(2010) 04 BOM CK 0130

In the Bombay High Court

Case No : Tax Appeal No. 05 of 2010

The Commissioner of Income Tax — APPELLANT

Vs

M/s. Flex Art Goa — RESPONDENT

Date of Decision : 12-04-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2(f)
Income Tax Act, 1961 — Section 143(1), 143(2), 263, 32A, 32AB

Citation : (2010) 04 BOM CK 0130

Hon'ble Judges : U.D. Salvi, J;S.J. Vazifdar, J

Bench : Division Bench

Advocate : Asha Dessai, for the Appellant; F.V. Irani, Sudin Usgaonkar, Hari Raheja and Mr. K. Gopal, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—The appellant has challenged the order of the Income Tax Appellate Tribunal, Panaji Bench, allowing the respondent''s appeal against the order dated 20.3.2008, passed by the Commissioner of Income Tax, Panaji u/s 263 of the Income Tax Act, 1961 ("the Act" for short), setting aside the order dated 24.3.06, passed by the Income Tax Officer, accepting the respondent''s return of income as filed. The respondent filed its return of income on 28.11.03, declaring NIL income, after claiming deduction u/s 80IB of the Act of Rs.1,35, 50,995/-. The return was processed u/s 143(1). The case was taken up for scrutiny as per the instructions of the CBDT. A notice u/s 143(2) was served upon the respondent on 15.10.2004. By an order dated 24.3.2006, the Income Tax Officer (ITO), stated that he had verified the books of account and the details collected, and completed the assessment by accepting the respondent''s return of income.

2. By an order dated 20.03.2008, u/s 263 of the Act, the Commissioner of Income Tax, (CIT), held the order of the ITO to be erroneous. The CIT observed that the process adopted by the respondent involved slitting of aluminum foils

into customized width, mounting the same on the printing machine and thereafter printing the necessary text thereon. It was held that the finished product was not significantly and distinctly different from the raw material used in the process and that the Assessing Officer accepted the respondent''s claim without properly examining the issue and verifying the facts. In view thereof, a notice u/s 263 dated 6.3.2008 was issued to the respondent, offering it an opportunity of being heard. It was observed that one of the conditions essential to establish a claim for deduction u/s 80IB of the Act is that the Assessee should manufacture or produce any article or thing, not being any article or thing specified in the list in the Eleventh Schedule or operate one or more cold storage plant or plants in any part of India. It is observed that there is no new thing which had been created or manufactured by the respondent and that, therefore, the respondent was not entitled to claim a deduction u/s 80IB of the Act. The entire order is based on the finding that the process adopted by the respondent does not fall within the ambit of the term "manufacture". Paragraphs 5 and 7 of the order, read as under :

5. In the instant case, the assessee has failed to fulfill the condition no.3 as mentioned above. The assessee has purchased manufactured packaging materials. It has carried out printing job on packaging material after slitting the packaging material accordingly to the customer''s specification. Thus, there is no new thing which has been created or manufactured by the assessee. Assessee is not entitled for deduction u/s. 80IB as claimed & allowed by AO. The assessment order made by the AO is, therefore, erroneous in so far as it is prejudicial to the interest of the revenue.

7. In brief, assessee has procured jumbo size manufactured flexible packing materials and has done mere printing work and thereafter cut into customs standard size for packing of tablets. The activity does not amount to manufacturing of any new and distinct product. Mere printing on and cutting of jumbo size packing material does not amount to any production of a new and distinct product as laid down by various High Courts and the Supreme Court in different decisions. There is no production and assessee is not entitled for any deduction u/s. 80IB. Therefore AO''s, order is erroneous and prejudicial to the interest of revenue.

3. Section 80IB of the Act, in so far as it is relevant, reads as under :

Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.

80-IB. (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections [(3) to [(11), (11A) and (11B)]] (such business being hereinafter referred to as the eligible business), there shall, in accordance with 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.

(2) This section applies to any industrial undertaking which fulfills all the following conditions, namely:

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence:

Provided that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(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:

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.

(3) The amount of deduction in the case of an industrial undertaking shall be twenty-five per cent (or thirty per cent where the assessee is a company), of the profits and gains derived from such industrial undertaking for a period of ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) beginning with the initial assessment year subject to the fulfilment of the following conditions, namely:

(i) it begins to manufacture or produce, articles or things or to operate such plant or plants at any time during the period beginning from the 1st day of April, 1991 and ending on the 31st day of March, 1995 or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular undertaking;

4. It is thus clear that the assessee would be entitled to the benefit of Section 80IB if it "manufactures or produces any article or thing". It is nobody''s case that the produce is an article or thing specified in the Eleventh Schedule. The CIT has proceeded entirely on the basis that the respondent''s process does not involve manufacture. In other words, what is not considered by the CIT is whether the respondent can be said to have produced the article or thing.

5. (A) The respondent filed an appeal before the ITAT against the said order. The ITAT, by the impugned Order dated 5.8.2009, allowed the respondent''s appeal on two grounds. It was held that the CIT ought not to have set aside the order of the ITO merely because it held a different view on the matter. Secondly, it was

held that the matter stands covered by the decision of the ITAT in the respondent''s own case for the Assessment Year 2004-05.

(B) The second ground, namely that the respondent''s case is covered by the ITAT''s decision cannot be urged before this Court as that decision has also been challenged by the appellant.

We find it unnecessary to consider the first ground also strongly urged before us by Mr. Irani, viz. that in exercise of revisional power the CIT ought not to have set aside the assessment order, merely because he took a different view, as we are of the view that the matter, on merits, stands concluded by a judgment of the Supreme Court, which we will refer to shortly.

Nor do we intend considering Mr. Irani''s submission that the process adopted by the respondent amounts to manufacture for, in view of the said judgment of the Supreme Court, we find that it, in any event, amounts to the respondent producing the said article.

6. Before dealing with the impugned order, it is necessary to note the further developments in the matter. Pursuant to the order of the CIT dated 20.03.2008, the Asst. Commissioner of Income Tax, passed a fresh order dated 26.12.2008, disallowing the claim for deduction u/s 80IB. This order also proceeded entirely on the basis that the process adopted by the respondent does not fall within the ambit of the term "manufacture". The entire reasoning is on this basis.

What is of vital importance is what is noted in paragraph IV. In paragraph IV(5), the distinction between the terms "processed" and "manufactured" is noted. It is observed thus :

... Where the commodity retains a substantial identity through the processing stage, it will be said to have been "processed" and not "manufactured". The broad distinction between "manufacture" and "processing" is that manufacture involves bringing into existence of a new product; a product which is of a different chemical composition or whose integral structure is different from the raw materials. Processing on the other hand, is doing specific acts to the raw material in order to change its shape or size etc. At some point "processing" and "manufacturing" may merge, but where the commodity retains a substantial identity through the processing stage, it will be said to have been processed and not manufactured.

The order was passed only on the ground that the respondent''s article cannot be said to have been manufactured. It is, accordingly, held that the respondent had filed inaccurate particulars by claiming ineligible deduction u/s 80IB. The Asst. Commissioner of Income Tax, however, does not proceed to consider whether the respondent''s article can be said to have been produced even assuming that the same cannot be said to have been manufactured. Thus, a crucial aspect of the matter was not considered.

7. (A) The respondent''s appeal against the order was dismissed by an order

dated 30.3.09, passed by the CIT. It is important to note that in this order it is observed that the Assessing Officer had disallowed the claim after holding that the activities carried out by the assessee company (the respondent) do not amount to manufacture of any new and distinct product.

(B) Thus, two aspects must be noted about this order. Firstly the CIT also recognized the fact that the assessment order dated 26.12.08 was passed only on the ground that the activities carried out by the respondent do not amount to manufacture. Secondly, the Commissioner of Income Tax also did not consider whether the activity carried out by the assessee company (the respondent) amounts to producing any article. These orders are, however, being challenged by the respondent in separate proceedings which will be decided independently, although the question that arises therein is identical to the one that arises in this appeal.

8. Before we deal with the authorities, it is necessary to set out the nature of the process adopted by the respondent. It is set out in the assessment order dated 26.12.2008, as under :

Customer provides us with an artwork alongwith shade samples.

Roto gravure Cylinder is processed from the artwork.

Depending on the specification.

? Either polybacked foil for strip pack.

? Or heat seal coated foil for blister pack.

Proof is sent to the customer for approval on text, lay out and colour scheme.

Inks and other solvents are procured to print that particular design.

Post proof approval, the approved shade card-relevant cylinders is sent to the plant as reference for printing.

Secondary packing material like cartons, cores, poly bags are also purchased to services the order.

? The jumbo material is slit to the customized width and mounted on the printing machine.

? Cylinders are mounted on the printing machine.

? Ink trays are filled with the inks pertinent to the job.

? The foil is drawn through the entire length of the machine manually and then the printing machine is started.

? The initial length of the foil is used to register the design as well as match the shade as per customer approval-at this point the machine is run at lower speeds.

? Once the register is set and shade is marched-the printing machine runs at full throttle.

? Due to break downs, certain portions of the foil may have defective, in adequate printing. Here, it is to be noted that the printing on the foil is very critical as it highlights the brand name, besides conveyance a huge amount of significant information to the patients/consumers. Therefore to eliminate any print related defects, an inspection rewinding operation is carried out on the doctoring machines.

? During the process of inspection rewinding, defective portion, if any, are eliminated and the foil is jointed through use of bop-tape.

? Final doctored reels are weighed individually, over wrapped with poly film and put in to cartons after clearance from Quality Assurance.

? Once the entire order quantity is produced and packed-Test certificate is generated by Quality Assurance department.

? Thereafter invoice is generated along with necessary excise documents and materials dispatched to the customer through a convenient mode of transport.

We are of the view that the respondent can be said to produce the said articles, if not, to manufacture them.

9. In India Cine Agencies Vs. Commissioner of Income Tax, Madras, , the Supreme Court considered the entitlement of benefit, inter alia, in terms of Sections 32A, 32AB and Section 80I of the Act. Section 80I is similar to Section 80IB to the extent that the entitlement to a deduction thereunder is also dependent upon the assessee "manufacturing or producing..............." the article. The ratio of the judgment would apply to a case of the present nature u/s 80IB. The question that arose for consideration before the Supreme Court was the effect of conversion of jumbo rolls of photographic films into small flats and rolls in the desired size. The assessee therein contended that the same amounted to manufacture/ production. The revenue contended that it was neither "manufacture" nor "production". The High Court decided it in favour of the Revenue. The Supreme Court in paragraphs 9, 10 and 11 observed thus :

9. The matter can be looked at from another angle. In Commissioner of Income Tax Vs. Sesa Goa Ltd., this Court considered the meaning of word "production". The issue in that case was whether the extraction and processing of iron ore amounted to manufacture or not in view of the various processes involved and the various processes would involve production within the meaning of Section 32A of the Act. It was inter alia observed as under:

There is no dispute that the plant in respect of which the assessee claimed deduction was owned by it and was installed after March 31, 1976, in the assessee''s industrial undertaking for excavating, mining and processing mineral ore. Mineral ore is not excluded by the Eleventh Schedule. The only question is whether such business is one of manufacture or production of ore. -The issue had arisen before different High Courts over a period of time. The High Courts have held that the activity amounted to "production" and answered the issue in question in favour of the assessee. The High Court of Andhra Pradesh did so in Commissioner of Income Tax Vs. Singareni Collieries Co. Ltd., ; the Calcutta High Court in Khalsa Brothers Vs. Commissioner of Income Tax, and CIT v. Mercantile Construction Co. (1994) 74 Taxman 41 (Cal) and the Delhi High Court in Commissioner of Income Tax Vs. Univmine (P.) Ltd., . The Revenue has not questioned any of these decisions, at least not successfully, and the position of law, therefore, was taken as settled.

The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This Court had, as early as in 1961, in Chrestian Mica Industries Ltd. v. State of Bihar (1961) 12 STC 150, defined the word "Production", albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning "amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort". From the wide definition of the word "production", it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word "production" since ore is "a thing", which is the result of human activity or effort. It has also been held by this Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, that the word "production" is much wider than the word "manufacture". It was said (page 423):

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

The word "production" or "produce" when used in juxtaposition with the word ''manufacture'' takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods.

9. In "Words and Phrases" 2nd Edn. by Justice R. P. Sethi the expressions "produce" and "production" are described as under:

In Webster''s New International Dictionary, the word "produce" means something that is brought forth either naturally or as a result of effort and work; a result produced. In Black''s Law Dictionary, the meaning of the word `produce'' is to `bring into view or notice; to bring to surface''.

A reading of the aforesaid dictionary meanings of the word `produce'' does indicate that if a living creature is brought forth, it can be said that it is produced. (See Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., ; CIT v. N.C. Budharaja and Company and Ors. (1994) (1) SCC 280)

Production or produce-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. The expressions `manufacture'' and `produce'' are normally associated with movables articles and goods, big and small but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road and a building. See Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, .

10. In Advanced Law Lexicon, 3rd Edn. by P. Ramanatha Aiyar, the expressions `production'' and "manufacture" are described as under:

"Production" with its grammatical variations and cognate expressions; includes

(i) packing, labeling, relabelling of containers.

(ii) re-packing from bulk packages to retail packages, and

(iii) the adoption of any other method to render the product marketable.

''Production'' in relation to a feature film, includes any of the activities in respect of the making thereof. Cine Workers and Cinema Theatre Workers (Regulations of Employment) Act (50 of 1981) Section 2(i).

The word `production'' may designate as well a thing produced as the operation of producing; (as) production of commodities or the production of a witness.

''Manufacture'' includes any art, process or manner of producing, preparing or making an article and also any article prepared or produced by manufacture. Patent and Designs Act (2 of 1911), Section 2(10).

''Manufacture'' includes any process

(i) incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, or, and the word `manufacturer'' shall be constructed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods but also any person who engages in their production or manufacturer on his own account.

(iii) which is specified in relation to any goods by the Central Government by notification in the Official Gazette as amounting to manufacture. (Central Excise Act (1 of 1944) Section 2(f))

The matter can yet be looked from another angle. If there was no manufacturing activity, then the question of referring to Item 10 of the Eleventh Schedule for the purpose of exclusion does not arise. The Eleventh Schedule, which was inserted by Finance (No. 2) Act, 1977 w.e.f. 1.4.1978 has reference to Sections 32A, 32AB, 80CC(3)(a)(i), 80I(2), 80J(4) and 88A(3)(a)(i) of the Act.

In view of what has been stated above the appeals deserve to be allowed which we direct.

11. In view of the above observations and especially the reference to the Advance Law Lexicon, by P. Ramanatha Aiyar,. which defines "production", to include packing, labelling, relabeling of containers, re-packing from bulk packages to retail packages, and the adoption of any other method to render the product marketable, it must be held that the process adopted by the respondent results in the respondent producing the article or thing. The Supreme Court held that the conversion of jumbo roles of photographic films into small flats and rolls in the desired sizes to constitute "production". The process adopted by the respondent is far more detailed and complex and must, therefore, fall within the ambit of the term "produce". The matter is, therefore, clearly covered by the Judgment of the Supreme Court.

12. It must be noted that the assessment order dated 26.12.08 relies, inter alia, upon the judgment of the Madras High Court in India Cine Agencies Vs. The Commissioner of Income Tax, . This very decision, however, was overruled by the above judgment. In the circumstances, the appeal is dismissed. There shall, however, be no order as to costs.