Allowance.--(1) In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction, in respect of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee :

Provided that in respect of a ship or an aircraft or machinery or plant specified in sub-section (8B), this sub-section shall have effect as if for the words "twenty-five per cent", the words "twenty per cent" had been substituted :

Provided further that no deduction shall be allowed under this section in respect of -

- (a) Any machinery or plant installed in any office premises or any residential accommodation, including any accommodation in the nature of a guest-house;
- (b) Any office appliances or road transport vehicles;
- (c) Any ship, machinery or plant in respect of which the deduction by way of development rebate is allowable u/s 33; and
- (d) Any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year.

Explanation.--For the purposes of this sub-section, "actual cost" means the actual cost of the ship, aircraft, machinery or plant to the assessee as reduced by that part of such cost which has been met out of the amount released to the assessee under sub-section (6) of section 32AB.

(2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely :-

(a) A new ship or new aircraft acquired after the 31st day of March, 1976, by an assessee engaged in the business of operation of ships or aircraft;

(b) Any new machinery or plant installed after the 31st day of March, 1976 -

(i) For the purposes of business of generation or distribution of electricity or any other form of power; or

(ii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any article or thing; or

(iii) In any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule.

It is clear from the above that in order to claim investment allowance, the assessee has to satisfy the following conditions :

(a) The assessee should own the plant and machinery;

(b) The same should be used wholly for the purpose of the business carried on by the assessee;

(c) The plant and machinery should come under any of the categories specified in sub-section (2) of section 32A.

Section 32A specifically states that the new plant and machinery should be installed after 31st day of March, 1976 in any industrial undertaking for the purpose of business of manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule. In the present case, there is no dispute regarding the above first two conditions since the assessee satisfied the same. The dispute involved in the present case is regarding the third condition stated above i.e., whether the hospital can be considered as an industrial undertaking and also engaged in manufacture or production of article or thing. Considering the controversy, it is necessary to take into consideration the functions, purposes and use of the said machinery/plant in the business activity of the hospital i.e., X-ray, ultra sound, angiography, gamma camera and stress analysis equipment and the details of the utilisation of the above said equipments are as follows :

1. Universal angiography with cardiovascular x-ray system : The system includes diagnostic imaging equipment wherein a catheter is inserted into an artery along with guide wires and a contrast agent is added to the blood to make the blood vessels visible on the x-ray images, x-ray machine produce pictures and data and gets exposed on the raw x-ray film when processed which helps in the diagnosis of the patient. These images may either be still images displayed on a monitor or film or moving images. From these images the radiologist or cardiologist can

visualize stenosis (blockages or narrowing) inside the vessels which may be inhibiting the flow of blood and cause of pain. Applications include coronary angiography, neurovascular angiography and peripheral angiography for visualization of blockages in the coronary arteries, arteries/veins in the brain and arteries supplying blood to legs and feet respectively. Thus on raw films, images of various blood vessels are produced in order to diagnose blockages. The system can also be used for interventional therapeutic procedures like stenting, angioplasty, pacemaker implantation etc.

2. Computerised gamma camera system with nuclear film processing unit : A gamma camera is a complex imaging device consisting of a scintillating NaI crystal detector and photomultiplier tubes mounted on a gantry. A radio-active isotope is injected into the patient and scanned over the region of interest. This isotope travels to various organs and tissues in the body, the photons emitted by the isotope are detected by the crystal detector and its distribution and relative concentration is reconstructed in the images produced through a computer system attached to the gamma camera. These images are produced on film and the resulting calculations obtained can predict the functional capacities of organs like heart, brain, liver, kidney, etc., which are useful in diagnosing the condition of the patient.

3. Ultramark 6C color flow imaging system (ultra sound) : The ultrasound imaging system uses transducers which produce ultrasound waves generally in the range of 1 to 10MHz frequency. These waves are directed at different organs and tissues in the patient and the reflected waves from boundaries of soft tissue, air or bone are picked up by the transducer and processed to form images on a display screen or film. The ultrasound scanner/ultra sonographic machine is an instrument with a monitor and the computer. As the ultrasound waves do not involve any harmful radiation like x-rays, they are more useful in gynaecological examinations and pre-child birth checkups apart from Doppler color blood flow studies in the heart and other arteries. Different transducers are used for imaging heart, abdomen and other body parts. Thus using the ultrasound system, images are produced on film which enables diagnosis of various diseases in these organs/tissues. The system can also be used for obtaining biopsy samples under ultrasound image guidance.

4. Quinton 3000 stress analysis system with ECG recordings output : The stress test system helps a doctor find out how well the heart can handle work of the body. The patient is asked to walk on a treadmill at a slow speed at first and later at a higher speed with the treadmill tilted. This simulates the work of walking up a small hill. The heart rate, blood pressure and ECG recordings produced are continuously monitored and print out of the images/recordings/waves taken are helpful in the analysis of diagnosis of coronary artery disease, predict risk of dangerous heart related conditions like heart attack and diagnose heart related causes of symptoms like chest pain and shortness of breath.

From a reading of the above details, the machinery i.e., X-ray, gamma camera

system, ultra sound and ECG produces following things :--

- (a) Images of the internal organs of the patients are produced on the monitor;
- (b) Prints and graphs record the pulses of various organs.

Therefore, the authorities below came to the conclusion that the assessee is engaged in manufacture or production of articles or things as stated above.

7. Much of medical know how today is based on discoveries about basic workings of the human body. Technical know how enables a Doctor new ways of studying, diagnosing and treating human diseases. It is no doubt that medical instruments provide a basic knowledge to diagnose and treat diseases and enable doctors to study how disease progress in human bodies and compare how biological process works in healthy body. Speed and technology are improving human life and they are also much more powerful and much accurate than those of early days. It lifts the veil and discloses something which has been unseen or dimly seen. We cannot ignore the progress of scientific and technical knowledge. Modern hospital runs with all the technical facilities. The above mentioned instruments installed in the assessee's premises certainly produce things as contemplated in the section 32A of the Act. The issue involved now is not *res integra*. In respect of other hospital cases, the various High Courts have considered the scope of section 32A of the Act and held that they are entitled to deduction u/s 32A of the Act. Eight High Courts have taken a view that the hospital is entitled to deduction and they are Rajasthan, Kerala, Gujarat, Gauhati, Punjab and Haryana, Andhra Pradesh, Patna and Allahabad. Only "Delhi" and "Bombay" High Courts have taken a contrary view.

8. The only argument advanced by the learned Standing counsel for the revenue is that hospital is not an industrial undertaking and also the same does not produce or manufacture any article or thing. The hospitals are only rendering service. Various High Courts in India considered the cases of hospitals as well as individual doctors and came to the conclusion that the hospital and the individual doctors carried on business activities and hence, they are entitled to investment allowance u/s 32A of the Act.

9. The Madras High Court, in the case of *Laxmichand Hirjibhai Vs. Commissioner of Income Tax, Gujarat-III*, , has considered the scope of development rebate u/s 33 of the Act and held that a medical practitioner is entitled to development rebate u/s 33 of the income tax Act on X-ray machine. In that case, the assessee was a medical practitioner. The issue before the court was whether the assessee was indulging in a commercial activity for the purpose of claiming development rebate or not. The court held that the assessee has been carrying on the business as a commercial activity. Further the court considered the principles enunciated in the Apex Court judgments in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, , *S. Mohan Lal Vs. R. Kondiah*, and also this Court's judgment in *Dr. P. Vadamalayan Vs. The Commissioner of Income Tax, Madras*, and held as follows :

We are in respectful agreement with each one of these passages. It is in the light of this legal position that we have to consider the facts of the present case. The AAC has pointed out the nature of the activity carried on by the assessee. He has pointed out also the total receipts and the receipts from the X-ray pictures. He has also referred to the expenditure involved in the purchase of X-ray films, chemicals, salary and bonus to technicians and electricity charges. The way in which this activity is carried on is in no way different from a non-qualified person carrying on a radiological institute. The mere circumstance that a professional person has, as an adjunct to his professional activities, such an institute does not disable him from running it as a commercial venture and earning income there from. For instance, a medical practitioner can have a medical shop in which medicine are sold not only to his patients, but also to others who come and ask for them. In such a case, it cannot be gain said that he was carrying on a trade as such. In this case there is no finding that the persons who came and took x-ray photographs were only the assessee's own patients and that he carried on the activity of X-ray photography in a manner restricted as an aid for diagnosis of his own cases. Just as an unqualified person could carry on such a radiological institute and have the benefit of development rebate, similarly a professional person who carries on such an institute as a commercial activity would be entitled to development rebate. The Tribunal has in the present case, given a finding that the assessee has been carrying on the business as a commercial activity. In view of this and in the light of the above reasoning, we would answer the first question in the affirmative and in favour of the assessee.

From a reading of the above principles, it is clear that when professional person, who carries such an institute as a commercial activity, he would be entitled to development rebate. The said judgment is considered by other High Courts in the case of hospitals as well as the individual Doctors and allowed investment allowance u/s 32A of the Act on the ground that the hospitals are considered to be industrial undertakings and also the technical instruments installed in the hospitals are engaged in manufacture or production of any article or thing. Now let us go to the case laws, which were decided in favour of the assessee.

10. The Rajasthan High Court, in the case of Trinity Hospital (supra), has considered the scope of section 32A of the Act. The assessee in that case is a hospital. The machinery installed in the hospital premises are (i) X-ray machine; (ii) Ultra sound scanner/ultra sonographic machine; (iii) a foetal monitor and (iv) air conditioning equipment. The Rajasthan High Court has taken a view that the assessee is a small scale industrial undertaking and that the hospital is engaged for the purpose of manufacture or production of article or thing as provided u/s 32A(2)(b)(ii) of the Act by following the judgment of this Court in the case of Dr. V.K. Ramachandran (supra) and held as follows :

The provisions have been made in the Act to give incentive to the entrepreneurs to instal machinery/plant to increase production. As it is a beneficial legislation, a liberal interpretation, which advances the purpose and object of the Act, should

be given to these provisions and as these words "manufacture", "production", "article" and "things" have not been defined in the Act, they must be given the plain and simple meaning in the context in which they are used :

It is true that these machines do not manufacture any article and produce only photographs of the internal parts of the body. The X-ray machine produces shadow pictures or photographs with the use of X-rays which reveal the internal structure of the object opaque to the ordinary light. The ultrasound scanner/ultra sonographic machine is an instrument which has a T.V. Monitor set and a computer and works on sound waves. A picture of abdominal organs (liver, gall bladder, pancreas, kidney, uterus, ovary, etc.) is produced and photographs are obtained which are extremely useful for diagnosis purposes while the foetal heart monitor is a machine which produces the picture and graphs of the heart rate of the foetus and uterine contractions of the mother. Admittedly, these photographs are not articles but whether they are "things". According to the Random House Dictionary, a "thing" is a useful or appropriate object, method, etc. According to Websters Dictionary the meaning of the word "thing" is the product of work or activity. The photographs of various parts of the body obtained by these machines are the resultant product of the work or activity. They are the ends and result of efforts and activities and give result in black and white regarding the internal position of the parts of the body and are helpful for proper and efficient diagnosis. The photographs or the graphs obtained from these machines, which are the result of efforts or activity, therefore, can be said to be "things" as used in section 32A of the Act. The installation of these machines in the hospital by the assessee was, therefore, for the purpose of the business of production of things. The installation of the air-conditioning equipment was done for the efficient working of these machines. Both the Tribunal as well as the Commissioner of income tax (Appeals), Jodhpur, have held that the air-conditioning equipment has been installed by the assessee for the purpose of efficient working of these machines and has not been installed for the purpose of office. This is a pure finding of fact. The Tribunal was, therefore, right in allowing investment allowance to the assessee.

11. The Kerala High Court in the case of Upasana Hospital (supra), has considered the same issue and granted investment allowance. In this case, the assessee, a hospital claimed investment allowance in respect of an X-ray, ICCU and ECG Equipment. The Kerala High Court, relying on the judgment of this Court in Dr. V.K. Ramachandrans case (supra), held that the hospital is a small scale undertaking and organised business activity resulting in manufacture or produce things, which amounts to industrial undertaking. The Kerala High Court in another case in Mar Gregorios Memorial Muthoot Medical Centre (supra) had taken a similar view as in the Upasana Hospitals case (supra) and granted investment allowance in respect of X-ray, ECG and other Laboratory equipment. In that case also, the assessee is running a hospital.

12. The Gauhati High Court, in the case of Down Town Hospital (P.) Ltd. (supra),

also considered the similar issue and granted investment allowance. In this case also, the assessee is a hospital, claiming investment allowance in respect of medical, technical and other electrical equipment. The said court held that the hospital is an industrial undertaking and granted investment allowance. The same court, in another case in Dr. M.L. Agarwalla (supra), has also allowed investment allowance u/s 32A of the Act.

13. The Punjab and Haryana High Court, in the case of Dr. S.K. Ohri, Prop., Ohri Maternity Hospital (supra), had taken a similar view, wherein the equipment involved is a scanner and following the Judgments of Rajasthan, Kerala and Gauhati High Courts cited (supra), granted investment allowance on scanner.

14. In the decision of Gujarat High Court in Natvarlal Ambalal Dave (supra), the assessee is an individual Doctor and claimed investment allowance. The machinery involved in this case is X-ray. The Court held that running X-ray clinic would amount to carrying on business and therefore, granted investment allowance u/s 32A of the Act.

15. The Andhra Pradesh High Court also in the case of Dr. S. Surender Reddy (supra), considered the scope of section 32A of the Act and granted investment allowance, where the instruments involved are X-ray, Scanner and other electrical machinery. Further, the Court held that the assessee was a qualified doctor and running a diagnostic centre and treated the same as small scale undertaking.

16. In the case of R.M. Malhotra, Prop., Malhotra Nursing & Maternity Home (supra), the equipment involved are ultrasound machine and echo scanning equipment and the assessee was running nursing and maternity home and claimed investment allowance on the medical equipment and on such facts, the Allahabad High Court following the decisions of Rajasthan, Kerala, Andhra Pradesh and Gauhati High Courts and held that the assessee is entitled to investment allowance.

17. The Patna High Court in the case of Dr. L.C. Mitra (supra) granted investment allowance on X-rays. The above said High Courts of Rajasthan, Kerala, Gauhati, Punjab and Haryana, Gujarat, Andhra Pradesh, Allahabad and Patna, have considered the scope of section 32A of the Act and held that the assessee is entitled to investment allowance on X-ray, ultrasound scanner, ECG, ICCU and other monitors and also following this Courts judgment in the case of Dr. V.K. Ramachandran (supra) held that the hospital is considered to be an industrial undertaking and granted investment allowance.

18. Further, the Supreme Court in the case of Commissioner of Income Tax-V, New Delhi Vs. Oracle Software India Ltd., considered the scope of section 80-IA of the Act and held that the technological advancement in science makes knowledge as of today obsolete tomorrow and further the Court categorically stated that the Courts need to move with the times and the revenue in each case has to study the actual process undertaken by the assessee in claiming deduction

and the term manufacture implies a change, but every change is not a manufacture, despite the fact that every change in an article is the result of a treatment of labour and manipulation. So the manufacture needs to be seen in the context of the above process and if an operation or process renders a commodity or article fit for uses for which it is otherwise not fit, the operation and process falls within the meaning of the word "manufacture". The Supreme Court also considered the same in *Tata Consultancy Services Vs. State of Andhra Pradesh*, and held that the department needs to look into the account and ground realities of the business and further the Supreme Court also relied on the decision of American Court in para 11 of the judgment. The Supreme Court also emphasised that if a process renders a commodity or article fit for use, which otherwise is not fit, the operation falls within the letter and spirit of manufacture. Further in para 12 of the said judgment, the Supreme Court also relied on the decision in the case of *The Gramophone Co. of India Ltd. Vs. The Collector of Customs, Calcutta*, . In that case, the question arose for determination is whether recording of audio cassettes on duplicating music system amounts to manufacture and it was held that the answer was in the affirmative and a blank audio cassette is distinct and different from a pre-recorded audio cassette and the two have different use and name.

19. In *India Cine Agencies case (supra)*, the Supreme Court has considered the scope of manufacture and production under sections 32A, 80HH and 80-I of the Act. The assessee before the Supreme Court converted jumbo rolls of photographic films into small flats and rolls in the desired sizes. The Supreme Court held that the "production" or "produce" used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture and held as follows :

The reasoning given by the High Courts, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This Court had, as early as in 1961, in *Chrestien Mica Industries Ltd. v. State of Bihar* defined the word production, albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort. From the wide definition of the word production, it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word production since ore is a thing, which is the result of human activity or effort. It has also been held by this Court in *CIT v. N.C. Budharaja & Co.* that the word production is much wider than the word manufacture. It was said : (SCC pp. 286-87, paras 7-8)

The word production has a wider connotation than the word manufacture. While every manufacture can be characterised as production, every production need not amount to manufacture.

The word production or produce when used in juxtaposition with the word

manufacture takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods.

20. This court in the case of Jamal Photo Industries (P.) Ltd. (supra) considered the case of photo industries and as to whether the assessee can claim deduction u/s 80-I of the Act. In that case, the assessee derived income from photo studio by printing positive photos. The issue is whether the assessee was engaged in manufacture, production of article or thing and the court followed the decision of Commissioner of Income Tax Vs. Prasad Productions P. Ltd., and held that photo processing unit installed by the assessee, which accepted negatives of photo films and after applying chemicals and other things, delivered colour photographs in different sizes, was used in the manufacture and production of article or thing known as coloured photographs and was entitled for deduction u/s 32A of the income tax Act, 1961.

21. In view of the principles enunciated in the judgments of the various High Courts referred (supra) and also the Apex Court judgment cited (supra), we are of the view that the hospitals and individual doctors are engaged in commercial activity. Therefore, we are of the view that the assessee is an industrial undertaking and also they are engaged in manufacture or production of any article or thing. It is pertinent to note that the eight High Court judgments cited supra are rendered in favour of the assessee. No appeals were preferred against those judgments by the revenue and the same had attained finality. Further it is relevant to note that in the present case, the Appellate Assistant Commissioner followed the assessee's own case for the assessment year 1986-87 and granted investment allowance and the revenue has not preferred any appeal against the said order. Under these circumstances, the assessee is entitled to investment allowance u/s 32A of the Act.

22. The learned counsel appearing for the appellant/revenue relied on the decisions of Delhi and Bombay High Courts, wherein they have taken a different view in respect of investment allowance in the case of a diagnostic centre. The Bombay High Court in the case of Insight Diagnostic & Oncological Research Institute (P.) Ltd. (supra), considered the scope of section 32A of the Act. In that case, the assessee was a company running a diagnostic centre and claimed investment allowance on CT Scan machine. The Bombay High Court, following another decision of the Bombay High Court in the case of Fariyas Hotels (P.) Ltd. v. CIT (1995) 211 ITR 390 (Bom.), rejected the contention of the assessee and held that the diagnostic centre cannot be considered as an industrial undertaking and it is not involved in manufacture or production of any article or thing. The Bombay High Court has taken a view that the fees charged is not the price of the exposed film but it is charged for services rendered. The price paid was for rendering professional service and hence, X-ray films cannot be treated as a manufactured article or thing and the CT Scan machine installed and run by the

assessee was not an industrial undertaking. As stated earlier, the Supreme Court categorically stated in the case of Oracle Software India Ltd. (supra) that the Court has to move along with the times and must study the actual process undertaken by the assessee and see whether there is any change in the article. Considering the above principle, we are inclined to follow the other High Court judgments.

23. The Delhi High Court in the case of Dr. Yogendar Sharma case (supra) considered the scope of section 32 of the Act and held that the hospital cannot be considered as industrial undertaking and followed the Bombay High Court judgment and distinguished all other decisions of other High Courts and held that the assessee is not entitled to investment allowance u/s 32A of the Act. We are inclined to agree with the other High Court judgments and disagree with the decisions of Delhi and Bombay High Courts. The Gauhati High Court, in the case of Down Town Hospital Ltd. (supra), has considered the scope of deduction under sections 80HH and 80-I of the Act and held against the assessee on the ground that it does not manufacture or produce any article or thing. The assessee appealed to the Supreme Court and the Supreme Court has remanded the same to the High Court on the ground that there is no identification of the items installed in the hospital. It is relevant to note that the Apex Court has not considered the larger issue whether the hospital is an industrial undertaking or not, but set aside the Gauhati High Courts Judgment and remanded the matter with a direction to consider afresh since there is no identification of the items installed in the hospitals. Further, the learned Standing Counsel for the revenue relying on the decisions of Indian Hotels Co. Ltd. (supra), Sterling Foods (supra), Venkateswara Hatcheries (P.) Ltd. (supra), contended that in those cases, the Supreme Court held that the assessees are not engaged in manufacture or production of any article or thing. In the first cited case, the assessee is a hotel and in another case, it is a hatchery unit. On the facts of the case, the Supreme Court held that they are not engaged in manufacture or production of any article or thing and hence, those judgments are not helpful to advance the case of the revenue.

24. Further, the learned counsel appearing for the revenue relied on the assessee's own case relating to the assessment year 2000-01 in Apollo Hospital Enterprises Ltd.'s case (supra). In that judgment, the issue involved was interpretation of section 72A of the Act. It is not the case rendered u/s 32A as in the present case. Section 72A of the Act deals with the carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger etc. By Finance Act of 2001, clause (aa) was added to sub-section (7) of section 72A with retrospective effect from 1-4-2000, whereunder, the "industrial undertaking" is defined. In paragraph 10 of the judgment, the issue was considered and the Court distinguished all the earlier judgments and held that the earlier judgments rendered are no longer a good law. Therefore, the said judgment cannot be made applicable to the facts of the case on hand. Therefore, the reliance placed on the said judgment by the learned counsel

appearing for the revenue is not helpful because in the said judgment, they considered the law amended with effect from 1-4-2000, that too, u/s 72A of the Act.

25. In these circumstances, we are agreeing with the view of the Rajasthan, Kerala, Gauhati, Punjab and Haryana, Gujarat, Andhra Pradesh, Allahabad and Patna High Courts and also this Courts judgment in the case of Dr. V.K. Ramachandran (supra) and hold that the assessee is entitled to the investment allowance u/s 32A of the Act. In these circumstances, we answer the above question in favour of the assessee and against the revenue and the tax case appeal filed by the revenue is dismissed. No costs.