* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **I.T.A. No.740/2010**

% **Date of Decision: 18.02.2011**

Commissioner of Income Tax .... Appellant
New Delhi-IV
Through: Ms. Prem Lata Bansal, Sr. Advocate with Mr.Deepak Anand, Advocate

Versus

M/s.Gitwako Farma (I) Pvt. Ltd. .... Respondent
Through: Mr. P.C. Yadav, Advocate

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1.	Whether reporters of Local papers may be allowed to see the judgment?	Yes
2.	To be referred to the reporter or not?	Yes
3.	Whether the judgment should be reported in the Digest?	Yes

M.L. MEHTA, J. (ORAL)
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+C.M. No. 11166/2010 (delay)

This is an application seeking condonation of delay of 151 days in refiling the appeal.

Upon hearing learned counsel for the parties and on perusal of the application, the delay in refiling the appeal is condoned subject to

payment of cost of Rs.5,000/- to Delhi High Court Legal Services Committee.

Accordingly, the application stands disposed of.

ITR No.740/2010

1. Notice. Mr.Yadav enters appearance and accepts notice on behalf of the respondent.

2. Heard the counsel for the parties. The present appeal is admitted on the following substantial questions of law.

   i) Whether the ITAT was correct in law in allowing the deduction under Section 80 IB of the Act to the assessee?

   ii) Whether the process undertaken by the assessee amounts to manufacturing or production of any article or thing so as to be eligible for deduction under Section 80 IB?

3. With the consent of parties, we have finally heard the appeal.

4. The assessee is engaged in manufacturing of tinned fish and mutton. It has been filing returns and claiming deductions under section 80IB of the Income Tax Act (hereinafter referred to

as "the Act") for the assessment years 1996-97 to 2003-2004. It is only during the assessment year 2004-2005 that its case came to be examined by the Additional C.I.T. by exercising his powers conferred upon him under Section 144A of the Act. Pursuant to the directions given by the Additional C.I.T. under Section 144A, the AO completed the assessment under Section 143(3) on 27th December, 2006 and disallowed the deduction amount to Rs.54,83,360/- claimed by the assessee under Section 80IB of the Act.

5. Aggrieved by this, the assessee preferred an appeal before CIT(A), who vide order dated 6th February, 2008 allowed the appeal holding that the processes undertaken by the assessee amounted to "manufacture". Consequently, CIT(A) held the assessee to be entitled for deduction under Section 80IB of the Act and deleted the disallowance made by the AO. The Revenue filed appeal before the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), which was dismissed upholding the reasoning and the order of the CIT(A). It is against this impugned order, the Revenue has preferred the appeal. The short question for consideration is as to whether the processes

undertaken by the assessee in converting raw fish into tinned fish for consumption amounted to “manufacture” or not.

6. The process involved in converting raw fish into tinned fish as presented by the assessee was examined by the Assessing Officer. Holding the activity to be a “process” and not “manufacture”, AO recorded as under:-

> “….. I am of the considered view that the manufacturing undertaken by the assessee company is at best food processing and cannot be categorized as manufacturing or production which results into creation of the new and distinct commodity, as recognized in the trade circle. The assessee company undertakes:
>
> (i) Sorting and quality control of fish
> (ii) Packaging the raw fish in ice.
> (iii) Procuring of raw fish from fishing docks
> (iv) Pre-processing of fish
> (v) Cleaning, cutting of fish head, tail, fins, tips and removal of skin.
> (vi) Pre-cooking and packaging of pre-cooked products in cans
> (vii) Creation of negative pressure for achieving long shelf life.
> (viii) Sterilization of canned product and inactivation of microbial load
> (ix) Cooling of packed canes for further inactivation of microbial load
> (x) Final product – tuna/mackerel fish
> (xi) Tinned fish kept in ware house.

> 2.1.5 After going through the above stages through which the input raw material – fish is converted into tinned fish, it is clear that, as a result of processing undertaken by the assessee company, no commercially different and distinct commodity has been produced and, hence, it is noticed that the processing undertaken by the assessee company cannot be held to be amounting to manufacturing or production of an article or thing and, therefore, the basic condition for eligibility of 80IB deduction is not found to have been fulfilled and, hence, the deduction claimed u/s 80IB is not found to be allowable."

7. The CIT(A) after going into the minute details of the processes involved in different commodities and also the judgments of different High Courts and the Supreme Court regarding those commodities held the activities involved in conversion of raw fish into tinned fish as 'manufacturing' and thus the assessee was held to be entitled to deductions under Section 80IB. The Tribunal recorded its agreement with CIT(A) in the following manner:-

> "Moreover, the claim of the assessee for deduction under Section 80IB was allowed by the Assessing Officer in the initial year and the same having not been admittedly withdrawn, we hold that the claim of the assessee for such deduction could not be denied for the subsequent years as held inter alia in the case of CIT vs. Paul Brothers 216 ITR 548 (Bombay)

> cited by the learned counsel for the assessee. Further more the entire process involved in conversion of raw fish into tinned fish was examined by the learned CIT(Appeals) and after having considered the different stages involved in the said process as well as the nature of input and output, the activity of the assessee company was held by him to be manufacturing activity eligible for deduction under Section 80IB, keeping in view the ratio of various judicial pronouncements discussed in the impugned order."

8. Learned counsel for the assessee has relied upon various judgments of different High Courts to substantiate his submission that the process involved in converting raw fish into tinned fish is manufacturing. He submitted that there was a difference in the input raw fish and the end product of tinned fish. He tried to demonstrate that the input is not eatable whereas the end product is eatable and the life of input raw fish is short as against the long self-life of the tinned fish. He further submitted that the process involved processing by mixing with oil, spices and other vegetables like ginger, chilly, onion, cooking at specified temperature and packaging in air-tight containers. He also submitted that the assessee has been paying excise duty on the basis of the manufacturing of tinned fish.

9. Learned counsel relied upon ***CIT v. Marwell Sea Foods***, 166 ITR 624 (Kerala); ***CIT v. Bharath Sea Foods***, 237 ITR 46 (Kerala); ***Aspinwall & Co. Ltd. v. Commissioner of Income Tax***, (2001) 21 ITR 323 (SC); ***Commissioner of Income Tax v. Sophisticated Marbles & Granite Industries***, (2009) 225 CTR (Del) 410 and ***Commissioner of Income Tax v. Jalna Seeds Processing & Refrigeration Co. Ltd.***, (2000) 246 ITR 156 (Bom.).

10. We may note that the decisions in the case of ***CIT v. Marwell Sea Foods*** (*supra*) and ***CIT v. Bharath Sea Foods*** of the Kerala High Court related to prawns and fish respectively are no longer holding field on the subject in view of the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax v. Relish Foods***, 237 ITR 59 (SC). In this case the undermentioned findings of ***Sterling Foods v. State of Karnataka,*** (1986) 68 STC 239, were approved by Supreme Court that:

> "the processed or frozen shrimps and prawns are commercially regarded as the same commodity as raw shrimps and prawns. When raw shrimps and prawns are subjected to the process of cutting of heads and tails, peeling, deveining, cleaning and

> freezing they do not cease to be shrimps and prawns and become other distinct commodities. There is no essential difference between raw shrimps and prawns and processed or frozen shrimps and prawns. In common parlance they remain known as shrimps and prawns."

11. The case of ***Aspinwall & Co. Ltd.*** (*supra*) related to manufacture of coffee beans from coffee berries. The process involved plucking or receiving the raw coffee berries and putting them to undergo nine processes to give it the shape of coffee beans. It was held that "the process is manufacturing process when it brings out a complete transformation in the original article so as to produce a commercially different article or commodity. That process itself may consist of several processes. The different processes are integrally connected which results in the production of a commercially different article. If a commercially different article or commodity results after processing then it would be a manufacturing activity. The assessee after processing the raw berries converts them into coffee beans which is commercially different commodity. Conversion of the raw berry into coffee beans would be a manufacturing activity."

12. In the case of ***CIT v. Jalna Seeds Processing & Refrigeration Co. Ltd.*** (*supra),* processing of raw seeds to make them suitable only for cultivation was held to be a manufacturing process. It was held that the raw seeds undergo various processes to make it marketable lot after which they are no longer edible and they can only be used for cultivation. The different commodity emerges after raw seeds undergo different stages and so the assessee can be said to be engaged in the manufacturing or production of seeds.

13. The case of ***CIT v. Sophisticated Marbles & Granite Industries*** (*supra*) related to conversion of marble blocks into slabs, tiles, etc. by involving different processes like cutting, putting full size fibre on one side, filling holes and cracks by applying chemicals, polishing, applying different types of tin oxides and then cutting the finished slabs to appropriate sizes and shapes from which the marketable size of slabs, moulded pieces, edged pieces and tiles are made. This activity was held to be clearly falling within the definition of manufacturing.

14. In the case of ***Golden Hind Shipping (India) Pvt. Ltd. v. CIT A-X, New Delhi***, 240 ITR 324, similar issue was raised before this High Court and it was observed as under:-

> "the broad principle which can be deduced from various judicial pronouncements on the subject is that it is only when a change or series of changes take the commodity subjected to such processes to a point where it can no longer be regarded as the original commodity but is instead recognised as a new and a distinct article, that such a process can be said to have resulted in "manufacture" or "production" of an article. In other words, what is to be seen is whether the article claimed to be manufactured or produced is commercially different from the commodity out of which the same has been produced. As noted above, in the present case, the Tribunal has found that the assessee's activity is restricted to catching of fish on the high seas, cleaning it from both the ends and then keeping it in the cold storage till the same is sold to various customers. So far as the process, the assessee puts the fish to, is concerned, the aforenoted finding, one of fact, is not sought to be challenged in the question referred to this court. Applying the above test to the facts found by the Tribunal, we are of the opinion that by mere cutting off of the head and tail of the fish, it does not become another distinct commodity. In common parlance it continues to be known as fish and, therefore, the assessee-company cannot be said to be an industrial undertaking engaged in the manufacture or production of an article to be entitled to any relief under Section 80J of the Act.
>
> The view we have taken finds support from the decision of the Supreme Court in Sterling Foods v. State of Karnataka [1986] 63 STC 239, wherein it has been held that the processed or frozen shrimps and prawns are commercially regarded as the same commodity as raw shrimps and prawns. When raw

shrimps and prawns are subjected to the process of cutting off of heads and tails, peeling, deveining, cleaning and freezing they do not cease to be shrimps and prawns and become other distinct commodities. There is no essential difference between raw shrimps and prawns and processed or frozen shrimps and prawns. In common parlance they remain known to be known as shrimps and prawns. Following the said judgment, in a recent decision in CIT v. Relish Foods [1999] 237 ITR 59, the apex court has affirmed the decision of the Bombay High Court in CIT v. Sterling Foods (Goa) [1995] 213 ITR 851, wherein it was held that the activity of processing of prawns is not an activity of manufacture or production. A similar view was taken earlier by the Bombay High Court in CIT v. Fazalbhoy Ibrahim and Co. P. Ltd. [1995] 214 ITR 239, wherein it was held that "catching fish" did not amount to "manufacture" or "production" of fish within the meaning of Section 80J. Both the decisions of the Bombay High Court are apposite to the question before us.

In the light of the aforenoted judgments of the Supreme Court, with respect, we are unable to subscribe to the view taken by the Calcutta High Court in CIT v. Union Carbide India Ltd. [1987] 165 ITR 550, relied upon by learned counsel for the assessee. We are of the view that the assessee is neither an industrial undertaking nor is it engaged in the business of manufacturing or producing any article and consequently it is not entitled to deduction under Section 80J."

15. On the same issue, the Hon'ble Madras High Court in the case of ***CIT v. E.I.D. Perry India Ltd.,*** 274 ITR 489 observed as under:

> "The assessee is engaged in the operation of catching of fish, processing the same, treating the fish with chemicals, freezing it and packing it in a cold storage plant. This Court in the case of CIT Vs. George Maino Exports Pvt. Ltd., 250 ITR 445 has held that the processing of shrimps does not amount to manufacture and, therefore, the assessee is not entitled to invest allowance u/s 32A of the Act. That decision squarely applies here."

16. Recently, this Court had the occasion to consider a similar issue in STR 12/2002 and STR 4/2003 decided on 24th January, 2011. In the said case, a reference was made to the case of ***Board of Revenue Taxes, Ernakulam v. Pio Foods Packers***, 46 STC 63 (SC). Though this case was under the Sales Tax Act, the question regarding manufacturing came to be considered. The case of ***Pio Foods Packers*** *(supra)* related to pineapple fruits which were processed into pineapple slices. It was held that though it has undergone a degree of processing, it must be regarded as still retaining its original identity. The principles laid down in this case by the Supreme Court are of wide importance, which are noted as under:

> "The generally prevalent test is whether the articles produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. 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 series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity.

...

"In the present case, there is no essential difference between the 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 from 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 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."

Referring to Anheuser-Bush Brqing Association v. United States, the Court said:

"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".

And further :

> "At some point processing and manufacturing will merge. But where commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured'."

17. In the light of facts and circumstances of the assessee's activities as described in the preceding paragraph and also in the order of the AO and in the light of the settled legal position as discussed above, it is held that the assessee is engaged in processing and not manufacturing and as such is not eligible for deduction under Section 89IB. In view of the findings, we answer question (ii) in favour of the Revenue and against the assessee in the sense that the activities undertaken by the assessee did not amount to production or manufacturing and so is not eligible for deduction under Section 80IB. Consequently, Question (i) is answered in negative in favour of the Revenue and against the assessee.

18. To substantiate his submission that the Department has been accepting the returns filed by the assessee and allowing the deduction for the previous years and so was estopped from doing so on the principle of consistency, learned counsel has relied upon the case of ***M/s.Radhasoami Satsang v. CIT***, 193 ITR 321, wherein it was observed as under:

> "We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment years being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

19. In this regard it may be stated that it is only during the relevant year that the case of the assess came to be examined by the higher authorities at appropriate level. The examination of the case of the assessee in the relevant year was not confined to the factual matrix of the previous years, but was an exercise done by the Department on the legal issues concerning the claim made by the assessee under Section 80IB of the Act. We are of the view that since each year assessment is independent of the previous years, there was no bar against the Revenue to examine the case of the assessee from this legal perspective.

20. The last submission of the learned counsel was that the activities undertaken by it in converting raw fish into tinned fish amounted to 'manufacture' was also accepted by the Excise Department

and they have been paying excise duty on their products. We have no hesitation in holding that the activities undertaken by the assessee did not amount to manufacturing by any stretch of extension and if for any reason or misconception, the assessee or the Excise Department have been taking the activities as manufacturing, that would be sorted out by the assessee with the Excise Department even to the extent of asking for refund of excise duty, if it was so entitled to.

21. For the aforesaid reasons, the appeal is dismissed.

M.L. MEHTA,
JUDGE

A.K. SIKRI,
JUDGE

February 18, 2011
'Dev'