* **HIGH COURT OF DELHI : NEW DELHI**

ITA Nos.1552, 1548, 1549/2006, 93/07 & 789/07

% Judgment reserved on: 18th March, 2008

Judgment delivered on: 31st March, 2008

THE COMMISSIONER OF INCOME TAX
DELHI-II
C.R.Building
New Delhi. ..... Petitioner.
Through: Mr.R.D.Jolly, Adv.

Vs.

M/S MAHAAN FOODS LTD.
78/3, 2nd Floor, Janpath,
New Delhi. ..... Respondent
Through: Mr.C.S.Aggarwal, Sr.Adv.
Mr.Prakash Kumar, Adv.

Coram:
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

V.B.Gupta, J.

By way of this common judgment, all the above five

appeals are being disposed of since the common question of law is involved in all these case.

2. Brief facts leading to dispute are that the Assessee is engaged in the business of manufacturing of dairy whitener and skimmed milk powder. The Assessee claimed deduction under Section 80-IA of the Income Tax Act, 1961 (for short as 'Act') from assessment year 1995-96 onwards. The Assessee's claim of deduction was initially not objected to for the assessment year 1995-96 as no scrutiny assessment under Section 143(3) of the Act was made and only processing of the return of income was done under Section 143(1)(a) of the Act. During the course of the assessment proceedings under Section 143(3) of the Act for assessment year 1996-97, the Assessing Officer asked the Assessee to justify its claim of deduction under Section 80-IA of the Act. The Assessee submitted that during the period relevant to assessment year 1995-96 and thereafter he had set up a new project with the state of art technology for multiplying the production capacity and enhancing the product quality. The new technology was aimed at improving the productivity, operational efficiency, saving in

energy cost and significant improvement in the product quality. As a result, the output increased substantially and there was a better product mix with more value added products. The Assessee stated that for this purpose it had entered into arrangements for acquiring new technology know-how as well as plant and machinery from M/s Rotacom Industries BV, Netherlands and M/s Seppo Ralli OY, Finland, who were the pioneer in providing technology for dryer and evaporators, which were main process equipments in the manufacture of dairy whitener and milk powder. As a result, on 31st December, 1994 the Assessee's plant and machinery was of the value of Rs.125.74 lacs as against the old plant and machinery of Rs.20.86 lacs. Thus, old plant and machinery was less than 20% permissible under provisions of Section 80-IA of the Act.

3. During the course of assessment proceedings for the assessment year 1996-97, the Assessee claimed that a new industrial undertaking has come into existence which has commenced commercial production from 1st January, 1995.

4. The Assessing Officer held that the Assessee was engaged in the production of dairy whitener and milk powder. Prior to 1st January, 1995 also the Assessee was manufacturing the same products. All that the Assessee had done was to undertake a modernization-cum-expansion programme of the existing undertaking. For this, the Assessing Officer relied upon the extract from the Directors' report for the year 1993-94. It was further held by the Assessing Officer that no separate and independent industrial unit came into existence and it was only absorption of the old business and so-called new industrial undertaking was nothing but modernization of the existing unit and as such the Assessee's case was hit by the provisions of Section 80-IA(2)(i) of the Act. The Assessing Officer, therefore, disallowed the claim of the Assessee under Section 80IA of the Act.

5. Against the assessment order, the Assessee filed appeals before the Commissioner of Income Tax (Appeals) [for short CIT(A)], and the CIT(A) allowed the appeals of the Assessee.

6. Being aggrieved with the order of CIT(A), the Revenue preferred an appeal before the Income Tax Appellate Tribunal (for short as 'Tribunal') and vide the impugned order, the appeal filed by the Revenue was dismissed by the Tribunal. Thus, the Revenue has filed an appeal before this Court.

7. It has been contended by learned counsel for the Revenue that Assessee had merely introduced new technology and new plant and machinery for two items, whereas for other things, the earlier machines were being used. Further, most of the production was being carried out by using the old plant and machinery and merely capacity of the Assessee unit was increased which goes on to show that it was the case of expansion of old industrial undertaking with some modifications and no new industrial undertaking came into existence and the Assessee continued to manufacture same products and continued to operate the old machinery and plant.

8. On the other hand, it has been contended by learned counsel for the Assessee that after collaboration with two international pioneers in the field of dairy whitener and

milk powder, the entire complexion of the Assessee's industrial unit was changed. The Assessee had made fresh investment in plant and machinery amounting to Rs.104.88 lacs. Further, the old unit became unviable with coming into existence of new industrial undertakings backed with latest technology, higher efficiency and better quality product. The Assessing Officer himself has stated that there was a complete absorption of the old business by the new unit and this absorption makes it all the clear that in certain part of the year, both the units existed independently simultaneously and the old unit gradually faded away after coming into the existence of new industrial unit. All these facts goes on to show that the new unit set up by the Assessee was not formed either by splitting up of the existing industrial undertaking or formed by reconstruction or rehabilitation of an undertaking. In support of his contention, learned counsel for the Assessee has cited a decision of the Supreme Court reported as ***Textile Machinery Corporation Ltd. vs. CIT [1997] 107 ITR 195 (SC)***.

9. Section 80-IA (2) of the Act 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.

(ii) It is not formed by the transfer to a new business of machinery or plant previously used for any purpose and in case it is transferred then the total value of the old machinery or plant or part so transferred does not exceed 20% of the total value of the machinery or plant used in the business.

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

10. The term **"splitting up of the business already in existence"** indicates a case where the integrity of a business earlier in existence is broken up and different sections of the activities previously conducted are carried on independently. [***CIT v. Hindustan General Industries Ltd. [1982] 137 ITR 851 (Delhi***)].

11. As observed by Supreme Court in ***Textile Machinery v. CIT [1997] 107 ITR 19(SC),*** *"*The term **'reconstruction'** implies that the identity of the business should not be lost, and substantially the same business should be carried on by substantially the same person. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the Assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business".

12. As per findings of fact recorded by the Tribunal, it has been stated that "in the present case the old undertaking no longer existed and remained identifiable. It was completely submerged in the new industrial undertaking of the Assessee. The provisions of Section 80IA of the Act with reference to Explanation 2, do not require that new industrial undertaking should be raised on separate plot of land leaving the earlier undertaking totally untouched. We find that the processes for which the Assessee entered into technological collaborations with M/s Rotacom Industries, B.V., Netherlands and M/s Seppo Ralli OY,

Finland were the key processes of the Assessee's industrial undertaking and other processes such as storage of milk in stainless steel storage tanks, pre-warming, pre-heating, pasteurization were only of preparatory nature for the manufacturing of the product of the Assessee. The Assessee appears to have introduced almost entirely new manufacturing technology and processes."

13. The reconstruction of a business or an industrial undertaking must necessarily involve the concept that the original business or undertaking is not to cease functioning, and its identity is not to be set to be lost or abandoned. The concept essentially rests on changes but the changes must be constructive and not destructive. There must be something positive about the whole matter as opposed to negative. The underlying idea of a reconstruction evidently must be - and this is brought out by the section itself - of a 'business already in existence'. There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied form. If the alteration and changes are

substantial, there would be little scope for describing what emerges as a reconstruction of the business. ***(See CIT v. Gaekwar Foam and Rubber Co. Ltd. [1959] 35 ITR 662 [Bom.]***

14. From the perusal of Section 80-IA of the Act it is clear that the statute itself has envisaged and approved of a situation in which an old existing smaller industrial undertaking is absorbed by a new much bigger industrial undertaking.

15. In the present case, only capacity was increased and there was expansion of old business with some modifications. As for 'reconstruction' of the business, it is nowhere evident that the old industrial unit was split up or damaged or destroyed that was supposedly reconstructed as a new unit by the assessee. What the Assessee has done is to set up an industrial undertaking with latest technology and with increased capacity and of course, with a fairly good amount of fresh investment.

16. The formation of the new undertaking is not as a consequence of the transfer of the plant or machinery of the old business. The value of the plant and machinery

utilized in the new undertaking has been less than 20% of the total investment. Thus, the assessee's case also does not get disqualified under this provision.

> Investment in new plant and machinery was Rs.104.88 Lacs.
>
> Investment in old plant and machinery was Rs.20.86 Lacs.

17. Therefore, in this view of the matter, the conclusion is inevitable that the assessee was entitled to deduction under section 80-IA in respect of the profits of the new industrial undertaking having satisfied the conditions.

18. Thus no infirmity can be found with the impugned order of the Tribunal.

19. In view of the above, no substantial question of law arises for consideration.

20. The appeals are accordingly dismissed.

V. B. GUPTA, J.

March 31, 2008 **MADAN B. LOKUR, J.**
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