

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

D.B. Income Tax Appeal No.25/2009.

Commissioner of Income Tax, Jaipur-II, Jaipur.

----Appellant

Versus

M/s Manglam Arts, Govind Nagar, Amber Palace Road, Jaipur.

----Respondent

Connected With

D.B.INCOME TAX APPEAL No.2/2012.

Commissioner of Income Tax, Jaipur-II, Jaipur.

----Appellant

Versus

Smt Ranjana Johari, Prop. M/s. Global Art Exports, S-249,
Mahaveer Nagar, Tonk Road, Jaipur.

----Respondent

D.B.INCOME TAX APPEAL No.4/2012

Commissioner of Income Tax, Jaipur-II, Jaipur.

----Appellant

Versus

Smt Ranjana Johari, Prop. M/s. Global Art Exports, S-249,
Mahaveer Nagar, Tonk Road, Jaipur.

----Respondent

D.B.INCOME TAX APPEAL No.17/2012.

Commissioner of Income Tax, Jaipur-II, Jaipur.

----Appellant

Versus

Smt Ranjana Johari, Prop. M/s. Global Art Exports, S-249,
Mahaveer Nagar, Tonk Road, Jaipur.

----Respondent

For Appellant(s) : Mr. R.B. Mathur

For Respondent(s) : Mr. Sanjay Jhanwar

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE VINIT KUMAR MATHUR

Judgment

Per Hon'ble Jhaveri, J.

14/02/2017

1. By way of these appeals, the department has challenged the judgment and order of the Tribunal whereby the Tribunal in some of the matters has dismissed the appeals of the department as well as in some of the cases where cross objections were filed by the assessee, dismissed the same.

2. This Court while admitting Appeal No.25/2009 on 11.04.2012 has framed the following substantial question of law:

"Whether in the fact and circumstances of the case the ITAT was justified in law in directing to allow deduction u/s. 10BA inspite of the fact that the assessee was not fulfilling the conditions laid down in the Act for claiming the said deduction?"

2.1. This Court while admitting Appeal No.2/2012 on 25.04.2012 has framed the following substantial question of law:

(i) "Whether in the facts and Circumstances of the case, the ITAT was justified in holding that the assessee was eligible for exemption u/s 10BA of the IT Act despite of the fact that the assessee was not fulfilling the required conditions which was proved during the course of survey proceedings and was evident from the purchases made

through form No. 17B of sales tax.

(ii) Whether in the facts and circumstances of law, the ITAT was justified in confirming the deletion of additions for depositing ESI & PF beyond the time prescribed without appreciating the provisions of section 36(1) (va) of the Act."

2.2. This Court while admitting Appeal No.4/2012 on 25.04.2012 has framed the following substantial question of law:

i) "Whether in the facts and Circumstances of the case, the ITAT was justified in holding that the assessee was eligible for exemption u/s 10BA of the IT Act despite of the fact that the assessee was not fulfilling the required conditions which was proved during the course of survey proceedings and was evident from the purchases made through form No. 17B of sales tax.

(ii) Whether in the facts and circumstances of law, the ITAT was justified in confirming the deletion of additions for depositing ESI & PF beyond the time prescribed without appreciating the provisions of section 36(1) (va) of the Act."

2.3. This Court while admitting Appeal No.17/2012 on 15.05.2012 has framed the following substantial question of law:

(i) "Whether in the facts and Circumstances of the case, the ITAT was justified in holding that the assessee was eligible for exemption u/s 10BA of the IT Act despite of the fact that the assessee was not fulfilling the required conditions which was proved during the course of survey proceedings and was evident from the purchases made through form No. 17B of sales tax.

(ii) Whether in the facts and in circumstances of law, the ITAT was justified in confirming the findings of CIT (A) that the assessee was eligible for exemption u/s 10BA of the IT Act, inspite of the fact that the goods exported were not manufactured by the assessee which is the primary

condition for exemption u/s. 10BA.”

3. Mr. Mathur, while arguing for the department has taken us to the order of the Assessing Officer and the CIT (A) and contended that the tribunal has seriously committed an error in dismissing the appeals preferred by the department up-holding the order of CIT (A) which has partly allowed the appeal of the assessee and modified the order of the assessing officer. He has also taken us to the provisions of Section 10BA which reads as under:

10BA. Special provisions in respect of export of certain articles or things.- (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export out of India of eligible articles or things, shall be allowed from the total income of the assessee :

Provided that where in computing the total income of the undertaking for any assessment year, deduction under section 10A or section 10B has been claimed, the undertaking shall not be entitled to the deduction under this section :

Provided further that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2010 and subsequent years.

(2) This section applies to any undertaking which fulfils the following conditions, namely :—

(a) it manufactures or produces the eligible articles or things without the use of imported raw materials;

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

Provided that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment,

reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

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

Explanation.—The provisions of Explanation 1 and Explanation 2 to sub-section (2) of section 80-I shall apply for the purposes of this clause as they apply for the purposes of clause (ii) of sub-section (2) of that section;

(d) ninety per cent or more of its sales during the previous year relevant to the assessment year are by way of exports of the eligible articles or things;

(e) it employs twenty or more workers during the previous year in the process of manufacture or production.

(3) This section applies to the undertaking, if the sale proceeds of the eligible articles or things exported out of India are received in or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation.—For the purposes of this sub-section, the expression “competent authority” means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

(4) For the purposes of sub-section (1), the profits derived from export out of India of the eligible articles or things shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things bears to the total turnover of the business carried on by the undertaking.

(5) The deduction under sub-section (1) shall not be admissible, unless the assessee furnishes in the prescribed form, along with

the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

(6) Notwithstanding anything contained in any other provision of this Act, where a deduction is allowed under this section in computing the total income of the assessee, no deduction shall be allowed under any other section in respect of its export profits.

(7) The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA.

Explanation.—For the purposes of this section,—

(a) “convertible foreign exchange” means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 (42 of 1999), and any rules made thereunder or any other corresponding law for the time being in force;

(b) “eligible articles or things” means all hand-made articles or things, which are of artistic value and which requires the use of wood as the main raw material;

(c) “export turnover” means the consideration in respect of export by the undertaking of eligible articles or things received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things outside India;

(d) “export out of India” shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance of any customs station as defined in the Customs Act, 1962 (52 of 1962).”

4. He has contended that the word which has been used in the section 'manufacturing or process' is to be construed very strictly and since it is an exemption, it should be equated with the provisions of Section 80I which has been interpreted by the Supreme Court in the case of **Commissioner of Income-Tax Vs. Gem India Manufacturing Co.- (2001) 249 ITR 307**, wherein it has been held as under:

4. The Tribunal took the view that it did because in "common parlance and commercial sense raw diamonds are not the same thing as polished and cut diamonds. The two are different entities in the commercial world. Though the chemical composition remains the same the physical characteristics of shape and class, etc., are substantially different". It would appear that no material had been placed on the record before the Tribunal upon which it could have reached the conclusions that, either in common or in commercial parlance, raw diamonds were not the same thing as polished and cut diamonds, and that they were different entities in the commercial world. An ipse dixit of the Tribunal is not the best foundation for a decision.

"5. The High Court, as aforesaid, concluded that the case was covered by its decision in the case of CIT v. London Star Diamond Co. (I.) Ltd.: [1995]213ITR517(Bom) . It was not pointed out to the High Court that the question in that case was whether the assessee was an industrial company within the meaning of Section [2\(8\)](#) of the Finance Act, 1975, and that, in answering that question, the High Court had held that raw diamonds and cut and polished diamonds were different and distinct marketable commodities having different uses ;

therefore, a company engaged in cutting and polishing raw diamonds for the purpose of export was engaged in the "processing of goods" to convert them into marketable form. The question that the High Court and we are here concerned with is whether, in cutting and polishing diamonds, the assessee manufactures or produces articles or things.

6. There can be little difficulty in holding that the raw and uncut diamond is subjected to a process of cutting and polishing which yields the polished diamond, but that is not to say that the polished diamond is a new article or thing which is the result of manufacture or production. There is no material on the record upon which such a conclusion can be reached.

7. The appeal is, therefore, allowed. The order under challenge is set aside. The question quoted above is answered in the negative and in favour of the Revenue. The assessee shall pay to the Revenue the costs of the appeal."

5. He has contended that the view taken by the Tribunal is required to be reversed in view of the observations made by the Supreme Court.

6. Mr. Jhanwar, counsel for the respondent has taken us to the judgment of the Tribunal and contended that while considering the process which has been undertaken by the assessee, the Tribunal has observed as under:

"The various activities carried out by the appellant, are as under:-

(i) Firstly, the appellant purchases wood,

semi finished material which requires further wood and other work of beautification and of artistic value. There apart, the other raw material, the wooden out of which is the main, and others i.e. grass, nails etc. are purchased.

(ii) Thereafter various other items are added depending upon the designs, size, quality of the subjected item to be exported,

(iii) After purchasing the semi finished goods and raw material, as stated above, the very first step is to assemble the same, if so required. Some time the semi finished furniture is required to be given further shape as per the desired exportable designs.

(iv) Thereafter, punching is done by hammering nails by hand. It is pure labour work which can be done by experts only. It may be noted that the nails are of special type having artistic and antique look.

(v) Fitting of brass and iron items again with a view to give artistic and antique look.

(vi) Filling and filing with a view to smoothen the surface.

(vii) Sanding

(viii) Carving with a view to bring the artistic value and to show that these are antique items.

(ix) And lastly polishing

(x) Thereafter, various wooden items are fitted according to the need and design of the exportable wooden article, i.e. wooden moulding is fitted Inlay is done."

7. He contended that taking into consideration the observations made by the Supreme Court in the case of **Income Tax Officer, Udaipur Vs. Arihant Tiles and Marbles (P) Ltd.- (2010) 320 ITR 79 (SC)**, the Supreme Court has observed as under:

"16. In the case of Aman Marble Industries Pvt. Ltd. v. Collector of Central Excise reported in [MANU/SC/0858/2003](http://manu.sc/0858/2003) :

157 ELT 393(SC), the question that arose for consideration was whether cutting of marble blocks into marble slabs amounted to manufacture for the purposes of Central Excise Act. At the outset, we may point out that in the present case, we are not only concerned with the word "manufacture", but we are also concerned with the connotation of the word "production" in Section 80IA of the Income Tax Act, 1961, which, as stated herein-above, has a wider meaning as compared to the word "manufacture". Further, when one refers to the word "production", it means manufacture plus something in addition thereto. The word "production" was not under consideration before this Court in the case of Aman Marble Industries Pvt. Ltd. (supra). Be that as it may, in that case, it was held that "cutting" of marble blocks into slabs per se did not amount to "manufacture". This conclusion was based on the observations made by this Court in the case of Rajasthan State Electricity Board (supra). In our view, the judgment of this Court in Aman Marble Industries Pvt. Ltd. (supra) also has no application to the facts of the present case. One of the most important reasons for saying so is that in all such cases, particularly under the Excise law, the Court has to go by the facts of each case. In each case one has to examine the nature of the activity undertaken by an assessee. Mere extraction of stones may not constitute manufacture. Similarly, after extraction, if marble blocks are cut into slabs per se will not amount to the activity of manufacture.

17. In the present case, we have extracted in detail the process undertaken by each of the respondents before us. In the present case, we are not concerned only with cutting of marble blocks into slabs. In the present case we are also concerned with the activity of polishing and ultimate conversion of blocks into polished slabs and tiles. What we find from the process indicated herein-above is that there are various stages through which the blocks have to go through before they become polished slabs and tiles. In the circumstances, we are of the view that on

the facts of the cases in hand, there is certainly an activity which will come in the category of "manufacture" or "production" under Section [80IA](#) of the Income Tax Act. As stated herein- above, the judgment of this Court in Aman Marble Industries Pvt. Ltd. was not required to construe the word "production" in addition to the word "manufacture". One has to examine the scheme of the Act also while deciding the question as to whether the activity constitutes manufacture or production. Therefore, looking to the nature of the activity stepwise, we are of the view that the subject activity certainly constitutes "manufacture or production" in terms of Section [80IA](#). In this connection, our view is also fortified by the following judgments of this Court which have been fairly pointed out to us by learned Counsel appearing for the Department.

18. In the case of Commissioner of Income Tax v. Sesa Goa Ltd. reported in [MANU/SC/1123/2004](#) : 271 ITR 331 (SC), the meaning of the word "production" came up for consideration. The question which came before this Court was whether the ITAT was justified in holding that the assessee was entitled to deduction under Section [32A](#) of the Income Tax Act, 1961, in respect of machinery used in mining activity ignoring the fact that the assessee was engaged in extraction and processing of iron ore, not amounting to manufacture or production of any article or thing. The High Court in that case, while dismissing the appeal preferred by the Revenue, held that extraction and processing of iron ore did not amount to "manufacture". However, it came to the conclusion that extraction of iron ore and the various processes would involve "production" within the meaning of Section [32A\(2\)\(b\)\(iii\)](#) of the Income Tax Act, 1961 and consequently, the assessee was entitled to the benefit of investment allowance under Section [32A](#) of the Income Tax Act. In that matter, it was argued on behalf of the Revenue that extraction and processing of iron ore did not produce any new product whereas it was argued on behalf of the assessee that it did produce a distinct new product. The view expressed

by the High Court that the activity in question constituted "production" has been affirmed by this Court in Sesa Goa's case saying that the High Court's opinion was unimpeachable. It was held by this Court that the word "production" is wider in ambit and it has a wider connotation than the word "manufacture". It was held that while every manufacture can constitute production, every production did not amount to manufacture."

8. He has contended that the word 'production' is to be construed as a wider meaning than 'manufacture' and in view of the observations made by the Supreme Court, the view taken by the Tribunal is just and proper.

9. Mr. Mathur has also contended that regarding second issue with regard to ESI and PF, however, the same is covered by the decision of this Court in the case of **Commissioner of Income Tax Vs. M/s State Bank of Bikaner & Jaipur- D.B. Income Tax Appeal No.177/2011 decided on 06.01.2014** wherein it has been held as under:

"Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act."

10. However, SLP is pending against the aforesaid decision, therefore, both the parties will be bound by the decision of the SLP.

11. We have heard learned counsel for the parties.

12. In view of the observations made by the Supreme court

in the case of **Income Tax Officer, Udaipur Vs. Arihant Tiles and Marbles (P) Ltd.** (supra), we are of the opinion that the process which has been prescribed by the Tribunal in para 10 clearly covers the process and will cover under section 10BA. Therefore, in our view, the view taken by the Tribunal is just and proper and no interference in the judgment of the Tribunal is called for. The issue is answered in favour of the assessee and against the department.

13. The second issue is subject to decision of the SLP. However, for the time being the same is answered in favour of the assessee and against the department.

14. All the appeals stand dismissed.

A copy of this judgment be placed in each of the file.

(VINIT KUMAR MATHUR)J.

(K.S. JHAVERI)J.

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