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

RESERVED ON : 05.12.2012
PRONOUNCED ON: 21.12.2012

\+ **ITA NOS. 87/2003 &**
ITA NOS. 1411/2006

COMMISSIONER OF INCOME TAX ……..Appellant

Through : Sh. Sanjeev Sabharwal, Sr. Standing Counsel with Ms. Gayatri Verma and Sh. Puneet Gupta, Jr. Standing Counsel.

Vs.

M/S. DEWAN CHAND SATYAPAL …… Respondent

Through : Sh. M.S. Syali, Sr. Advocate with Sh. Satyen Sethi, Sh. Arta Trana Panda, Ms. Husnal Syali, Sh. Mayank Nagi and Sh. Rahul Sateeja, Advocates.

ITA NOS. 1541/2006

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CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. This judgment disposes of appeals by the revenue under Section 260A of the Income Tax Act 1961 against the orders of the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT") dated 16.08.2002, 26.10.2004 and 01.12.2005 respectively. The appeals involve similar substantial questions of law which are:

1) Whether the ITAT was correct in holding that a Diagnostic Centre is an industrial undertaking within the meaning of Section 80-IA of the Income Tax Act 1961?

2) Whether the ITAT was correct in law in holding that the assessee was entitled to deduction under section 80-IA of the Act?

2. The respondent i.e. M/s Dewan Chand Satyapal (hereinafter referred to as "the assessee") is engaged in running an advanced radiological clinic providing services of X-ray, MRI, CT Scan and NMI etc. This Diagnostic Centre was setup in 1948. The Assessee established a new Magnetic Resonance Imaging (MRI) unit in the assessment year 1995-96. The assessment- for the assessment year 1995-96 -was completed under Section 143(3) at an income of ₹.69,30,880/- by order dated 28.08.1997. Deductions under Section 80-IA were allowed to the assessee at ₹.6,18,205/-. On 28.03.2000, the CIT issued an order under Section 263 of the Act which

found that during the accounting year relevant to assessment year under consideration, the assessee established a new MRI unit and had claimed a deduction under Section 80-IA of the Income Tax Act, ("the Act") at ₹.6,18,205/- and the deduction, as it existed then could be granted where the gross income of the assessee included any profits or gains derived from an industrial undertaking or a hotel etc manufacturing or producing any article or a thing not being the article or thing specified in the list in the Eleventh Schedule.

3. On 22.03.2002, a fresh assessment order was made by Assessing Officer under Sections 143/ 263 of the Act which disallowed the benefit of deduction under section 80-IA of the Act. The ITAT passed an order on 26.10.2004 which confirmed the order of the CIT and held that the Appeal of the Department was infructuous in view of the order of the ITAT dated 16.08.2002.

4. The Assessee filed its return of income for the assessment year 1999-2000 on 24.12.1999 declaring an income of Rs.4065110 and same was assessed under the provision of section 143(3) of the IT Act 1961. On 22.03.2002, the Assessing Officer (A.O.) passed an Assessment order which noticed that Assessee has claimed deduction under Section 80-IA on the MRI and CT Scan-II machines installed in August 1991 and March 1991 respectively and A.O. disallowed the claim of deduction under section 80-IA on the ground that the deduction is allowable to a new industrial undertaking unit, whereas the installation of new machines by the Assessee was just an

expansion of existing business, as the assessee's Radiology and imaging unit was in existence since 1948. On 16.10.2002, the Commissioner of Income Tax (Appeals) made an order confirming the order of the A.O. On appeal, the ITAT passed an order on 1.12.2005 by following its own orders in the case of the Assessee for the A.Y. 1998-99 in I.T.A. No. 1614/Del/2000 and for A.Y. 1995-96 in I.T.A. No. 2050/Del/2000.

5. The revenue challenges the correctness of orders of the ITAT on the grounds that any profits derived from any business of an industrial undertaking is entitled to deduction under this Section at 25% for an initial assessment year in which it begins to manufacture or produce articles or things and ten succeeding years, the assessee was running the business since 1948 and it was not a new industrial undertaking and to be entitled under 80-IA the industrial undertaking must manufacture or produce any articles or thing which is different from inputs utilised in it. Also, the revenue further contends that X-Ray equipments, scanners, etc. cannot be considered to manufacture of new articles or things as it involves no manufacturing. The revenue relies on *JMD Medical Limited* v. *Union of India* [1996] 218 ITR 184 (Cal) where the Calcutta High Court decided whether a diagnostic centre was an industrial undertaking. In that case, the assessee purchased, from a Japanese concern, a resonance scanner used for medical diagnosis by using the scanner so as to expose unexposed films. The petitioner contended that by virtue of certain provisions of the Income Tax Act, 1961, discussed hereafter- they were entitled to relief in regard to the interest payable on the purchase price of the scanner. Their submission was that they process the

goods, being the unexposed films by the use of the scanner and thus they are to be classed as an industrial undertaking. They relied upon Section 10(15) (iv) (c) of the 1961 Act and upon the Explanation to Section 10(15) (iv) (i). The Explanation mentioned is set out below:

> *"Explanation.--For the purposes of this sub-clause, the expression 'industrial undertaking' means any undertaking which is engaged in-*
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> *(a) the manufacture or processing of goods ; or*
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> *(b) the business of generation or distribution of electricity or any other form of power ; or*
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> *(c) mining ; or*
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> *(d) the construction of ships ; or*
>
> *(e) the operation of ships or aircrafts ;"*
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> The learned single judge held:
>
> *"If a medical diagnostic centre were to be classed as an industrial undertaking processing goods being the films within the meaning of the above Explanation, it would become grouped with such other organisations as are concerned with mining, construction of ships, etc. This would appear to be an unnatural construction of the words "processing of goods". Secondly, as emphasised by the Board, the films which are claimed to be the processed goods are not themselves sold to outsiders. It is indeed a weird case of processing of goods undertaken by an industrial undertaking when none of the processed goods is sold to anybody at all.*

Thirdly, the purpose of the above relief is obviously to permit industrial undertakings to engage with relief in the activity of manufacture or processing of goods even when such activity requires purchase of foreign machinery. A diagnostic centre is, by no ordinary meaning of the words, an industrial undertaking merely by purchase of a machine and only for the purpose of tax relief to be claimed by it as owner of the said machine. The purpose of the relief nowhere appears to be the grant of any benefit for the rendering of any professional services.

Fourthly, an industrial processing of goods has a certain similarity in the case of each of the goods processed. The products are largely similar or identical to one another. This is usual though not always the case. A scanner machine will, however, produce photographs which are totally different in the case of different patients and the value of the photographs derives from those differences rather than from their identity to one another.

In short, it is quite clear that the diagnostic centre is not processing goods as an industrial undertaking when it is exposing films by the use of the scanner obtained from Japan. Like most obvious things, it is easier to see and to understand than to explain."

6. The revenue relied on a decision of this Court reported as *CIT v. Yogender Sharma* 311 ITR 372 (Del). The Court held as follows:

"As mentioned above, the Bombay High Court has taken a different view in Insight Diagnostic and Oncological Research Institute P. Ltd. v. Deputy CIT [2003] 262 ITR 41. In this case, a CT scan machine was installed in a diagnostic centre and it was held that a diagnostic centre is not an industrial undertaking in the context of the Income-tax Act. In fact the expression "industrial undertaking" must be read in the context

of the Income-tax Act and not in the context of the Industrial Disputes Act.

As mentioned above, we are in agreement with the view taken by the Bombay High Court. What is required to be seen is that the machinery or plant must be installed first of all in a small scale industrial undertaking and, secondly, it must be used for the purposes of business of manufacture or production of any article or thing. The primary question is, therefore, whether a clinic or a diagnostic centre is at all a small scale industrial undertaking. Explanation (2) to section 32A(2) is a deeming provision and an industrial undertaking shall be deemed to be a small scale industrial undertaking, if it satisfies certain conditions. But, first of all, it must be an industrial undertaking before the deeming provision with regard to the financial limits can be invoked. In other words, if a unit is not an industrial undertaking then, even if it fulfils the financial requirements, it cannot be deemed to be a small scale industrial undertaking. Therefore, what is to be first seen is whether a unit is an industrial undertaking or not. If the answer is in the negative then the deeming provision cannot be invoked.

In our opinion, the expression "industrial undertaking" is to be used in the context in which it is used in the Income-tax Act and not in the context in which it is used in other laws such as the Industrial Disputes Act. If so understood, it cannot be said by any stretch of imagination or by the use of common English language, that a hospital or a clinic or a diagnostic centre or any such unit is an industrial undertaking. It may be that a machine or a plant within a clinic or a hospital or a diagnostic centre may manufacture or produce an article or thing; but that would not convert a clinic or a hospital or a diagnostic centre into an industrial undertaking. The unit must first be an industrial undertaking and it is then that we have to see whether it can be deemed to be a small scale industrial undertaking and then if it is involved in the production or manufacture of an article or thing.

> *The primary condition in the present case is not met inasmuch as the clinic of the assessee cannot be said to be an industrial undertaking. If that be so, it is of no consequence whether the x-ray machine manufactures or produces an article or a thing. The primary condition is not met in the first place.*
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> *In our opinion, the question of law referred to us is required to be answered in the negative in favour of the Revenue and against the assessee."*

7. It was highlighted, during the submissions, that the intention of the legislature was not to confer benefits on all kinds of activity, but only those which have some element of industrial activity which result in the production of goods, or result in production of intangibles which would be of use to the customer. In the case of diagnostic equipment, there is no such outcome; the result is of no universal application; unlike software, it does not facilitate production of goods or services. It is an aid to medical science, and assists physicians and other specialists to diagnose the symptoms and other conditions that a patient suffers.

8. The assessee resisted the submissions of the revenue and contended that several High Courts have ruled that hospitals are industrial undertakings, and diagnostic centres are also such industrial undertakings. It relied on the decision reported as *Commissioner of Income Tax* v. *Air Survey Co. of India (P) Ltd* [1998] 232 ITR 707 to support his argument that they are manufacturing goods and therefore, in terms of the definition of "industrial undertaking" under section 33B (as referred to by in section 80-IA as it existed prior to the amendment w.e.f. 1.04.2000), diagnostic centre is an industrial undertaking. In the said case, the assessee, an air survey

company, in the business of survey, mapping, aerial photography and aero-magnetic photography claimed investment allowance under Section 32A of the Act in respect of aircraft radio purchased. The question before the High Court was whether the activity and the use of aircraft radio in the aforesaid business would fall within the purview of the expression "manufacture" or "production" and whether the ultimate photography which came to be produced as a result of such activity was covered by the expression "article" or "thing". It was held by the Calcutta High Court that it does amount to manufacture or production and the question was answered in favour of the assessee.

9. The assessee had placed heavy reliance on the decision reported as *CIT v. Peerless Consultancy (P) Ltd* 186 ITR 609. The Court had noticed a previous ruling of the Karnataka High Court, and held as follows:

> *"In support of the contention that the business activity of the assessee is industrial in nature, reliance has been placed on a decision of the Karnataka High Court in the case of CIT v. Datacons (P.) Ltd. [1985] 155 ITR 66, where it was held that the term "industrial company" has been described as including a company engaged in the processing of goods. The word "processing" has not been defined and, therefore, it must be interpreted according to the* ***dictionary meaning*** *according to which****, where commodity is subjected to a process or treatment with a view to its development or preparation for the market, as for example, by sorting and repacking fruits and vegetables, it would amount to processing of the commodity.*** *The nature and extent of processing may vary from case to case ; in one case, the processing may be slight and in another, it may be extensive, but with each process suffered, the commodity would undergo a change. Where a company was*

engaged in processing the data furnished by its customers by using IBM Unit Record Machine Computer, it was held (headnote): "that the assessee received vouchers and statements of accounts from its customers and converted them into balance-sheets ... Such activities amounted to 'processing' of goods." And the assessee was held to be an industrial company and entitled to the concessional rate of taxation. We, respectfully, agree with the view expressed by the Karnataka High Court in the case mentioned above. Following the aforesaid decision, question No. 1 must be answered in the affirmative and in favour of the assessee. So far as the second question is concerned, since we hold that it is an industrial company within the meaning of section 2(7)(c) of the Finance Act, 1981, the assessee is entitled to get investment allowance in respect of the generator installed by it."

10. Counsel for the assessee contended that the Courts have always construed the term "industrial undertaking" in a broad sense, so as to include processing activity. Viewed from that perspective, the specialized activity of diagnostics in which the film is processed, and the end product reflecting the details which assist a patient in medical diagnostic can certainly be called a part of the processing of articles. Counsel emphasized that it is not the entire business of the assessee, but only a part of it, which deals with the MRI, CT scanning and X-Ray, that can be termed as "industrial undertaking" justly qualifying for concessions under Section 80-IA. In this respect, the ruling in *CIT v. Oracle* 320 ITR 546 (SC) was relied upon. The Supreme Court had, on that occasion, held as follows:

"From the details of Oracle Applications, we find that the software on the Master Media is application software. It is not an operating software. It is not system software. It can be categorized into Product Line Applications, Application

Solutions and Industry Applications. A commercial duplication process involves four steps. For the said process of commercial duplication, one requires Master Media, fully operational computer, CD Blaster Machine (a commercial device used for replication from Master Media), blank/unrecorded Compact Disc also known as recordable media and printing software / labels. The Master Media is subjected to a validation and checking process by software engineers by installing and rechecking the integrity of the Master Media with the help of the software installed in the fully operational computer. After such validation and checking of the Master Media, the same is inserted in a machine which is called as the CD Blaster and a virtual image of the software in the Master Media is thereafter created in its internal storage device. This virtual image is utilized to replicate the software on the recordable media.

9. What is virtual image? It is an image that is stored in computer memory but it is too large to be shown on the screen. Therefore, scrolling and panning are used to bring the unseen portions of the image into view. [See Microsoft Computer Dictionary, Fifth Edition, page 553] According to the same Dictionary, burning is a process involved in writing of a data electronically into a programmable read only memory (PROM) chip by using a special programming device known as a PROM programmer, PROM blower, or PROM blaster. [See Pages 64, 77 of Microsoft Computer Dictionary, Fifth Edition]

10. In our view, if one examines the above process in the light of the details given hereinabove, commercial duplication cannot be compared to home duplication. Complex technical nuances are required to be kept in mind while deciding issues of the present nature. The term "manufacture" implies a change, but, every change is not a manufacture, despite the fact that every change in an article is the result of a treatment of labour and manipulation. However, this test of manufacture needs to be seen in the context of the above process. If an operation/ process renders a commodity or article fit for use for which it is otherwise not fit, the operation/ process falls within the meaning of the word "manufacture". Applying the above

test to the facts of the present case, we are of the view that, in the present case, the assessee has undertaken an operation which renders a blank CD fit for use for which it was otherwise not fit. The blank CD is an input. By the duplicating process undertaken by the assessee, the recordable media which is unfit for any specific use gets converted into the programme which is embedded in the Master Media and, thus, blank CD gets converted into recorded CD by the afore-stated intricate process. The duplicating process changes the basic character of a blank CD, dedicating it to a specific use. Without such processing, blank CDs would be unfit for their intended purpose. Therefore, processing of blank CDs, dedicating them to a specific use, constitutes a manufacture in terms of Section 80IA(12)(b) read with Section 33B of the Income Tax Act.

11. One of the arguments advanced on behalf of the Department is that since the software on the Master Media and the software on the pre-recorded media is the same, there is no manufacture because the end product is not different from the original product. We find no merit in this argument. Firstly, as stated above, the input in this case is blank disc. Secondly, the test applied by the Department may not be relevant in the context of computer technology. One of the questions which arose for determination before this Court in the case of ***Tata Consultancy Services v. State of Andhra Pradesh, 137 STC 620*** *was whether a software programme put in media for transferring or marketing is "goods" under Section 2(h) of the Andhra Pradesh General Sales Tax Act, 1957.* ***It was held that a software programme may consist of commands which enable the computer to perform a designated task. The copyright in the programme may remain with the originator of the programme. But, the moment copies are made and marketed, they become goods. It was held that even an intellectual property, once put on to a media, whether it will be in the form of computer discs or cassettes and marketed, it becomes goods.*** *It was further held that there is no difference between a sale of a software programme on a CD/ Floppy from a sale of music on a cassette/ CD. In all such cases the intellectual property is incorporated on a media for purposes of*

transfer and, therefore, the software and the media cannot be split up. It was further held, in that judgment, that even though the intellectual process is embodied in a media, the logic or the intelligence of the programme remains an intangible property. It was further held that when one buys a software programme, one buys not the original but a copy. It was further held that it is the duplicate copy which is read into the buyer's computer and copied on memory device. [See Pages 630 and 631 of the said judgment] If one reads the judgment in Tata Consultancy Services (supra), it becomes clear that the intelligence/ logic (contents) of a programme do not change. They remain the same, be it in the original or in the copy. The Department needs to take into account the ground realities of the business and sometimes over-simplified tests create confusion, particularly, in modern times when technology grows each day. To say, that content of the original and the copy are the same and, therefore, there is manufacture would not be a correct proposition. What one needs to examine in each case is the process undertaken by the assessee. Our judgment is confined strictly to the process impugned in the present case. It is for this reason that the American Courts in such cases have evolved a new test to determine as to what constitutes manufacture. They have laid down the test which states that if a process renders a commodity or article fit for use which otherwise is not fit, the operation falls within the letter and spirit of manufacture. [See United States v. International Paint Co. reported in 35 C.C.P.A. 87, C.A.D. 76]"

11. The relevant extract of Section 80-IA as it existed prior to it being substituted w.e.f. 1.04.2000 is as follows:

"Section 80-IA. DEDUCTIONS IN RESPECT OF PROFITS AND GAINS FROM INDUSTRIAL UNDERTAKINGS, ETC., IN CERTAIN CASES.

(1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or a hotel or operation of a ship or developing,

maintaining and operating any infrastructure facility or scientific and industrial research and development or providing telecommunication services whether basic or cellular or operating an industrial park or commercial production or refining of mineral oil in the North Eastern Region or in any part of India on or after the 1st day of April, 1997 (such business being hereinafter referred to as the eligible business) to which this section applies, 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 the percentage specified in sub-section (5) and for such number of assessment years as is specified in sub-section (6).

(2) This section applies to any industrial undertaking which fulfils 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:

Provided that the condition in this clause shall, in relation to a small-scale industrial undertaking, or an industrial undertaking referred to in sub-clause (b) of clause (iv) which begins to manufacture or produce an article or thing during the period beginning on the 1st day of April, 1993 and ending on 31st day of March, 1998 apply as if the words "not being any article or

thing specified in the list in the Eleventh Schedule" had been omitted;

(iv)(a) In the case of an industrial undertaking not specified in sub-clause (b), or sub-clause (c), it begins to manufacture or produce articles or things or to operate such plant or plants, at any time during the period beginning on 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 industrial undertaking.

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(d) In the case of an industrial undertaking being a small scale industrial undertaking, not specified in sub-clause (b) or in sub-clause (c), it begins to manufacture or produce articles or things or to operate its cold storage plant at any time during the period beginning on the 1st day of April, 1995 and ending on the 31st day of March, 2000;

(v) 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.

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(12) For the purposes of this section, - (a) "Domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

(aa) "Hilly area" means any area located at a height of one thousand metres or more above the sea level;

(b) "Industrial undertaking" shall have the meaning assigned to it in the Explanation to section 33B;

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The definition of "industrial undertaking" under Explanation to Section 33B is as follows:

> *"**33B. Rehabilitation allowance.***
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> ***"**...Explanation: In this section, "industrial undertaking" means any undertaking 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."*

12. A joint reading of Section 80IA and Section 33B would make it apparent that the first condition spelt out in sub-section (2) (iii) is that the industrial undertaking *"manufactures or produces any article or thing."*; the second condition is that the "article or thing" should not be listed in the Eleventh schedule. The third aspect is that Section 33-B contains a somewhat wider definition of "industrial undertaking"; it posits that the unit should be an *"undertaking 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."* The articles listed out in the Eleventh Schedule are:

> *"1. Beer, wine and other alcoholic spirits.*
>
> *2. Tobacco and tobacco preparations, such as, cigars and cheroots, cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff.*
>
> *3. Cosmetics and toilet preparations.*
>
> *4. Tooth paste, dental cream, tooth powder and soap.*
>
> *5. Aerated waters in the manufacture of which blended flavouring concentrates in any form are used.*

Explanation.—"Blended flavouring concentrates" shall include, and shall be deemed always to have included, synthetic essences in any form.

6. Confectionery and chocolates.

7. Gramophones, including record-players and gramophone records.

8.

9. Projectors.

10. Photographic apparatus and goods.

11-21.

22. Office machines and apparatus such as typewriters, calculating machines, cash registering machines, cheque writing machines, intercom machines and teleprinters.

Explanation.—The expression "office machines and apparatus" includes all machines and apparatus used in offices, shops, factories, workshops, educational institutions, railway stations, hotels and restaurants for doing office work and for data processing (not being computers within the meaning of section 32AB).

23. Steel furniture, whether made partly or wholly of steel.

24. Safes, strong boxes, cash and deed boxes and strong room doors.

25. Latex foam sponge and polyurethane foam.

26.

27. Crown corks, or other fittings of cork, rubber, polyethylene or any other material.

> *28. Pilfer-proof caps for packaging or other fittings of cork, rubber, polyethylene or any other material.*
>
> *29. ....."*

A plain reading of the two provision clarifies that Parliament intended the benefit of Section 80-IA to specific kinds of undertakings; if Section 80-IA – which prescribes preconditions for the extension of the benefit – were to be seen, then the undertaking should produce or manufacture articles or things. A somewhat broader intention can be discerned if one considers Section 33-B, since it talks of an *undertaking 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."* The assessee's contentions hinge on the terms "processing of goods". The argument is that in its diagnostic centre, which maintains separate accounts and where such equipment are installed, raw film is used and the image from a patient is printed on it from the imaging machine, such as X-Ray or CT-Scan. This assists the attending doctor in diagnosing the patient medical condition.

13. The view of the Calcutta High Court in *JMD Medical Ltd* (supra) was echoed in *Insight Diagnostic and Oncological Research Institute P. Ltd. v. Deputy CIT* [2003] 262 ITR 41 by the Bombay High Court. That decision was noticed by this Court's Division Bench, in *Dr. Yogendar Sharma's case* (supra). The Bombay High Court, pertinently observed that:

> *"The CT scan machine is installed in a diagnostic centre. That diagnostic centre is not an industrial undertaking for the purpose of business manufacture. In this connection, one must read the expression "industrial undertaking" in the context of*

> *the Income Tax Act and not in the context of the Industrial Disputes Act and, if so read, it is clear that the activity should be of production of any article or thing and any activity which primarily concerns production of any article or thing would fall in the category of industrial undertaking…….In the present case, the report of patients coming from the CT scan machine did not amount to manufacture or production of article or thing and therefore, one of the basic tests laid down in CIT v Shaan Finance Pvt. Ltd 1998 (231) ITR 308 (SC) is not satisfied…."*

14. The common thread or refrain in these decisions, whether of this Court, or the Bombay or the Calcutta High Court is the emphasis on the statutory condition that the unit or undertaking must engage in production of an article or thing – be it in the context of Section 32A or Section 10 (15). Such consideration is equally important and relevant for applicability of Section 80-IA by virtue of Sub-section (2) (iii) of that provision. No doubt, Section 33-B facially is cast in wider terms since it talks of processing. Yet, that activity is not unqualified; it is processing of "goods". What emerges from all these decisions, and the relevant provisions – i.e. Sections 80-IA and 33-B is that the unit or activity is deemed an industrial undertaking, if it is involved in production of goods or articles. The Supreme Court decision in *Oracle*, in this Court's opinion does not advance the assessee's case further; the court there was concerned with the replication, on discs of copyrighted content, which was commercially sold or licensed. The situation is entirely different; there is no change of the article; the intention of the service provider is not to produce the article – the film is the medium in which what is recorded is made available for interpretation by the physician or doctor. If it can be more conveniently given in a pen drive or even over the internet, the question of production of goods or article would not arise.

What is important is that the primary activity is not manufacture or processing of goods; the end use product is one capable of use only by one person, for a limited purpose; even the "producer" has no right to disseminate it in any manner, because it is the private property or confidential matter of the patient. Plainly, it is a service that is provided. Another aspect to the matter is that the negative list – the contents of the Eleventh schedule, all point to articles or things, which illustrate that facilities provided by diagnostic centres do not result in manufacture or production of goods or things, or their processing.

15. A judge's task is limited to interpreting the law; if the language of the statute is plain, the interpretation has to be literal. In the case of a fiscal statute, the Court must interpret the statute as it stands; it cannot make good deficiencies, if there be any: *(Ref. C.A. Abraham v ITO* 1961 (41) ITR 425). To quote Oliver Wendell Holmes, that great American judge *"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used."* In the present context, the expression "manufacture" or "production" or processing has to be of "articles or things". They are to be interpreted as such along with the company (of the other words) they keep. While the benefit which might flow to the general public if diagnostic facilities are deemed industrial undertakings is undeniable, as it would probably result in lower cost of diagnosis of diseases and conditions, yet that result cannot be achieved by doing violence to the statute, in the guise of interpretation. The remedy (to this perceived mischief) is clearly elsewhere.

16. In view of the above conclusions, the questions of law framed in these appeals are answered in favour of the revenue, and against the assessee; the appeals are consequently allowed. No costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

December 21, 2012