
(2011) 02 DEL CK 0134
In the Delhi High Court
Case No : ITA No. 24 of 1999

Titanor Components Ltd.

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Citation : (2011) 241 CTR 255 : (2011) 177 DLT 662 : (2013) 358 ITR 55 :
(2011) 197 TAXMAN 441

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : C.S. Jain and G. Tushar Rao, for the Appellant; Prem Lata Bansal, for the Respondent

Judgement

Rajiv Shakdher, J.—This is an appeal preferred u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as "IT Act") by the Assessee against the judgment of the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") dated 24.04.1999 passed in ITA No. 2079/D/98 pertaining to assessment year 1994-95. 1.1 The Appellant is aggrieved by the impugned judgment inasmuch as it has resulted in denial of deduction claimed by the Assessee under the provisions of Section 80IA of the I.T. Act. The captioned appeal against the impugned judgment was admitted on 18.08.2000. By this order, the following questions of law were framed:

(i). Whether coating with oxides of Noble Metals on Titanium Metal Electrode / Anode bringing about a change in its character and user for making it fit for use in the production of chlorine and caustic soda in an electrolytic process is "manufacture" or "production" of "article" or "thing" within the meaning of Section 80-IA of the Income Tax Act, 1961?

(ii). Whether the conclusion, drawn by the Income Tax Appellate Tribunal that by coating electrode or titanium anodes the Appellant was not "manufacturing" or "producing" an "article" or "thing" within the meaning of Section 80IA(2) of the Income Tax Act, 1961, is erroneous being -

- (a). Contrary to mandatory provision of Section 80IA;
- (b). Contrary to and inconsistent with the evidence on record?"

2. The brief facts which have led to the present appeal are as follows:

2.1 The Assessee applied to the Government of India through Ministry of Industry, Department of Industrial Development for a licence to set up a plant to manufacture coated metal electrodes at Kundaim Industrial Area in north Goa. The Assessee was issued a licence on 16.10.1990. The Assessee also applied for and was issued a registration certificate by the Excise Department vide letter dated 26.06.1993. In the interregnum, i.e., on 26.02.1993 the Assessee had entered into an agreement (in short "agreement") with a company by the name of M/s UHDE India Limited (hereinafter referred to as "UHDE") for coating titanium substrates. This contract was evidently executed between the Assessee and UHDE with the knowledge of another company by the name of Indian Petro Chemicals Corporation Ltd. (hereinafter referred to as "IPCL").

2.2 It appears that UHDE had undertaken an obligation to supply coated titanium substrates to IPCL for the use in their chlorine-caustic soda plant. By virtue of this agreement IPCL was to supply the titanium substrates through UHDE to the Assessee free of cost, to enable the Assessee to execute the job work, which entailed coating of, the titanium substrates, in terms of the specifications provided for in the aforementioned agreement.

2.3 Under the said agreement the Assessee was required to coat the titanium substrates numbering 1212 at a total cost of Rs. 6,42,84,480/-. The per square metre cost of coating titanium substrates was pegged at Rs. 19,500/-. Importantly, the cost agreed to did not include excise duty which was required to be reimbursed by UHDE. Furthermore, the Assessee was also obliged to dispatch the coated titanium substrates to another company, i.e., one Alpha Label India Ltd (hereinafter referred to as "Alpha") along with necessary documentation, which included, the excise gate pass; so as to enable the said entity from claiming MODVAT credit in respect of the excise duty. Evidently, Alpha was required to undertake further fabrication work to manufacture "membrane cell elements". It is not disputed that the Assessee executed the contract arrived at between itself and UHDE.

3. With this background the Assessee filed its return for the relevant assessment year, i.e., 1994-95. The Assessee's return was a loss return which, pegged the loss at Rs. 1,28,71,873/-. During the course of assessment, the assessing officer noted that the Assessee had claimed a deduction under the provisions of Section 80IA of the I.T. Act amounting to Rs. 2,62,20,996/- against a gross total income of Rs. 1,33,49,093/-.

3.1 It is pertinent to note that the Assessee avers in the appeal that the claim for deduction u/s 80IA of the IT Act was evidently reduced to a sum of Rs. 1,46,24,648/- and furthermore, the overall deduction u/s 80IA of the I.T. Act

would be limited to the gross total income u/s 80A(2) of the I.T. Act.

4. The assessing officer was evidently of the view that the deduction u/s 80IA of the I.T. Act was not available to the Assessee as the "process" whereby, the titanium substrates were coated by the Assessee did not constitute "manufacture" within the meaning of the said provision. The Assessee, however, on its part attempted to furnish an explanation vide letters dated 28.02.1997 and 07.03.1997.

4.1 Briefly, the Assessee attempted to explain that titanium substrates were received by it through UHDE as free issue material which, the Assessee was required to coat with chemicals (Noble Metal Oxide), as per the specifications contained in its agreement with the UHDE. For its efforts the Assessee had received consideration, as stipulated in the aforementioned agreement against an expenditure of Rs. 1,67,80,525/- incurred by it towards raw material consisting of Noble Metals, such as, ruthenium and iridium. In addition the Assessee claimed it had paid excise duty to the tune of Rs. 1,60,45,945/-.

4.2 The sum and substance of the explanation furnished by the Assessee was that a commercially distinct product had come into existence after it was processed by the Assessee.

4.3 Before the assessing officer reliance was placed on the provisions of Section 80IA and, in particular, Sub-Section 2(iii) read with Sub-Section 12(b) and, the explanation to Section 33B to contend that the word "manufacture" in Section 80IA necessarily would include processing of goods.

5. The assessing officer, however, rejected the contention of the Assessee and proceeded to hold that the processing of goods could not be equated with manufacture and production of articles. In his view, chemical coating of titanium substrates did not result in it being transformed into an entirely new commercial commodity. Thus, the assessing officer concluded that processing in the instant case, did not partake the attributes of manufacture or production of an article or thing as envisaged in Section 80IA of the I.T. Act.

6. Aggrieved by the order the Assessee preferred an appeal to the Commissioner of Income Tax (Appeal) [hereinafter referred to as "CIT(A)"]. The CIT(A) sustained the order of the assessing officer. In arriving at his conclusion, the CIT(A) placed reliance on the judgment of the Bombay High Court in the case of Commissioner of Income Tax Vs. Sterling Foods (Goa), , even though the said decision pertained to the provisions of Section 80HH of the I.T. Act, since it used the same expression "manufacture" or "production" of articles.

6.1 On facts, the CIT(A) more or less replicated the view of the assessing officer by holding that coating of titanium substrates by the Assessee did not result in its conversion into an entirely new commodity. The underlying theme of CIT(A)'s order is that titanium substrates and titanium anodes are one and the same thing; therefore, all that the Assessee did was to coat the said articles with noble

metal oxides which, according to the CIT(A), did not result in emergence of an entirely new commodity.

7. The Assessee being aggrieved preferred an appeal to the Tribunal. The Tribunal sustained the view of the authorities below.

7.1 The thrust of the Tribunal's view appears to be that the expression used by the Assessee in its agreement with UHDE to describe the articles received, i.e., titanium substrates (which, as noticed above, were free issue material supplied for the purposes of coating them with noble metal oxides) was a "misnomer". For this purpose, the Tribunal relied upon the observations set out in the encyclopedia of chemical technology authored evidently by Kirk and Othmer (volume 15 at pages 172-183).

7.2 In other words, the Tribunal was of the view that what the Assessee was receiving under its agreement with UDHE as free issue material was nothing but uncoated titanium metal anodes which on receipt were subjected to a process of coating by the Assessee. In the opinion of the Tribunal the process of coating carried out by the Assessee only enhanced the "longevity" and the "utility" of the original article by making it resistant to corrosion and, increasing its "conductivity" and "dimensional stability". In sum and substance the Tribunal concluded that a distinct commercial commodity did not emerge by virtue of the process employed by the Assessee on the original article. According to the Tribunal, what the Assessee received were titanium electrodes. These were, as per the Tribunal, nothing but titanium metal anodes; which remained unaltered in its character even after the conclusion of the process of coating. The discussion in this regard is found in paragraphs 22 and 24 of the impugned judgment of the Tribunal. 7.3 The Tribunal went on to support the aforementioned analysis by adverting to the fact that the Assessee's agreement with UHDE disclosed that the coated titanium metal anodes had to be dispatched by it, for further fabrication, to one Alpha for the purposes of manufacturing membrane cell element. In the Tribunal's wisdom, this demonstrated that in order to convert a coated titanium metal anode into a "useful commercial commodity" it would require further processing. Consequently, the Tribunal repelled the contention of the Assessee in regard to its claim for deduction u/s 80IA of the I.T. Act.

8. The instant appeal impugns this very reasoning of the Tribunal.

8.1 In support of the appeal, arguments on behalf of the Assessee were addressed by Mr. Jain, while in opposition Ms Bansal appeared on behalf of the department.

8.2 Mr Jain briefly reiterated the grounds taken before the authorities below and, in particular, stressed on the opinions rendered by two experts, i.e., Dr. (Mrs.) K. Gadgil and Mr M.K. Sarkar, professors with the Indian Institute of Technology, Delhi (in short, I.I.T. Delhi) to demonstrate that the process undertaken by the Assessee actually resulted in production of an anode and hence, a new article

emerged contrary to what had been held by the authorities below. Mr Jain submitted that the test for ascertaining as to whether a new article was produced was: as had been settled by courts in several decisions rendered in the past; the coming into existence of a new marketable commodity. It was contended, the fact that this article had been subjected to a process which resulted in manufacture, and that the manufactured article was marketable was apparent on perusal of the material placed on record, i.e., invoices, excise gate passes and the agreement entered into by it with UHDE as also the opinion of the experts. In support of his submissions the learned Counsel relied upon the following: Commissioner of Income Tax-V, New Delhi Vs. Oracle Software India Ltd., ; Vijay Ship Breaking Corpn. and Ors. v. CIT (2008) 14 DTR (SC) 74 ; Commissioner of Income Tax Vs. Tamil Nadu Heat Treatment and Fetting Services (P.) Ltd. (No. 1), ; Commissioner of Income Tax Vs. Laxmi Art Studio, ; and Commissioner of Income Tax, Mumbai Vs. Emptee Poly-Yarn Pvt. Ltd., .

9. As against this, Ms Bansal largely relied upon the judgment of the Tribunal and the authorities below. In particular, Ms Bansal stressed upon the fact that what the Assessee had undertaken was job work and, in lieu thereof, the consideration received was nothing but job work charges. The learned Counsel contended that the findings of fact returned by the Tribunal and the authorities below, clearly demonstrated that no new commodity had come into existence as contended by the Assessee. In support of this submission she laid great stress on the observations made by the Tribunal in paragraph 25 of its judgment (which have already been noticed by us hereinabove) to the effect that the coated titanium substrates required further fabrication and, for this purpose they had to be dispatched under the agreement with UHDE by the Assessee to one Alpha. The learned Counsel in support of her contentions relied upon the judgment in the case of Bhagat Construction Co. (P) Ltd. Vs. Commissioner of Income Tax, .

10. We have heard the learned Counsel for the parties and perused the judgment and orders of the authorities below, including the material placed before us.

10.1 On consideration of the material, in our view the following facts have emerged:

(i) the Assessee had applied for a license to set up an industry to manufacture coated titanium metal anodes. This license was issued to the Assessee on 16.10.1990;

(ii) On 26.02.1993 the Assessee had entered into an agreement with UHDE for coating titanium substrates. It is pertinent to note at this stage (as noticed above) that while the department all along has contended that the titanium substrates are nothing but uncoated titanium metal anodes, the Assessee on the other hand has taken the stand that titanium substrates are nothing but supports, which after coating are transformed into anodes;

(iii) the Assessee was issued a registration certificate by the Excise Department on 26.06.1993 in respect of the process of coating it undertook qua the article it

received from UDHE. We are consciously not using, at this juncture, either the expression titanium substrate or titanium metal anode as there is contest between the parties on this very aspect;

(iv) the Assessee has in its invoices issued to UHDE sought recovery of both, the charges towards coating of the article received as well as in respect of excise duty leviable on it. Towards excise duty the Assessee has paid a sum of Rs. 1,60,45,945/-. There is no dispute raised before us with regard to production of invoices and the relevant gate passes before the assessing officer for scrutiny;

(v) In terms of the agreement arrived at between the Assessee and UHDE the coated articles were sent to an entity by the name of Alpha for further fabrication to manufacture membrane cell elements;

vi). the Assessee had placed before the authorities below, a flow chart with respect to the process employed in converting the article received from UDHE into a finished product. For the sake of convenience the same is extracted hereinbelow:

vii). the Assessee had supported its contention made to the effect that, the process undertaken by it involved a transformation of the original material into a distinctly new marketable product, by relying upon the following material: extracts from the encyclopedia of chemical technology authored by Kirk and Othmer (volume 15 page 172-183); the opinion of professors Dr. (Mrs) K. Gadgil and Mr Sarkar of I.I.T., Delhi, who, in their opinion had placed reliance on relevant contents of the aforementioned encyclopedia of chemical technology; and lastly on invoices and excise gate passes; to which reference is already made hereinabove by us.

11. With aforesaid material on record let us examine what it briefly reveals:

11.1 A reading of the extracts from the encyclopedia of chemical technology seems to suggest that in a chlor-alkali industry electrolytic process is inevitably used. An electrolytic process broadly involves de-composition of a liquid, which contains ions, by electrolysis. Electrolysis is nothing but de-composition of the substance by application of electric current. Therefore, what was crucial for IPCL, who happens to be manufacturer of Chlorine-Caustic Soda that they had, for their purposes in place anodes, which allowed passage of electricity without building up non-corrodible oxide coating on the surface.

11.2 As is therefore evident that an anode is really one of the terminals through which electrons pass in an electrolytic process; the other terminal is commonly referred to as a cathode.

11.3 The Tribunal upon reading the following passage came to the conclusion that what was supplied to the Assessee was nothing but an uncoated anode. For the sake of convenience the passages are extracted hereinbelow:

In response to the needs of the aerospace industry, an important technological

breakthrough in the development of metal anodes took place in the 1950s when titanium became commercially available in large quantities. The excellent corrosion resistance of titanium in a variety of solutions and its self-oxidizing, valve-metal characteristic quickly were recognized to be of value for electrochemical systems. Titanium as an anode does not pass current satisfactorily because of the build up of non-corrodible oxide coatings on the surface, but with the addition of a non-corrodible metal coating, a useful anode can be produced. Extensive research work culminated in the filing of patents in 1957 in the Netherlands the U.K. (5-6) in 1958, which led to a group of patents (7-9) where oxides of noble metals are used in the coating of titanium, in particular, ruthenium oxide in combination with other metals and oxides. These precious metal oxide coatings have received worldwide acceptance in the chlor-alkali industry and have resulted in considerable power savings in the production of chlorine. By optimizing the characteristics of these anodes, new cell designs and technology for the production of chlorine have been developed.

11.4 A perusal of a further extract from the very same encyclopedia of chemical technology would show that a commercially distinct product, which is ubiquitously described as precious metal anode or noble metal coated titanium or dimensionally stable anodes etc., come into existence. The relevant extract from the said encyclopedia succeeding the extract set out hereinabove reads as follows:

A Second group of patents (10-12) covers platinum and mixtures of platinum-iridium deposited thermally or electrolytically on the titanium substrate. Such anodes have their main application in cathodic protection and the production of sodium chlorate. These composite anodes, with titanium as the base metal, have been described variously as precious metal anodes (PMA), noble-metal coated titanium (NMT), dimensionally stable anodes (DSA), and platinized titanium anodes (PTA).

11.5. The fact that there is a distinct different product produced is borne out from the following extracts under the heading "ruthenium titanium oxides".

Scanning electron micrographs of ruthenium titanium oxide coatings show a characteristic microcracked surface (23). This cracking occurs early in the coating preparation, as solvent evaporates from the surface to form a gel of unreacted ruthenium and titanium compounds. As the coating is baked at higher temperatures, the cracks increase in size because of volume contraction of the gel. A fully baked anode coating has the appearance shown in Figure I and a surface area factor of 180-230 times the geometrical area, as measured by BET (Brunauer-Emmett-Teller) nitrogen adsorption. This large surface area contributes to the low chlorine discharge potential of these types of coatings, providing a large number of catalytic sites for gas evolution while minimizing concentration polarization...Chlorine-Caustic. The widest application and most rapid acceptance of metal anodes has been in the chlorine-caustic industry, where ruthenium-titanium oxide DSA coatings are used. In the mid 1960s,

chlorine producers were shifting worldwide to mercury cells to take advantage of the high current densities attainable. For this reason, and because of more favourable economics, the DSA initially was first operated commercially in mercury cells. Anode structures were designed to replace graphite anodes and conversion could be completed without modification of the cells (see Alkali and chlorine products). (emphasis is ours)

11.6. Prof. Dr. (Mrs.) K. Gadgil and Mr Sarkar of the IIT, Delhi while relying upon the said encyclopedia opined as follows: "In manufacture of caustic soda-chlorine by electrolytic process, the positive terminal Anode should have the property that it should facilitate liberation of chlorine and suppress production of Oxygen from the aqueous electrolyte (sodium chloride solution). This requires operations at a very low current density with high resistance to oxidation corrosion). Pure titanium metal cannot be used because of quick coverage of surface by non-conducting Titanium dioxide which increases the resistance and voltage quickly to a level where high amount of oxygen is produced, besides reducing conducting surface area in a very short time. Bare Titanium is not a Anode. Consequently industrial chlorine cannot be produced. Best solution to this problem was found by coating the surface of Titanium with Noble metal oxides (which are conducting) in particular, Ruthenium oxide with or without other noble metals, such as Iridium. Coated Titanium Metal Anodes are manufactured by coating of Titanium substrate with solution of mixed metal oxides, followed by drying and controlled baking, with strict process control. The formulae of coating solutions and process of their manufacture are closely guarded secrets of Technology suppliers.

It has been found that such coated metal titanium anodes have micro-cracked surfaces having internal surface area around 200 times that of geometrical surface, with high amount of conductivity even in presence of Titanium oxides. Through these micro-cracks high rate of chlorine release is facilitated. In absence of the noble metal oxide coating, the current will face enormous resistance to pass through the base titanium surface due to the formation of titanium oxide film and electrolysis does not take place to produce industrial chlorine.... Titanium only acts as a substrate (support) for supporting the real anode which is noble, metal oxides In summary, it can be stated that bare titanium metal is not an Anode and therefore, cannot be used as a Metal Anode for caustic soda - chlorine manufacture by electrolytic process. Whereas, mixed metal oxide coated titanium metal Anode provides excellent conductivity, resistance to corrosion and dimensional stability necessary for manufacture of caustic soda and chlorine by electrolytic process all over the world. Technology of coating composition and methods of manufacture of anodes, however, tend to get upgraded continuously through R&D efforts of Technology suppliers. (emphasis is ours)

11.7. A reading of the aforesaid opinion alongwith the extracts from the encyclopedia quite clearly indicates that, according to the experts, titanium substrates is only used for the purpose of supporting production of a real anode,

that is, a noble metal oxide. A bare titanium is not an anode.

11.8. It is important to bear in mind that the department did not produce any material by way of affidavit of any chemical analyst or an expert in chemical technology to counter the view of professor Mr. Sarkar and Dr. (Mrs.) K. Gadgil. The authorities below had donned upon themselves the role of an expert by reading an extract in a manner which perhaps suited their conclusion.

11.9. In our view such an approach is flawed; while sitting as an adjudicator, courts have to base at times, their decision; on material produced before it on an issue which requires expert input - therefore its decision not to accept material placed before it should ordinarily also be based on a similarly persuasive evidence, unless the material placed before it is completely unreliable. As noted above, the department did not adduce any evidence in support of its contention, which was contrary to that raised by the Assessee.

12. What lends credence to the submissions made on behalf of the Assessee which is that, coating of titanium substrates leads to emergence of a distinct product, is the fact that the process undertaken by the Assessee has been subjected to excise duty by another statutory authority of the State. This crucial aspect of the matter we find has not been adverted to by any of the authorities below including the Tribunal even though the material as well as submission with regard to this aspect was squarely put forth by the Assessee.

12.1 It is trite law that only that process is recognized as constituting manufacture which results in emergence of a distinct article on being subjected to either treatment, or labour or even manipulation. [see Union of India (UOI) Vs. Delhi Cloth and General Mills, . The Supreme Court in the aforementioned case while, quoting from the Permanent Edition Of Words And Phrases Vol. 26 cited with approval the following passage: "Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

12.2 But for the purposes of imposition of excise duty it is not enough that manufacture takes place, it should result in production of an article which is marketable though not necessarily marketed. This aspect of the matter has been dealt with by the Supreme Court in several decisions. We do not wish to burden the judgment with all those cases; however only to highlight the contours of this principle we intend to refer to the following two judgments.

12.3 First being: South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, . In South Bihar Sugar Mills (supra) case [in which Delhi Cloth Mills (Supra) was cited with approval] the Supreme Court after analyzing the scientific evidence put forth both by the Assessee and the department came to the conclusion that, in manufacture of sugar, kiln gas was produced by the Assessee, which was not carbon dioxide as known to the market and hence, could not be

made amenable to imposition of excise duty. The relevant observations is extracted hereinbelow:

16. The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the act does not define goods, the legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in *Union of India (UOI) Vs. Delhi Cloth and General Mills,*

12.4 The second being: *A.P. State Electricity Board Vs. Collector of Central Excise, Hyderabad, .* In this case once again the Supreme Court was called upon to adjudicate as to whether pre-stressed cement concrete poles manufactured by Andhra Pradesh State Electricity Board (APSEB) were goods within the meaning of Section 3 of the Central Excise Act Sale Act, 1994. The Supreme Court after examining a number of judgments including the judgments in the case of *Delhi Cloth Mills (supra)* and *South Bihar Sugar Mills (supra)* came to the conclusion that what was necessary for imposition of excise duty was for the emergence of marketable goods. It was argued on behalf of the Assessee that pre-stressed cement concrete poles manufactured by them were not goods inasmuch as they were not marketable since they were manufactured for a captive purchaser. The court after analyzing its own precedents opined that: whether or not the goods were in fact marketed was of no relevance; what was essential was that goods were marketable. Marketability being essentially a question of fact it would have to be decided as an issue of fact in each case. Even if goods were available only from one source or from a specified market it made no difference so long as they were available to the purchaser. Marketability was not dependent upon whether or not a number of purchasers available for the goods in issue; a single purchaser would suffice. Relevant observations in this regard are contained in paragraph 10 of the judgment which are extracted hereinbelow for the sake of convenience:

10. It would be evident from the facts and ratio of the above decisions that the goods in each case were found to be not marketable. Whether it is refined oil (non-deodorised) concerned in *Delhi Cloth and General Mills* or kiln gas in *South Bihar Sugar Mills* or aluminium cans with rough uneven surface in *Union Carbide* or PVC films in *Bhor Industries* or hydrolysate in *Ambalal Sarabhai* the finding in each case on the basis of the material before the Court was that the articles in question were not marketable and were not known to the market as such. The "marketability" is thus essentially a question of fact to be decided on the facts of each case. There can be no generalization. The fact that the goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are

goods for the purposes of Section 3. IT is also not necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country. The Appellant's own case before the excise authorities and the CEGAT was that these poles are manufactured by independent contractors from whom it purchased them. This plea itself - though not pressed before us - is adequate to demolish the case of the Appellant. (emphasis is ours)

13. As in the Central Excise and Salt Act, 1944, in the I.T. Act there is no definition of the word manufacture. The expression industrial undertaking, however, has been defined inter alia in the explanation to Section 33B of the I.T. Act as any undertaking which is mainly engaged in the manufacture or processing of goods. The Tribunal in this case has, returned a finding to the effect that the Assessee has been treated as an industrial undertaking by the relevant authorities. However, after accepting that the Assessee is an industrial undertaking; (and there being no dispute that the only activity in which the Assessee is engaged in is: coating titanium substrates with noble metal oxides) - the Tribunal, curiously, went on to say that what was produced was not a distinct article ignoring the evidence on record.

13.1 This apart, the Tribunal while rejecting the contention of the Assessee in paragraph 26 of the impugned judgment observed that the Assessee had not placed on record material to show that after coating the article in issue it became a "saleable" article and hence, a different commodity.

13.2 In our view the Tribunal lost sight of the fact that a distinct new product had come into existence after it was processed by the Assessee. The fact that it had a single purchaser, (i.e., UHDE/IPCL) for its coated titanium substrates ought not to have come in the way of Tribunal allowing the deduction to the Assessee. As noticed above the test is that the transformed article should be marketable. In this case there could not have been a better evidence of marketability than the Assessee's agreement with UHDE.

14. The Supreme Court, as a matter of fact has, in a recent judgment entitled Commissioner of Income Tax-V, New Delhi Vs. Oracle Software India Ltd., further refined the test as to what constitute a manufacturing process. In this case the Court was called upon to decide as to whether a process by which blank compact discs are transformed into loaded software would constitute manufacture in context of Section 80I of the I.T. Act. The Court employed the test of fitness. In other words, to come to the conclusion whether the process employed

constitutes manufacture one would have to ascertain the efficacy of the process in rendering the commodity or an article fit for use. The relevant observations of the court in this regard are given in paragraph 16 to 18 of the judgment. This judgment of the Supreme Court was followed in Commissioner of Income Tax, Mumbai Vs. Emptee Poly-Yarn Pvt. Ltd., .

14.1 In our view the Tribunal had to employ the test of fitness in ascertaining whether the process employed by the Assessee rendered the free issue material supplied to it (whether referred to as titanium substrates or a titanium metal anode), fit for use in the industry.

14.2 The Tribunal's conclusion; that the coated titanium substrates did not result in production of a distinct new article, based on provisions of the agreement arrived at by the Assessee with the UHDE which, required it to dispatch the processed titanium substrates to Alpha for further fabrication to manufacture membrane cell element is, in our view, flawed. The reason for this is: the Tribunal had to address the issue as to whether the process employed by the Assessee resulted in manufacture of a distinct new article. If it did, it mattered little that the said product could be further worked upon to manufacture membrane cell element. This line of inquiry and the resultant conclusion, without relevant material to support it: was, according to us, misdirected. In our opinion the Tribunal employed the wrong test. Once the Tribunal found as a fact that the process undertaken by the Assessee resulted in production of a "useful commercial commodity" the enquiry had to end there, and the Assessee's claim allowed.

15. The judgment cited by Ms Bansal, i.e., Bhagat Construction (supra) has no applicability. In the said case the Assessee before the court impugned the order of the Tribunal before it whereby, its claim of investment allowance in respect of equipment used for quarrying and stabilizing electricity was denied. The court sustained the contention of the department on the ground that the Assessee was not an industrial undertaking. The reason for coming to this conclusion was that it had been found as a matter of fact that the Assessee's main business was civil engineering works and not to manufacture any intermediary products. In the course of carrying out civil engineering works it had quarried certain material which were mainly stones and the said material had been used for the said purpose. The court was of the view that, since in the course of its main activity, which was, as indicated above, civil work certain by-product had been produced, which was consumed, it would not enable the Assessee to claim investment allowance on the ground that it was engaged in carrying out an industrial activity. The court held that the Assessee was not a manufacturer of any article or thing but, as a matter of fact was a consumer of by-product, produced, and therefore, the machinery in issue was not amenable to investment allowance. In our view, the case is completely distinguishable on facts and hence, not applicable.

16. For the reasons given above, both questions of law are answered in favour of

the Assessee and against the department. Consequently, the impugned judgment is set aside. However, in the circumstances parties shall bear their own cost.