
(2005) 07 RAJ CK 0017

In the Rajasthan High Court

Case No : Civil Special Appeal No. 296 of 2004

D.D. Shah and Brothers

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 18-07-2005

Acts Referred:

Central Sales Tax Act, 1956 — Section 8(3)(1)(b)
Finance Act, 1966 — Section 2(5)
Finance Act, 1978 — Section 2(7)
Income Tax Act, 1961 — Section 10(1), 2(1A), 35B(1A), 80HH, 80HH(2)
Tea Act, 1953 — Section 16A, 3, 4

Citation : (2005) 197 CTR 1 : (2006) 283 ITR 486 : (2004) 3 WLC 425

Hon'ble Judges : Rajesh Balia, J; Dinesh Maheshwari, J

Bench : Division Bench

Advocate : Vineet Kothari, for the Appellant; K.K. Bissa, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh Balia, J.—In this special appeal, a short but interesting question that arises for consideration is whether the blending of different types of tea by the assessee amounts to production of a thing or an article by an industrial undertaking within the meaning of expression as used in Section 80IB of the IT Act, 1961, though it may not amount to manufacture of goods in the sense of bringing into existence altogether a new and different thing as known differently in the commercial parlance in the market where tea is transacted.

2. The appellant-assesses has set up a small-scale industrial unit in the backward industrial area of Banswara. The appellant's case is that it purchased tea leaves powder/granules and these tea leaves are collected by marking the name of garden and lot number. The samples of available quality are dispatched to the "Blend Master" who after going through his own process, suggests the mixing ratio and process of mixing for making the perfect blend of tea. The activity of blending of different types of leaves obtained from different gardens in a definite ratio results in production of a commodity having its own identity and though

may not amount to manufacture, it amounts to production, which is a word of wider connotation. Therefore, it being an industrial undertaking set up in the backward industrial area and fulfilling all other conditions, is entitled to avail the benefit of deduction equal to 100 per cent of its profits derived from its business of producing of and trading in blended tea under the specific brand name of "Maa Betee Tea".

3. The AO has found that the assessee purchases different types of tea, blends them in different proportion and thereafter sells the tea. The mixing of different types of tea in no way can be said to be manufacture or production of article or thing for the purpose of claiming benefit of deduction u/s 80IA/80IB of the IT Act of 1961. The activity of the assessee does not involve any manufacturing but only a processing. There is no element of manufacture in this case. The commodity continues to remain in its original identity even after blending of different kinds of tea in certain proportion. The assessing authority placed reliance on Dy. CST v. Pio Food Packers 46 STC 63 (SC) for holding that even after blending, tea remained tea and blending does not bring out a distinct marketable commodity and it does not amount to manufacture.

4. The assessee before preferring an appeal against the order of assessment dt. 4th Dec., 2003, relating to asst. yr. 2001-02 had approached this Court by way of writ petition being S.B. Civil Writ Petn. No. 161 of 2004. He has relied on a decision of this Court in case of Dhanseri Tea Industries v. State of Rajasthan (S.B. Civil Writ Petn. No. 3102 of 1999, decided on 31st Aug., 2001) which had arisen under the Rajasthan Sales-tax Act, wherein this Court has held that process of blending tea amounts to manufacture and has held M/s Dhanseri Tea Industries eligible to avail benefit of incentive scheme under the Rajasthan Sales-tax Act, 1954. He has also relied on a circular of Government of India under the Department of Industries, dt. 20th Nov., 1996, wherein the industries engaged in manufacture of made tea or in the process of packing or repacking were held to be eligible for registration under the Small Scale Industries Development Scheme.

5. Learned Single Judge dismissed the writ petition on the ground of availability of alternative remedy and noticed that after the filing of writ petition, the petitioner has also filed an appeal before the Dy. CIT(A) which was still pending.

6. Ordinarily, we would have also agreed with the learned Single Judge in not interfering at the stage of passing of the assessment order, but during the course of hearing, at the admission stage, learned counsel for the appellant stated that he shall not press any issue except on the question whether blending or processing of tea amounts to manufacture/production and said question being of recurring nature and is likely to affect the successive assessment years as well as other dealers engaged in the like business and the said issue requires to be settled by this Court to minimise litigation on this issue. Considering the aforesaid circumstances, it appear to us to be a fit case in which availing alternative remedy may not be considered as a ground for not examining the issue on merit, thus, we admitted the special appeal.

7. Section 80IB, under which the assessee has claimed deduction, was substituted for Section 80IA vide Finance Act, 1999, w.e.f. 1st April, 2000. Prior to its enactment, Section 80IA was inserted in the Act of 1961 vide Finance (No. 2) Act, 1991, w.e.f. 1st April, 1991. Section 80IA, as it was originally enacted, provided that where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise of any eligible business as stated in Sub-section (4) of Section 80IA, the assessee was entitled to avail deduction equal to 100 per cent of the profits and gains derived from such industrial undertaking for ten consecutive assessment years. Section 80IA in its original incarnation envisaged where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking, etc. carrying on eligible business, he would be allowed, in computing the total income, a deduction from such profits and gains of an amount equal to percentage specified in Sub-section (5) and for such number of assessment years as is specified in Sub-section (6). The condition which an industrial undertaking is required to fulfil for availing the benefit was that it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India.

8. In the case of an industrial undertaking located in the industrially backward State, it was entitled to claim 100 per cent deduction of its profits and gains. However, by the insertion of Section 80IB as aforesaid, its application was confined to enterprise carrying on business of developing, maintaining and operating any infrastructure facility or scientific and industrial research and development or providing telecommunication services, whether basic or cellular including radio paging, domestic satellite service or network of trunking and electronic data interchange services, any undertaking which develops and operates or maintains an industrial power or an undertaking which is set up in India for generation or distribution of power or starts transmission or distribution by laying new lines of transmission.

9. Section 80IB, which is applicable to the assessment year in question envisaged that where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections as the eligible business and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

10. The bone of contention is the condition precedent which the industrial undertaking is required to fulfil before it avails the aforesaid benefit. It is not in dispute before us that if the condition, to which we shall presently refer, is fulfilled by the assessee, he is entitled to avail 100 per cent deduction of the profits and gains derived from the business of such undertaking under Sub-clause (iii) of Sub-section (2) of Section 80IB, which reads as under :

"(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India :

Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in Sub-section (4) shall apply if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted."

11. Learned counsel for the appellant contends that legislature has specifically used two expressions, namely, "manufactures" or "produces" any article or thing, therefore, expressions "manufactures" and "produces" are not the same thing. Expression "produces" cannot be identical and synonymous with expression "manufactures". The expression "produces" has wider connotation than the expression "manufactures". Bringing into existence altogether a new and distinct commodity than the raw material on which the manufacture process is applied is not an essential condition to be fulfilled to fall within the province of expression "produce". A thing which is not manufactured may still be produced. He relies for that purpose on the decision in the case of Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . On same premise, learned counsel placed reliance on a Bench decision of Karnataka High Court in the case of Brooke Bond Lipton India Ltd. v. State of Karnataka 109 STC 265 (Kar) and on a decision of Calcutta High Court in case of G.A. Renderian Ltd. Vs. Commissioner of Income Tax, for the purpose of holding that blending of tea by the process as stated by the appellant amounts to production of tea of specified quality and strength. Learned counsel also relied on a Supreme Court decision in the case of Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, in which decision of the Bombay High Court in case of Nilgiri Ceylon Tea Supplying Co. Vs. The State of Bombay, was partially overruled.

12. Learned counsel for the Revenue, on the other hand, urged that blending of tea of different grades and making it a mixture of tea of different grades for giving it a brand name for marketing neither amounts to "manufacture" of tea in ordinary sense, as no new and distinct commodity than the tea which has gone into process has come into existence nor does it amount to production of any thing or article so as to be considered as production, because tea as a thing is already in existence when blending takes place. The blended mixture remains the same as is known commercially and is not distinct from any other tea. He places reliance on a decision of the Calcutta High Court in case of Appeejay Pvt. Ltd. Vs. Commissioner of Income Tax, and a decision of the Bombay High Court in case of J.B. Advani & Co. (P) Ltd. v. CIT (1992) 193 ITR 781. He contended that blending of different tea may amount to process and process simplicitor does not result in "manufacture" or "production" of tea which is an essential condition for claiming relief u/s 80IB by any industrial undertaking. He also relies on decision of the Supreme Court in the case of Chowgule & Co. (P) Ltd. and Anr. v. Union of India and Ors. (supra) which is also relied on by the learned counsel for the assessee.

Learned counsel further places reliance on *Dy. CST v. Pio Food Packers* (supra), wherein food processing for the purpose of selling pineapple in tin was held not to be a manufacture because no new commercially distinct commodity comes into existence.

13. The first question we have to consider is whether there is difference between the expressions "produce" and "manufacture" or they are exactly synonyms. The words "manufacture" or "production" have not been defined in the IT Act, therefore, have to be accepted in their ordinary meaning as part of the statute. The expressions "manufacture" and "produce/production" have definite connotation in the judicial vocabulary and have been held to be not an expression of art. The expression "manufacture" has been explained in the Black's Law Dictionary as under :

"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 the hand, by machinery, or by art. The production of articles for use from raw and prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine".

The aforesaid explanation has been given as noun.

The Black's Law Dictionary defines "manufacture" as the making of goods or wares by manual labour or by machinery, especially on a large scale, has expanded as workmanship and art have advanced, so that now nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, for chemical processes devised and directed by human skill, or by the employment of machinery, are commonly designated as "manufactured".

Correspondingly, the expression "manufacturer" has been defined to mean one who by labour, art or skill transforms raw material into some kind of a finished product or article for trade.

14. In contrast, expression "produce" as a verb and as a noun has a multifarious meaning depending on the context in which it is used, like to produce witnesses, to bring forward, to bring into view or notice, to present a play, etc. Firstly, "produce" as a noun means the product of natural growth, labour or capital. Articles produced or grown from or on the soil, or found in the soil. As a verb, in the context, it is stated to mean "to make, originate, or yield, as gasoline. To bring to the surface, as oil."

The expression "production" has been defined as under :

"process or act of producing. That which is produced or made; i.e., goods. Fruit of labour, as the productions of the earth, comprehending all vegetables and fruits, the productions of intellect, or genius, as poems and prose compositions, the productions of art, as manufactures of every kind".

Thus, production not only includes expression manufacture of articles or things by applying labour or process on the existing raw material but also bringing to surface a natural produce of soil like agricultural product, horticultural product, production of fruits and vegetables and excavation of minerals and mineral oil from the product of plants which are grown by the cultivators, agriculturists through labour and other plant products as well as exploitation of other natural resources like mines. Thus, learned counsel for the assessee is right when he says that word "produce" or "production" has a wider connotation than the term "manufacture".

The expression "produce" in the context of producing any thing or article has been assigned its meaning in the Oxford Dictionary as under :

"3.b. of an animal or plant; To generate, bring forth, give birth to, bear, yield (offspring, seed, fruit, etc.);

d. To work up from raw material, fabricate, make, manufacture (material objects);

e. To produce the goods, money, results."

Apparently, expression used in the provision with which we are concerned relates to "produce".

In contrast, word "manufacture" has been defined to mean :

"1.b. The action or process of making articles or material (in modern use, on a large scale) by the application of physical labour or mechanical power.

1. To work up (material) into forms suitable for use."

These definitions denote one inherent property of term "manufacture", that is, existence of raw material which is subjected to certain process, whether manually or by machine or by chemical treatment and as a result of which it undergoes a change and brings out a new commodity known to the commercial world. Thus, manufacture is an activity which is applied to an existing product known as raw material for altering its face to something else.

15. However, the question still arises whether the expression "produce" is wide enough to cover even process which though makes the commodity more marketable but which does not result in bringing into existence any article or thing which did not earlier exist or brought out as a commercial commodity which may amount to production.

16. In *Pio Food Packers* (supra), the Supreme Court was considering the expression "manufacture" used in the Kerala General Sales-tax Act, 1963. The question has arisen in the context of an activity carried on by Pio Food Packers of processing the fruit pineapple into slices for the purpose of being sold in sealed cans. The provision with which the Supreme Court was concerned related to charge of purchase-tax. The contention of the dealer before the Supreme Court

was that the tinned fruit and fresh fruit are two different commodities and, therefore, the petitioner was engaged in manufacturing of tinned fruits, therefore, on purchase of pineapple he was not liable to pay purchase-tax. The Supreme Court dealt with the meaning of "manufacture" and quoted with approval the following passage from *Anheuser-Busch Brewing Association v. United States* 52 L.Ed. 336, 338 :

"Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary.... There must be transformation; a new and different article must emerge, "having a distinctive name, character or use"."

The Court further held that in processing the raw pineapple into slices by peeling off its kernel, the fruit was not consumed as was the requirement of the Kerala Act. The ratio of decision is primarily in the context of provision of Kerala Act which required consumption of fruit in the process before it could be termed as manufacture. The Court said :

"There is no essential difference between pineapple fruit and the canned pineapple slices. The dealer and the consumer regard both as pineapple. The only difference is that the sliced pineapple is a presentation of fruit in a more convenient form and by reason of being canned, it is capable of storage without spoiling. The additional sweetness in the canned pineapple arises from the sugar added as a preservative. On a total impression, it seems to us, the pineapple slices must be held to possess the same identity as the original pineapple fruit."

In coming to this (conclusion, the Court referred to yet another decision from United States in *East Texas Motor Freight Lines v. Frozen Food Express* where the United States Supreme Court held that the dressed and frozen chicken was not a commercially distinct article from the original chicken. It was pointed out:

"killing, dressing and freezing a chicken is certainly a change in the commodity. But, it is no more drastic a change than the change which takes place in milk from pasteurizing, homogenizing, adding vitamin concentrates, standardising, and bottling.... There is hardly less difference between cotton in the field and cotton at the gin or in the bale or between cottonseed in the field and cottonseed at the gin, than between a chicken in the pen and one that is dressed. The ginned and baled cotton and the cottonseed, as well as the dressed chicken, have gone through a processing stage. But, neither has been "manufactured" in the normal sense of the word."

17. In a recent case of *Aman Marble v. State of M.P.* (2003) 58 RLT 595, the Supreme Court has held that cutting of marble block into marble slabs or tiles does not amount to manufacture as in both the forms marble remains marble. However, for the present context, the principle which emerged from the Supreme Court case is that the manufacture is essentially the process applied to existing raw material which transforms the raw material into a commercially distinct article.

18. The Supreme Court in *The Deputy Commissioner of Agricultural Income Tax Vs. Palampadam Plantations Ltd., Kottayam*, had considered this issue in slightly different context. It was considering the meaning of term "produce" used in Kerala General Sales-tax Act, 1963. The expression used was "the person who sells goods produced by him by manufacture, agriculture, horticulture or otherwise". The question has arisen whether spontaneously grown plants which were cut by the assessee and sold in the market as timber was a person who had produced timber. The principle question was whether spontaneous growth of plantation resulting in providing timber to the dealer amounted to production of timber by him.

The Court said :

"...The context in which the word "produced" appears in the definition can only mean "to bring forth, bring into being or existence--to bring (a thing) into existence from its raw materials or elements...."

Thus, expression "produced" was given a wider meaning than the word "manufacture" pointing out that word "produced" will include an activity of manufacturing the materials by applying human endeavour on some existing raw material, but word "produce" may include securing certain produce from natural elements, for example, by growing plants on soil, or by operating mines and the like or for example, by milching the cow the milkman produces milk though he has not applied any process on any raw material for the purpose of bringing into existence the thing known as milk.

19. In *CIT v. N.C. Budharaja & Co. and Anr.* (supra), the question has arisen before the Supreme Court for interpreting the like provision contained u/s 80HH of IT Act, 1961, as is contained in Section 80IB with which we are concerned. u/s 80HH, one of the conditions for availing the benefit of deduction u/s 80HH was prescribed under Sub-section (2) which was couched in same language as is the provision of Section 80-IB(2)(iii) with which we are concerned. The assessee had claimed that the foundation for superstructures on which the dam is to be constructed is an article manufactured by the assessee.

The Court referring to its earlier decision in *Pio Food Packers* (supra) reiterated the difference as under :

"Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But, it is only when the change, or a series of changes take the commodity to the point where commercially it can no longer be regarded as the original commodity, but instead is recognised as a new and distinct article that a manufacture can be said to take place."

Coming to expression "production", the Court added :

"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. In the case of manufacture, the original commodity transforms into a new commodity as per the illustrations we have seen earlier. The cultivation of crops, operation of mines for getting the minerals from the sub-soil or for getting the milk by milching the cow or say by producing the meat by slaughtering the animals, making the milk of different grades by pasteurizing, homogenizing, adding vitamin concentrates, standardising and bottling, or applying process to the original chicken by converting into a dressed or frozen, does not amount to an act of manufacture or production as it does not bring into existence a new commodity. About third thing in the context, the Court said the manufacture or produce an article or thing refers to bringing into existence movable thing or article and construction of the building or darn cannot be construed as an activity of manufacture for bringing a thing or article into existence.

21. Ratio of this decision clinches the issue. In either case--manufacture or produce--brings into existence a new commodity either by altering the face of raw material, or by bringing into existence a new product from natural elements or process. It is immaterial whether new product is a direct result or indirect result.

22. Illustratively, reference can be made to the Supreme Court decision in the case of ASPINWALL and CO. LTD. Vs. Commissioner of Income Tax, wherein the Court after noticing the nine processes through which the raw coffee is made to undergo before it ultimately results into coffee beans amounts to manufacture as the coffee beans have an independent identity distinct from raw material from which it was manufactured. A distinct change comes about in the finished product.

23. In another case of Sacs Eagles Chicory v C.I.T., (2002) 255 ITR 178 , the Supreme Court found that the process of making chicory powder from chicory roots does not amount to manufacture as no new commodity comes into existence.

24. Therefore, in each case it has to be found as a fact the process through which the end product is arrived at and whether it is a new product brought into existence through manufacture by applying the various processes on the original material as raw material or is derived by human endeavour from natural element or other resources. There being no involvement of applying process to the raw material, the same may not amount to manufacture. In either case, in order to fall within the meaning of term "manufacture" or "produce", it must result bringing into existence a thing or article which is new.

25. This brings us to consider the Supreme Court decision in Chowgule's case (supra), on which reliance has been placed by both the learned counsel. The Court was considering the case of a dealer under the Central Sales-tax Act. The assessee was a private limited company carrying on the business of mixing iron ore and selling it in the export market after dressing, washing, screening and blending it. u/s 8(3)(1)(b) of the Central Sales-tax Act, 1956, certain transactions in the course of inter-State trade or commerce are subject to lower rate of tax @ 3 per cent of the turnover. The condition is that the goods which are subject to inter-State trade or commerce must be one falling within the description referred to in Sub-section (3). The Court was concerned with Clause (b) of Sub-section (3) of Section 8, which reads as under :

"Section 8. (1) Every dealer, who in the course of inter-State trade or commerce--

(a) sells to the Government any goods; or

(b) sells to a registered dealer other than the Government, goods of the description referred to in Sub-section (3);

shall be liable to pay tax under this Act, which shall be 3 per cent of his turnover.

(3) The goods referred to in Clause (b) of Sub-section (1)--

(b) ***** are goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power."

It may be noticed mere processing of goods, which may not amount to manufacture, will entail application of lower rate of Central Sales-tax.

26. The entire activity of assessee was broadly divisible into seven different operations, one following upon the other. The last one was blending of the ore from different stock piles with a view to produce iron ore of the required specifications and loading it into the ship by means of the "mechanised ore handling plant".

27. The questions that arose before the Court were (i) Whether the blending of different qualities of ores whilst loading it in the ship by means of the "mechanised ore handling plant" constituted "manufacture" or "processing" of ore for sale within the meaning of Section 8(3)(b) and Rule 13 read with Section 8(1)(b) and (ii) Whether the process of mining, conveying the mined ore from the mining site to the riverside, carrying it by barges to the harbour and then blending and loading it into the ship through the mechanical ore handling plant constituted one integrated process of mining and manufacture or processing of ore for sale, so that the items of goods purchased for use in every phase of this

integrated operation could be sold to be use of goods purchased in the course of inter-State trade intended to be used for manufacturing or processing of ore for sale falling within the scope and ambit of Section 8(3)(b) and Rule 13 so as to attract the lower rate of sales-tax u/s 8(1)(b). The Court dealt with the two aspects separately. Firstly, whether this amounts to manufacture, the answer was in negative. The Court after referring to the test evolved by it in finding out whether any process results in manufacture of goods or not, said :

"The test that is required to be applied is : does the processing of the original commodity bring into existence a commercially different and distinct commodity. On an application of this test, it is clear that the blending of different qualities of ore possessing different chemical and physical compositions so as to produce ore of the contractual specifications cannot be said to involve the process of manufacture, since the ore that is produced cannot be regarded as a commercially new and distinct commodity from the ore or different specifications blended together. What is produced as a result of blending is commercially the same article, namely, ore though with different specifications than the ore which is blended and hence it cannot be said that any process of manufacture is involved in blending of ore."

28. Applying this test to the present case, it can be said that blending of different grades of tea may on blending result into bringing the tea of particular specification, but it cannot be held to involve the process of manufacture because the tea, Which arrives as a result of blending activity cannot be regarded as a commercially new commodity. What is produced as a result of blending is commercially the same article, namely, tea, though with different combinations than those which are blended, hence it cannot be said that any process of manufacture is involved in blending of tea.

29. Coming to the second aspect of the matter whether blending of different types of ore amounts to processing. The Court held in favour of dealer. While overruling the decision of the Bombay High Court in Nilgiri Tea Co.'s case (supra), the Court said :

"What is necessary in order to characterise an operation as "processing" is that the commodity must, as a result of the operation, experience some change. Here, in the present case, diverse quantities of ore possessing different chemical and physical compositions are blended together to produce ore of the requisite chemical and physical compositions demanded by the foreign purchaser and obviously as a result of this blending, the qualities of ore mixed together in the course of loading through the mechanical ore handling plant experience change in their respective chemical and physical compositions, because what is produced by such blending is ore of a different chemical and physical composition. When the chemical and physical composition of each kind of ore which goes into the blending is changed, there can be no doubt that the operation of blending would amount to "processing" of ore within the meaning of Section 8(3)(b) and Rule 13."

30. For the purpose of counter-mining the aforesaid contention of the assessee, the Revenue has relied upon the decision of the Bombay High Court in Nilgiri Tea Co.'s case (supra), wherein the Bombay High Court has held that blending of tea of different grades does not even amount to processing.

31. The Supreme Court recognised the close analogy between the facts of Nilgiri Tea Co.'s case (supra) and the facts of the case before the Supreme Court, namely, blending of iron ore. By overruling the decision of the Bombay High Court, the Court said :

"When different brands of tea were mixed by the assessee in the Nilgiri Tea Co.'s case (supra) for the purpose of producing a tea mixture of a different kind and quality according to a formula evolved by them, there was plainly and indubitably processing of the different brands of tea, because these brands of tea experienced, a result of mixing, qualitative change, as that the tea mixture which came into existence was of different quality and flavour than the different brands of tea which went into the mixture."

32. The assessee relied on the later part of the judgment of Chowgule & Co.'s case (supra), wherein the Court equated the blending process of iron ore with the blending of different grades of tea. However, the Court clarified that process in either case does not amount to manufacture, in other words, it does not bring into existence a new commodity, commercially different from one which has gone into blending. Thus, blending though not manufacturing of goods but amounts to processing of goods in the sense that it brings some change in the goods, hence it was entitled to lower rate of tax under the Central Sales-tax Act. However, we are not concerned with the expression "process" in juxtaposition with expression "manufacture". The legislature as clearly used "manufacture" and "produce" in juxtaposition of each other.

33. We have noticed above the ratio of decision of the Supreme Court in N.C. Budharaja's case (supra) that in either case bringing into existence new commodity is of essence. The Supreme Court in Chowgule's case (supra), drawing analogy between blending of iron ore and blending of tea, has held that it does not bring into existence a new commodity commercially distinct from tea.

34. The Supreme Court in N.C. Budharaja's case (supra) has held that result of manufacturing or producing must be bringing into existence a new commodity. The difference which was clearly noticed in N.C. Budharaja's case (supra) was also noticed by the Supreme Court in its earlier decision in the case of Palampadam Plantations Ltd. (supra). The basic difference between the two is that while manufacturing is confined to applying process on an existing article termed as raw material and through the process applied manually or by machine, a change is brought into the raw material which makes it commercially distinct commodity in the market; while producing a thing or article, which is a wider connotation, includes the process of manufacturing but is not confined to applying process to raw material for converting that raw material into a new

commodity, but it can be a production of a thing or article from the natural elements or other resources, as we have noticed hereinabove in illustrations of agricultural produce and mineral produce.

35. The expression "article or thing" is qualified by two adjectives; manufacturing or producing. Thus, manufacturing or production must result bringing into existence an article or thing as a distinct marketable commodity. Apparently, in view of the distinction drawn between the two expressions and the distinction being clear in Chowgule's case (supra), the contention of the assessee that blending of tea amounts to process of production though it may not amount to manufacture cannot be accepted. We may notice here in all fairness to either party that both the parties have been carried away with the facts stated by assessee and decision given by the assessing authority solely based on the decision in Pto Food Packers" case (supra) which in our opinion deals with the term "manufacture" and was not dealing with the expression "production" or "produce". Moreover, it was more concerned with consumption of an article in manufacture of goods and finding that the fruit after it is cleared from its skin, sliced and put in preservatives does not result in consumption of the fruit so as to fall within the purview of Kerala General Sales-tax Act with which the apex Court was dealing.

"Manufacture" and "Production" of tea : A perspective under Tea Act, 1953

36. It is to be noticed that tea is a natural product of bushy plant. The Tea Act, 1953, was enacted by the Parliament to provide for control by the Union of the tea industry, including the control, in pursuance of the international agreement then in force, of the cultivation of tea in, and of the export of tea from India and for that purpose to establish a Tea Board and levy a duty of excise on the tea produced in India. The Act defines tea to mean the plant *Camellia Sinensis* (L) O. Kuntze as well as all varieties of the product known commercially as tea made from the leaves of the plant *Camellia Sinensis* (L) O. Kuntze including green tea. Significantly, it uses the expression in the main provision of the Act more than once, "the manufacture of tea".

37. Section 4 provides for establishment and constitution of Tea Board. The Tea Board includes representatives of owners of tea estate and gardens and growers of tea and manufactures of tea. The Act defines "manufacturer" u/s 3(i) to mean manufacturer of tea. While Chapter III provides control over the extension of tea cultivation, Chapter II-A deals with management or control of tea undertakings or tea units by the Central Government in certain circumstances. Section 16A(e) defines "tea undertaking" as an undertaking engaged in the production or manufacture, or both, of tea through one or more tea units and "Tea unit" has been defined u/s 16A(f) as a tea estate or garden including a subdivision thereof, which has a distinct entity for which accounts are kept and has a factory of its own for the production and manufacture of tea.

The expression "tea undertaking" engaged in production or manufacture, or

both, of tea are two different connotations and notwithstanding that the tea which comes in the market is in different form from the leaves which are plucked from the bush, tea bushes are situated in tea estate or garden or are grown by other persons and is a matter of cultivation, whereas, manufacturing is something different and that is making of the natural tea leaves as a marketable and consumable because tea leaves in their natural form are neither consumable nor marketable as same thing from which tea liquor could be procured.

38. Before noticing what is meant by manufacturing of tea as is known in the commercial world of tea business, it may be relevant here to notice some provisions of the IT Act, 1961, which make the distinction between "manufacture" and "production" of utmost relevance.

39. As we have noticed, tea in ordinary sense is a natural vegetable product. Under the IT Act, agricultural income is not subject to charge. Under Sub-section (1A) of Section 2 "agricultural income" has been defined to mean the income derived from any rent or revenue derived from land which is situated in India and is used for agricultural purposes and any income derived from such land by agriculture or the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market. Therefore, agricultural income derived by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market is also not taxable. It is in this context, it has to be examined that what is the impact of expression "producer of tea" and "manufacturer of tea".

40. Tea trade has three different stages. Firstly, producing of tea leaves by the owner of the garden, second stage is manufacture of tea from green leaves plucked from the bushes, and lastly, sorting and grading tea, as it comes in different groups and different quantities not of uniform quality. The blending becomes an important part of tea marketing. Therefore, if the blending which comes after manufacture of tea is a part of process of manufacture of (or) making the tea marketable.

41. The question has to be viewed from different angles. If the entire process is done by the grower of tea then the entire income being an agricultural income derived from applying process to the goods to make them fit to bring them to market as per Section 2(1A) is not taxable u/s 10(1) and consequently, eligibility u/s 80-IB does not arise.

Further, if this process is applied by different persons, the question may arise who manufactured tea. The manufacturer may not be absolved from charge of Income Tax as he is not a cultivator and for him it is not an agricultural income and in such case he is subject to tax. But, he may avail the benefit of deduction u/s 80-IB as an industrial undertaking engaged in manufacture of tea. If blending becomes integral part of manufacturing process, the activity may fall within the purview of Section 80IB. But, if a manufacturer of tea or a grower of

tea after manufacturing tea brings sorted and graded tea to the market which is purchased by a trader, who after blending the teas of various varieties sells in saleable packets for retail purpose or in loose form, such blending being a process for the purpose of marketing only may not amount to manufacture or production of tea. In such event, if we apply the test as has been applied by the Supreme Court in Chowgule's case (supra) as well as in N.C. Budharaja's case (supra), since blending of tea does not bring into existence a new commodity which is so essential to avail benefit u/s 80IB, the same is not available to the assessee. Consequently, mere activity of blending is not qualified for claiming deduction u/s 80IB.

42. Some foray into tea trade will not be out of place here. The tea which reaches consumer market begins its journey with the growing of tea as an agricultural product. The information that emanates from Encyclopedia Britannica (Macropaedia Vol. 18) 1980 Edn., can be stated in brief as under :

Tea is made from young leaves and leaf buds of tea plant a specie of evergreen (Camellia Sinensis). It originated in China, as per existing records according to legends about 2737 BC, in his writing dating back to 780 AD. Lu Tie, a Chinese scholar, said that there were a thousand and ten thousands teas. He described how the tea is used specifying that tea leaf be plucked during certain months and clear weather, how it is to be manipulated in hands, dried and sealed. This signified that tea leaves as such are not used as a fresh green leaves but has to be brought by some process to its usable condition. The growing operation as per scientific study undertaken since 1890 reveals that tea growing operations include seed production, clonal selection, tea nursery management, transplanting, development of bushes and subsequent pruning and plucking; the soil management, and the ultimate replanting of the stand. With plucking of tea leaves, the agricultural or plant produce of tea comes in hand. But that is not marketable. It has to be subjected to process of preparing or making tea which can be brought to market.

The second stage is properly described as preparing or making or manufacturing of tea. Hand method for preparation of tea shoots consisting of young leaves and terminal leaf bud have their origin in antiquity. The prepared teas are designated broadly black (fermented) green (unfermented) or oolong (semi-fermented).

In its most simple form, the preparation of black tea has been described as under :

"When black tea is made by the small producer, the leaf is plucked on a clear day after the dew is gone, exposed to the sun and air for atleast an hour, then lightly rolled on a table to develop a red colour and an aroma. The leaves are heated in a hot iron pan, rolled, heated several additional times, and finally dried in a basket over a charcoal fire."

The modernisation of tea preparation has introduced mechanised tea making. In India, when tea cultivation began, new withering process was developed. In the

new withering process, the leaves were spread on trays and left overnight, then rolled only once, and spread on the floor to ferment. Drying began in a hot iron pan and was finished on trays placed over a charcoal fire. Hand-rolling required the greatest amount of labour.

The modern method of producing CTC (crushing, tearing and curling) is now applied to most of tea forms in North India. The process is described as under:

"Normally, withered leaf is given a short, light roll, then put through the machine. Two engraved metal rollers, one making 70 revolutions per minute (rpm) and the other, 700, distort the leaf in fraction of a second. Other machines producing rapid and full leaf distortion have also been perfected. The unorthodox method is currently applied to 70 per cent of the tea manufactured In North East India, and the method is also prevalent in several other countries. The grades of tea produced are mainly dust and fannings, with some broken.

The tea is machine fired and on the following day it is sorted into grades. It is then stored in bins until a sufficient amount accumulates to make up an invoice of about 60 to 240 chests."

Tea thus prepared and graded is brought to market through public auction house. As noticed above, each accumulation of relatively smaller quantity makes it difficult to carry a uniform result in quality and chemical contents of different lots and tea carrying from different gardens, estates and growers and region.

That leads to preparing the uniform blends of different hue and colour to suit the market by tea traders. Tea bought at auction are blended by the traders to suit their own markets. Each firm bases its bidding on information provided by tea-taster, who notes the appearance of dry tea, the infused leaf and the infusion; the aroma of both the dry tea and the infused leaf are the taste and flavour of the infusion.

Teas to be used for a blend are selected for the quality, flavour, strength, and body of the liquors and the size and style and density of the leaf.

Teas are blended by mixing the leaf in a machine consisting of a revolving drum fitted with veins. Satisfactory blending requires about 16 revolutions.

43. From the aforesaid narration of the Encyclopedia Britannica, it can be inferred that the three stages through which the tea goes in the market are growing of tea in different estates or gardens by the growers of tea at a suitable place. Green tea leaves as plucked from the tea bushes are not directly usable as tea as we know. It has to undergo certain process before it can be used as tea. That process is described as making or manufacturing of tea which results in bringing green tea leaves to the stage of its usability as tea of different grades having different chemical contents and properties depending upon the process applied and the geographical region in which the tea is grown, the soil over which plantation has taken place and the period in which the leaves have been plucked and collected from the tea growing centre. The making and manufacturing of tea

result in bringing into existence the tea which is brought to the market for selling. However, as the tea is not a uniform product, different traders who purchase the tea brought to the market by different growers and manufacturers, resort to blending of tea to suit their own markets and consumers before they are sold loosely in retail or in branded packets to bring uniformity of taste and flavour for the buyers.

44. This process of tea trading is also evidenced in the book "TEA" written by T. Eden, who was the Director of Tea Research Institute, East Africa. In its second edition, he has described the entire gamut of tea in its cultural aspect and in its trading aspect. After describing the whole process of growing tea, it deals with the chemistry of tea leaves, its manufacturing and lastly, in present context the tea trade and industry in separate chapters.

45. In Chapter XII, he describes the chemical composition of tea leaves, its inorganic constituents--the nitrogen compounds--carbohydrate and associate compounds--the polyphenols pigments--enzymes--vitamins which exist in different variants in green tea leaves. In this chapter, he states that the most important chemical process is the oxidation of atmospheric oxygen with the help of oxidants. He describes in detail what change is brought by fermentation into the properties of tea leaves.

46. In Chapter XIII, Mr. Eden deals with manufacturing process and which shows that manufacturing process primarily refers to the black tea as we have noticed above including plucking of tea leaves, withering, rolling, roll-breaking and green leaf sifting, fermentation, firing, grading and sorting. All these processes bring into existence the tea known to the market as black tea, CTC and as brought to the auction house in bulk for tea traders.

47. In Chapter XIV, he points out the process that is applied by the traders when they purchase tea in bulk as manufactured or made from the green tea leaves. He states that tea industry does not produce a uniform product. The characteristics of an accepted grade such as Broken Orange Pekoe vary to some extent from country to country, district to district and from estate to estate. Superimposed on these broad differences are others determined by the season of the year during which the leaf is harvested and manufactured. The tea buyer takes all these factors into consideration. From long experience he knows the type of tea to be expected at any particular time from a particular locality and even from a particular estate, and in his operations his interest is centred on the individual estate or group of estates. When he buys, he is not buying in bulk but in a series of small lots some of which may be no greater than 600 Ibs. Consequently, bearing in mind the multiplicity of estates, it will be readily appreciated that the marketing of tea is a very intricate business.

It is for the purpose of making a uniform grade out of assorted product which is purchased by the traders that the process of blending takes place by tea traders.

48. Mr. Eden has dealt with some process held in London tea auction in detail

and that may be taken as illustration for other countries, reason being obvious that at the time the book was published, major tea trading took place at London and traditional markets were at Calcutta, Colombo.

49. Similar view has been expressed by E. Jaiwant Paul in his recently published book "The Story of Tea". He describes "Planting and Manufacture of Tea", and "Tea Tasting and Blending" in two separate chapters. According to him also, as noticed above, bulk teas are sold by public auction, though the gardens could "sell their tea to private buyers. It has been noticed that multinational tea companies like Brooke Bond own not only tea plantation companies in India, Sri Lanka and Africa, but also separate companies which blend, pack and market tea. The procedure for auction is described as under :

"The procedure for the auction is virtually the same whether in Calcutta, Colombo or London. When the tea arrives from the gardens, it is stored in bonded warehouses. The brokers then inspect the tea, taste samples and value it. Full particulars are printed in the brokers' sale catalogue. The prospective buyers, who are generally the packet tea companies, consider the brokers' idea of the likely price but, naturally, are not over-influenced by their indications, They in turn draw their own samples of tea, taste them and make their own valuation before the sale. After this, they decide which teas they are going to bid for. The senior tasters and blenders to the big tea companies are very highly paid men. As a result of astute buying and anticipation of market movement, these senior tasters can make huge profits for the blending and packing companies."

Then it says :

"For the buyers who have bought in bulk at the auctions, the next stage is blending of different teas in order to maintain the consistent quality and flavour of each blend. Teas from individual gardens vary not only throughout the seasons, but also from one season to the next due to local climatic conditions and also due to differences in manufacture. By blending the teas, the companies can create blends which maintain a constant qualityIt is only rarely that pure tea from an individual garden is marketed. This is for reasons of consistency in quality and the price factor discussed above. When a tea is labelled Darjeeling and Darjeeling blend, it may well be made up of 5 or 17 per cent pure Darjeeling with the rest comprising price reducers--medium quality or even low quality teas which nevertheless achieve a pure Darjeeling flavour."

This treatise also clearly makes out that marketing of tea could mean two things. First, there is disposal of tea from the estates in bulk through the auctions or through private sale. Second, the marketing of tea in its branded packaged form to the consumer through the wholesale and retail network. Blending is really a part "of second stage of marketing by traders. It does not involve production or manufacture of tea.

50. We shall presently notice that manufacture of tea is subjected to excise duty by way of cess imposed under the Act which distinguishes between growing of

tea, manufacturing of tea and marketing of tea. In short, the tea manufactured or made in different quality as stated above and in different grades is brought to the auction house where it is purchased by the traders in variable quantities,

51. About the blending of tea, Mr. Eden says that the grades into which tea is sorted in producer's factories are not sold as such to consumers. Retail tea, whether sold loose, or more usually in the branded packet, is invariably a blend of different grades derived from a variety of estates and usually from more than a single country of origin. The blend may contain in various proportions twenty to forty different components. In blending tea, different components are chosen for their contribution to a number of desirable qualities in the brew, such as, colour, strength, pungency and flavour. The prescription for a blend is based on various tea-taster's reports on various teas. There are no quantitatively precise methods of evaluating quality and consequently, tea-tasting remains an art, rather than a science. The concerted opinion of a panel of tea-tasters provides a reliable evaluation of a tea's worth.

52. It is true that by blending the tea of different qualities by their purchaser, brings into some qualitative change and a particular brand of tea carrying uniformity in its appearance, taste and chemical contents rules the market as a blend or mixture of tea. So far as making of tea from green tea leaves is concerned, it may amount to manufacture or production of tea. We have noticed above in two different decided cases that expression "produce" or "production" has a wider connotation. The manufacture is invariably included in the expression "production", but vice versa it may not be true inasmuch as the basic difference is that in the former transformation of existing commodity takes place. The existing commodity which after undergoing the process applied to it by the manufacturer undergoes such a change that it becomes a new commodity, a commodity different from the raw material as distinctly known in the commercial world from its raw material. Whereas, expression "produce" or "production" may not necessarily mean conversion of raw material into a new commodity, but may be obtaining new product from the natural elements or by some other activity from different sources, for example, extracting mineral ore from mines, producing milk by milching the cow, securing latex or rubber from rubber trees; every agricultural produce grown by cultivation in the fields are illustrations of things produced which does not amount to manufacture.

In that sense, the green leaves of tea bushes are produced by cultivation. That is the first stage. Since the green leaves are not consumable as such, using green leaves as raw material, the same is converted into made tea or manufactured tea and a consumable commodity is brought into existence. Such process amounts to manufacture of tea. After the tea is made by converting green leaves into consumable tea of different qualities in different lots and brought to market, the buyers of different teas blend them into different specifications for convenient retail marketing through different brands. The process remains processing for bringing some qualitative change but not bringing into existence any distinct tea

as a new article or thing.

53. Apparently, in the present case, the natural product through vegetation growth is the green tea leaves. Its subjection to Income Tax depends on who brings it into the market, and at what stage. It is relevant to mention here that under the IT Act, 1961, agricultural income is not taxable as the same is exempted u/s 10(1) from the charge of tax. Agricultural income has been defined under Sub-section (1A) of Section 2, which reads as under :

"(1A) : "agricultural income" means--

(a) any rent or revenue derived from land which is situated in India and is used for agricultural purposes;

(b) any income derived from such land by--

(i) agriculture; or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market; or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in paragraph (ii) of this sub-clause;

(c) ..."

It is to be noticed that agricultural income includes income derived from any such land by the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market.

54. In view of the aforesaid provision, a grower of tea if himself is performing activities which is essential for bringing the produce of tea to the market, for him it becomes; agricultural income and not liable to tax. Obviously, in such case, Section 80IB would have no application. The income in the hands of a grower or cultivator of tea who applies the process of manufacturing of tea to make it marketable and without which it is not marketable remains an agricultural income fully exempted from liability of tax and, therefore, it is not included in total income for which deduction can be claimed. If the cultivator who manufactures or makes tea, in the sense we have noticed above, there is no difficulty in saying that it still remains an agricultural income.

55. However, different consideration arises when cultivator or grower of green tea leaves sells the green tea leaves to the manufacturer, who sells the manufactured tea or made tea in the market to traders. In such case a person other than grower of tea makes the tea, as noticed by us above, to make the green leaves into marketable tea and the blending by the trader who has purchased the made tea from the market at the auction house or from the

grower of tea; his income ceases to be an agricultural income as exemption of agricultural income is available only to the grower and not to the person who independently after buying the agricultural produce applies one or more process to it and converts it into a different commodity or applies process for the purpose of marketing. In their hands the income is not agricultural income and is subject to tax under the Act of 1961. For such persons the produce purchased serves as raw material or the original material to which process is applied, if as a result of such process a new and distinct commodity comes into existence it becomes a production of new commodity by process of manufacture, but if it does not result into bringing a new commodity. It can neither be a production by the process of manufacture or a thing otherwise produced because in either case bringing into existence a new product is a condition necessary.

56. In these circumstances, somewhat similar question has arisen before the Supreme Court in Commissioner of Sales Tax, Lucknow Vs. D.S. Bist and Sons, Nainital, under the U.P. Sales-tax Act, 1948.

Under the U.P. Sales-tax Act, 1948, the term "turnover" has been defined u/s 2(1), which reads as under :

""Turnover" means the aggregate amount for which goods are supplied or distributed by way of sale (or are sold), or the aggregate amount for which goods are bought, whichever is greater, by a dealer, either directly or through another, on his account or on account of others, whether for cash or deferred payment or other valuable consideration :

Provided that the proceeds of the sale by a person of agricultural or horticultural produce, grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, or poultry or dairy products from fowls or animals kept by him, shall be excluded from his turnover."

It may be noticed that no specific definition of "agricultural turnover from the agriculture or horticulture produce grown by himself or grown on any land" in which such person has interest was provided, yet principle made explicit in definition of "agricultural income" under IT Act, was read implicit in the expression of turnover of agricultural produce. It was held to include sale of agricultural produce after applying the process by the grower of agricultural produce to make it fit to bring it to the market. The question which fell before the Supreme Court for determination was that the assessee-respondent had owned some tea gardens in the State of U.P. He has sold the tea leaves grown by him in his garden in the market after being processed and packed. The stand taken on behalf of assessee was that tea leaves sold by him were agricultural produce grown by himself, therefore, sales were not exigible to sales-tax. The Revenue had not accepted the plea of the assessee. According to the Revenue, the assessee had made green tea leaves marketable and fit for consumption by the consumers. The process has resulted in leaves undergoing such vital change

that they lost their character of being an agricultural produce and became a different commodity. Thus, sales made by the assessee were exigible to sales-tax.

57. It may be noticed that in the case before the Supreme Court, the process by which green leaves were made marketable was undertaken by the grower himself and not by the buyer.

58. The High Court has taken the view that the tea leaves are plucked from the tea plants as green tea leaves. The tea leaves so plucked were not fit for consumption and were not sold in the open market. They are often purchased by big tea concerns from the owners of the gardens and after processing and packing them the buyer sells them in the market. Since in their case the proviso will not apply, the sales will be exigible to sales-tax. But, when the producer himself does the same or similar kind of job, then the question arises whether it can be justifiably said that he also cannot take advantage of the proviso. The High Court noticing the 7 processes through which the leaves had gone through, which are very much the same as we have noticed above, even in the absence of aforesaid provision under the U.P. Sales-tax Act, as enacted u/s 2(1A) of IT Act, 1961, still the same principle was applied. Affirming the judgment of High Court, apex Court said :

"It should be remembered that almost every kind of agricultural produce has to undergo some kind of processing or treatment by the agriculturist himself in his farm or elsewhere. In order to bring them to a condition of non-perishable and to make them transportable and marketable, some minimal process is necessary to be applied to many varieties of agricultural produce.... But, there may be some other kinds of agricultural produce which required some more processing to make it marketable. In the case of such a commodity what one has to judge is to find out whether in relation to that agricultural produce the process applied was minimal or was it so cumbersome or long-drawn that either in common parlance or in the market or even otherwise, anybody would not treat the produce as an agricultural produce."

With this background, the Court said :

"Unlike many agricultural products, tea leaves are not marketable in the market fresh from the tea gardens. Nobody eats tea leaves. It is meant to be boiled for extracting juice out of it to make tea liquor. Tea leaves are, therefore, only fit for marketing when by a minimal process they are made fit for human consumption. Of course, the processing may stop at a particular point in order to produce inferior quality of tea and a bit more may be necessary to be done in order to make it a bit superior. But, that by itself will not substantially change the character of tea leaves, still they will be known as tea leaves and sold as such in the market.... Withering, crushing and roasting of tea leaves will be surely necessary for preserving them. The process of fermentation or final roasting with charcoal for obtaining suitable flavour or colour and also the process of grading them with sieves were all within the region of minimal process and, at no point of

time, it crossed that limit and robbed the tea-leaves, the agricultural produce, of their character of being and continuing as such substantially."

59. In coming to this conclusion, the Supreme Court quoted the meaning of "manufacture of tea" from Encyclopedia Britannica Vol. 21 (1968 Edn.) as under:

"Then comes the sub-head "Manufacture", which enumerates the categories of three classes of teas and then it is mentioned :

"Most stages of processing are generally common to the three types of tea. First, the fresh leaves are withered by exposure to the sun or by heating in trays until pliable (usually 18-24 hours). Next, the leaves are rolled by hand or machine in order to break the leaf cells and liberate the juices and enzymes. This rolling process may last upto three hours. Finally, the leaves are completely dried either by further exposure to the sun, over fires, or in a current of hot air, usually for 30-40 minutes".

On this premise, the Supreme Court inferred that it would thus be seen that the tea leaves as plucked have got to pass through stages of processing of one kind or the other in order to make them fit for human consumption, as in the case of paddy and many other commodities, de-husking in the case of former and some other kind of process in regard to the latter has got to be done in order to make them marketable and fit for consumption.

On this premises, the Court affirmed the view of the High Court and it also affirmed distinction between the case of process applied by the grower of tea leaves for making it marketable to be different from the case of buyer of green leaves from the grower and making it marketable.

60. The aforesaid decision fortifies us in our conclusion to which we have reached above that if the process of manufacture is applied by the buyer of green tea leaves, it loses its character as an agricultural income as defined u/s 2(1A) as the process of making tea fit for marketing is not carried out by the grower of agricultural produce but has been applied by a trader or a dealer in tea, who is not an agriculturist. This also fortifies our conclusion that in such case, manufacturer or producer of tea in the sense it make it marketable by applying the process as popularly known as manufacturing or making of tea and it becomes chargeable to Income Tax and the question of applicability of deduction u/s 80IB arises for consideration.

61. In the present case, obviously, the appellant purchased manufactured or made tea leaves powder/granules through auction or through the dealer and not directly from the grower. The samples of available qualities are dispatched to the "Blend Master", who after going through his own process suggests the mixing ratio and process of mixing for making the perfect blend of tea. So, apparently, the assessee is not the producer of green tea leaves and he only applies the process to make made tea marketable tea, as noticed by us above. The circular to which the appellant has referred applies to made tea or manufacture of tea in

the sense that green tea leaves itself are not marketable and are subjected to the process by which it is converted into marketable tea. Annex. 2 dt. 20th Nov., 1996, refers to made tea and refers to a notification issued under the Small Scale Industries Development Scheme for registering an industry engaged in packing or repacking of made tea. It has nothing to do with the question whether the appellant is an industrial undertaking which manufactures or produces tea as an article or thing which is not included in Schedule 11 to the Act. As a matter of fact, the provisional registration of the appellant is only for tea packing. The registration is not for manufacturer of tea. The appellant is only carrying out the blending of different grades and qualities of manufactured or made tea purchased by him from auction house or from the dealer of tea, therefore, he is not a person who has directly purchased green tea leave from the grower of tea and then applied to it the process of manufacture within the terms of Tea Act where the grower and manufacturer of tea have been classified differently and he remains a trader in tea, who markets his merchandise in loose or packed form under the brand name.

62. If the process is to be examined in the light of principle enunciated in Chowgule's case (supra) on which both the parties have relied, we are of the opinion that appellant's case does not go beyond the processing of tea for marketing and does not result in manufacturing or producing tea as an article or thing within the meaning of Section 80IB.

63. We have discussed in detail the Chowgule's case (supra) hereinabove. It has clearly made distinction between the manufacture and process. The apex Court was dealing with a case in which lower rate of tax was applicable to a commodity which has been manufactured or processed. The Supreme Court has held the case of mixing of iron ore and mixing of tea as of proximate analogy. While coming to the fact of mixing of different qualities of iron ore, the Supreme Court made it clear that though blending of different qualities of ore possessing different composition so as to produce ore of contractual specification, the same cannot be said to involve the process of manufacture, since the ore that is produced cannot be regarded as commercially new or distinct commodity from the ore which is blended and hence, it cannot be said that any process of manufacture is involved. One has to replace tea for ore in reaching the same conclusion.

64. We have no hesitation in coming to this conclusion that blending of different qualities of tea possessing different chemicals and physical composition so as to produce the specified blend of tea does not involve an act of manufacture of tea. What is brought about as a result of blending remains tea though of different specification than the tea which is blended. Therefore, it cannot be said to be manufacturing or producing of tea. We have already noticed that appellant is not engaged in growing tea, so that he may be called producer of tea, nor he is engaged in manufacturing of potable tea from green leaves, which cannot be used as otherwise potable drink. In such event, different conclusion may be

reached, depending upon whether the grower of tea himself undertakes process of manufacturing tea as a marketable and usable commodity, resulting in agricultural income or is a different person engaged in such activity of producing taxable income.

65. So far as emphasis laid by the learned counsel for the appellant on overruling the decision in Nilgiri Tea Co.'s case (supra), it may be noticed that the Supreme Court made it clear that though it is not manufacture, the question still remains whether ore blended in the course of loading it into the ship through the mechanical ore handling plant constitutes processing. In the light of expression used in the Central Sales-tax Act, the question was examined and the Court answered that blending does amount to processing which does result in some change in the commodity though it does not bring about a new article or thing into existence.

66. In examining the Nilgiri Tea Co.'s case (supra), the Supreme Court held that when different brands of teas were mixed by the assessee for the purpose of producing a tea mixture of a different kind and quality, according to the formula evolved by them, there was plainly and indubitably processing of different brands of tea because these brands of tea experienced, as a result of mixing, qualitative change in that the tea mixture which came into existence was of different quality and flavour than the different brands of tea which went into the mixture. But, the question whether the processing brings into existence any article or thing which may be said to be distinct from the article on which process has been applied had been answered in negative while considering the analogical case of blending of iron ores. It was held that it is processing.

67. From the above conclusion, it is clear that where blending does not bring into existence a new and distinct commodity, it cannot be said that the process of manufacture has been applied.

But where processing brings clear change into an existing commodity to make it fit for market it can be considered as producing the thing or article within the meaning of the provision.

68. We have noticed above that blending is essential part of tea trading and a part of tea industry for the purpose of bringing into existence the marketable tea from the green tea leaves which are not consumable by themselves but made consumable by bringing about the change into its chemical properties to make it fit for consumption. Only then, it reaches market as tea as a consumable commodity, commercially known as manufactured or made tea. The Supreme Court had noticed close proximate analogy between blending of tea and blending of ore with which the Court was dealing. Applying the analogy to tea, the blending of various teas to smoothen its marketability may amount to processing of tea, but does not amount to manufacture or production of a thing or article so as to fulfil the condition of availing benefit of deduction u/s 80IB.

69. We may briefly refer to some of the decisions which have been referred to by

both the learned counsel stating that they have direct bearing on the case.

70. Firstly, we may refer to the decisions relied on by the learned counsel for the appellant. The appellant heavily relied on a decision of the Karnataka High Court in Brooke Bond Lipton India Ltd. case (supra). It may be noticed, at the outset, that the Karnataka High Court was dealing with the issue arising under the provisions of the Karnataka Sales-tax Act, 1957, and notifications issued thereunder. The relevant notifications provide for exemption to industrial units engaged in "agro-food processing, agro-based high-tech packaging" units amongst other industries. These industries were listed as "thrust sector" industries. The incentive scheme issued vide Notification dt. 19th June, 1991, under the Karnataka Act envisaged exemption in respect of goods manufactured and sold by new industrial units. Vide earlier Notification dt. 25th July, 1990, which was published in Karnataka Gazette dt. 7th March, 1991, provided for enhanced incentives and concessions for the thrust sector which was dealt with under Annex. II under which "agro-food processing and agro-based hi-tech packaging" industrial unit were included for making them eligible for enhanced concession as a part of thrust sector industries. The Bench made it clear that they have referred to above entry because one of the contentions debated at the Bar was as to whether the industrial unit of the petitioner has to be categorised as falling under "thrust sector" being an agro-food processing and agro-based hi-tech packaging industrial unit. Apparently, a unit which is engaged in preparing blended tea can undoubtedly be said agro-food processing industrial unit as held by the Supreme Court in Chowgule's case (supra). The Tribunal rejected the claim of the assessee for exemption on the ground that no exemption is available because no manufacturing process is involved in such hi-tech packaging. The Karnataka High Court reached the conclusion that industrial unit of the petitioner falls under the category of agro-food processing and/or agro-based hi-tech packaging industrial unit and, therefore, as per the policy decision of the State Government pronounced in the first notification, the products of the industrial unit of the petitioner become entitled for all incentives including exemption from sales-tax. The Karnataka High Court further held that there was no change in the industrial policy while issuing the second notification and the second notification was drafted in terms of the new industrial policy. The Court reached the conclusion that second notification is a part of first notification and did not give overriding effect over the existing notification extending benefit to "thrust sector" industries.

71 Reaching these conclusions, the Court made it clear that in view of the fact that petitioner is an industrial unit engaged in agro-food processing and agro-based hi-tech packaging, it was not necessary to enter into the aspect whether blending amounts to manufacture or not, though it decided to embark initially by applying the Supreme Court decisions in Ujagar Prints v. Union of India : [1989]179ITR317(SC) and Empire Industries Limited and Others Vs. Union of India and Others, , wherein the processes of bleaching, dying, sizing, printing, finishing were held to be manufacture and held that blending and packing to be

manufacture. Undoubtedly, SLP against that judgment was dismissed. A question which is not decided, observation about it cannot be read as ratio.

72. We may notice here that apart from the fact that decision was rendered in the particular interpretation taken by the Karnataka High Court on the combined reading of the two notifications issued under the Karnataka Sales-tax Act, it refers to Chowgule's case (supra) for supporting its conclusions while considering the question whether blending of different teas amounts to manufacture. The Karnataka High Court, with great respect, has not relied on the Chowgule's case (supra) and reached its conclusions in para 29, in which it was said as under :

"For the same very reason, it can conveniently be held that blending of different kinds and varieties of tea to provide a balance in terms of flavour, strength and colour is only a processing of the tea to suit the demands of a particular class of consumers. Mere blending of the tea by itself cannot be characterised as manufacturing of a different commercial product."

Ironically, while reaching this conclusion that blending of different varieties of tea does not amount to manufacture within the meaning of two notifications issued under the Karnataka Act, there has been no reference to Chowgule's case (supra) in the judgment and the case has been founded on the principle laid down in Ujagar Prints" case (supra) dealing with the textile and the provisions of the Central Excise Act.

73. It is settled principle that expression used in different Acts cannot automatically have the same meaning. It has to be read in the context of subject-matter of the Act. The principle has been clearly stated by the Supreme Court in another decision which has been relied on by the learned counsel for the appellant in the case of Ashirwad Ispat Udyog and Others Vs. State Level Committee and Others, wherein the Court clearly said that the decisions construing the meaning of the word "manufacture" as used in other statutes does not apply unless the definition of that word in the particular statute under consideration is similar to that construed in the decision.

74. In Ashirwad Ispat's case (supra), the Court was considering the question whether treating of iron and steel scrap of considerable bulk by cutting it down by mechanical processes into pieces that may be conveniently utilised in rolling mills and foundries fall within the definition of "manufacture" or not ? The Court was considering the case in the light of definition of "manufacture" given u/s 2(j) of the M.P. General Sales-tax Act, 1958, which, inter alia, reads as under :

"2(j) "manufacture" includes any process or manner of producing, collecting, extracting, preparing or making any goods and in respect of trees which have severed from the land or which have been felled, also the process of lopping the branches, cutting the trunks or converting them into logs, poles or baulks or any other articles of wood, but does not include such manufacture or manufacturing process as may be prescribed."

Apparently, the Court was considering the aforesaid definition of such wide amplitude which not only included manufacture proper but any process or manner of producing, collecting, extracting or preparing of any goods. In the aforesaid context, the Court said :

"The plain construction of the special definition of the word in a particular Act must prevail. In the special definition given in Section 2(j) of the said Act, "manufacture" has been defined as including a process or manner of producing, collecting, extracting, preparing or making any goods. There can be no doubt whatsoever that "collecting" goods does not result in the production of a new article. There is, therefore, inherent evidence in the definition itself that the narrow meaning of the word "manufacture" was not intended to be applied in the said Act. Again, the definition speaks of "the process of lopping the branches (of trees), cutting the trunks". The lopping of branches and the cutting of trunks of trees also, self-evidently, does not produce a new article. The clear words of the definition, therefore, must be given due weight and cannot be overlooked merely because in other contexts the word "manufacture" has been judicially held to refer to the process of manufacture of new articles."

Consequently, the process adopted by the assessee was held to be eligible for exemption under the M.P. General Sales-tax Act, therefore, this case does not assist the appellant.

75. Likewise, the decision of learned Single Judge of this Court in Dhanseri Tea Co.'s case (supra) is also of little assistance. Learned Single Judge was considering the question of manufacture under the provisions of the Rajasthan Sales-tax Act, 1954, as it was existing at the relevant time, against the rejection of the application of the petitioner for grant of exemption eligibility certificate under the Rajasthan Sales-tax Act New Incentive Scheme. The "manufacture" as defined in the Rajasthan Sales-tax Act, 1954, which was in force at the relevant time was *pari materia* with the definition of "manufacture" given in the M.P. General Sales-tax Act, which we have referred to above. Hence, decision rendered under the Rajasthan Sales-tax Act with such wide definition of "manufacture" in the statute cannot be invoked in the present case. The principle enunciated by the Supreme Court in Ashirwad Ispat's case (supra) aptly apply to such cases, however, the same cannot be of any help to the petitioner while construing the meaning of "manufacture" or "produce" under the IT Act which has been used in generic sense.

76. In Ujagar Print's case (supra), the question had arisen in the context of fabric going through different processes before it results into an end product. The question had arisen before the Supreme Court whether the process which brings about a change in the commodity when it reaches the market can be held to be manufacture within the meaning of Central Sales-tax Act. The apex Court in Empire Industries" case (supra) has held that these processes through which the fabric goes amount to manufacture. Further, the Court observed as under :

"The prevalent and generally accepted test to ascertain that there is "manufacture" is whether the change or the series of changes brought about by the application of processes takes the commodity to the point where commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes. The principles are clear. But, difficulties arise in their application in individual cases. There might be borderline cases where either conclusion with equal justification be reached. Insistence on any sharp or intrinsic distinction between "processing" and "manufacture", we are afraid, results in an oversimplification of both and tends to blur their interdependence in cases such as the present one."

The Court further observed that :

"On a consideration of the matter, we are persuaded to think that the view taken in the *Empire Industries Limited and Others Vs. Union of India and Others*, that "grey fabric" after they undergo the various processes of bleaching, dyeing, sizing, printing, finishing, etc. emerge a commercially different commodity with its own price structure, customs and other commercial incidents and that there was in that sense a "manufacture" within the meaning of Section 2(f), even as unamended, is an eminently plausible view and is not shown to suffer from any fallacy. Indeed on this point, the referring Bench did not disagree or have any reservations either. It is to be noticed that if the amending law is valid, this aspect becomes academic."

This clearly goes to show that accepting the general principle and the meaning of "manufacture" in the specific case of Central Excise Act with its amending provision having retrospective effect, the Court came to the conclusion that even under the unamended provision, the view taken in the *Empire Industries*" case (supra) did not require reconsideration. Therefore, no support can be drawn from the ratio laid down in *Ujagar Print*"s case (supra).

77. Similarly, the decision of the Supreme Court in *CCE v. Tata Tea Ltd.* 128 STC 331 (SC) is of little assistance to the appellant. It was a case under the Tea Act in which cess was levied on instant tea. We have noticed that provision of the Tea Act which has drawn distinction between tea growers, tea manufacturer and tea trader. The manufacturing process we have already discussed above. The instant tea is not blending of tea after the tea is manufactured but is a kind of product which comes into existence after the green leaves are made into tea which can be used and, therefore, it was held to be amenable to cess as a different product of tea within the meaning of the Tea Act. It was not a case which concerns with the blending of tea after it has left the producer"s factory as made or manufactured tea and has reached the trader through auction of made tea within the meaning of Tea Act.

78. Similarly, the decision in *G.A. Renderian Ltd. v. CIT* (supra) is also of little assistance. This was a case in which the Court was considering the merit of the

expression "industrial company" as used in Section 2(7)(c) of the Finance Act, 1978. Under the Finance Act, 1978, "industrial company" was defined to mean a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining. Apparently, the benefit of Section 2(7)(c) in terms of the Finance Act, 1978, was also extended to the industrial company which was engaged in only processing of goods. Blending is processing of tea and thus there was no difficulty in reaching to the conclusion to which the Calcutta High Court reached. But, this judgment can be read as laying down blending as processing and not holding it to be manufacture or production of tea within the meaning of Section 80IB of the IT Act, 1961.

79. Learned counsel for the appellant has also relied on a decision of the Kerala High Court in case of Commissioner of Income Tax Vs. Tara Agencies, The Court was considering the meaning of small-scale exporter within the meaning of Section 35B(1A) of the Act, 1961, which, inter alia, defined small-scale exporter to mean a person who exports goods manufactured or produced in any small-scale industrial undertaking or undertaking owned by him. With utmost respect, we are unable to agree with the conclusion reached by the Kerala High Court in interpreting the expression "manufacture" or "produce" by referring to the dictionary meaning of the word "process" and by ignoring the ratio of the Supreme Court decision in Chowgule's case (supra) distinguishing "manufacture" and "process". The term "process", in our opinion, cannot be equated with "manufacturing" or "producing" in each and every case.

80. Lastly, reliance was placed by the learned counsel for the appellant in this regard on the Supreme Court decision in the case of S.S.M. Brothers (P) Ltd. and Others Vs. Commissioner of Income Tax (Central) Madras, Again, this was a case where the Court was construing different provisions of the Income Tax. The question relevant was allowing development rebate where the machinery or plant is installed for the purpose of manufacturing of any one or more of the articles or things specified in the list in the Fifth Schedule.

Item 32 of the Fifth Schedule reads as under:

"Textile (including those dyed, printed or otherwise processed) or made wholly or mainly of cotton, including cotton yarn, hosiery and rope."

Reading the two provisions together, the Supreme Court concluded that the production of textile including those dyed, printed or otherwise processed is to be taken into account. The embroidered textile as they fall within the list of articles listed at Entry 32 of Fifth Schedule, were held to be eligible for enhanced rate of development rebate. Apparently, the decision was given in the particular scheme of the provision giving out a different meaning of expression "manufacture" in the context of list of eligible articles production of which entitled higher rate of development rebate. The eligible articles included processed textile, therefore, same cannot be of any assistance to the appellant in this case.

81. On the other hand, learned counsel for the respondent relied on the decisions given by Calcutta High Court in the case of Appeejay (P) Ltd. (supra) and of Karnataka High Court in the case of Lipton India Ltd. (supra), wherein the Courts held that blending and mixing of different types of leaves purchased from tea gardens and then packed to offer for sale to the wholesalers does not amount to manufacturing.

82. Similarly, the Bombay High Court in the case of J.B. Advani & Co. (P) Ltd. v. CIT (supra) was considering the meaning of industrial company within the meaning of Section 2(5)(a)(ii) of the Finance Acts, 1966 and 1967, and has distinguished the decision of the Calcutta High Court in the case of G.A. Renderian's case (supra). Bombay High Court pointed out that the decision of the Calcutta High Court depended on industrial policy given in the Finance Act, 1978, where term "industrial company" was defined to include one which is engaged in processing of goods which is conspicuous by its absence in the Finance Acts, 1966 and 1967, in defining "industrial company". In the absence of extended meaning in the statute, the Court has taken the view following the Nilgiri Ceylon Tea Supplying Co. v. State of Bombay (supra) that it does not amount to manufacturing activity though it may amount to processing of goods, as per Chowgule's case (supra).

83. As a result of aforesaid discussion, we have no hesitation in coming to the conclusion that expression "manufacture" or "producing" any thing or article u/s 80IB has been used in generic sense and within its ambit it does not include any processing of goods, which does not bring out new or commercially distinct commodity. In view of clear distinction between the expressions "manufacture" and "producing" in N.C. Budharaja's case (supra), blending of different teas by a trader of tea who has purchased the tea from the auction house or the dealer does amount to processing of tea but falling short of manufacturing process and it does not amount to manufacturing or producing any article or thing within the meaning of Section 80IB of the IT Act, 1961.

84. Consequently, the assessee cannot be held to have fulfilled the condition for availing the benefit of deduction u/s 80IB of the IT Act, 1961.

85. In the result, the appeal fails on merits and is hereby dismissed. There shall be no order as to costs.