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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1393 OF 2000

The Commissioner of Income-tax,)
Bombay City-IV, Bombay,)..APPELLANT

Versus

M/s.Emptee Poly-Yarn Pvt. Ltd.)
122, Zaveri Bazar, "Trishla")
2nd Floor, Bombay-400 002.)..RESPONDENT

Mr. B.M. Chatterji with Mrs. P.P. Bhosale and Mr. P.S. Sahadevan for the appellant.
Mr. V. Sridharan with Mr. Prakash Shah i/b. PDS Legal for the respondent.

CORAM: F.I. REBELLO &
R.S.MOHITE,JJ.
DATED: 27TH FEBRUARY,2008

JUDGMENT (PER F.I. REBELLO, J.):

. Various questions have been framed as questions of law. It is, however, essential to reframe the questions as Questions A, B, D. E, and F as framed are referable to only one question. The questions as reframed and on which the Appeal is admitted and finally heard are as under:-

"A. Whether on the facts and circumstances of the case, twisting and texturising of POY, amounts to manufacturing or production of an article or thing distinct from the commodity involved in the manufacture and, therefore, entitled for deduction under Section 80IA of the Income Tax Act?

B. Whether the Tribunal is correct in holding that the view taken by the A.O. in earlier years cannot be changed in subsequent years and thereby importing the maxim of res judicata in income-tax proceedings.?"

2. A few facts may be noted. The relevant assessment year is assessment year 1996-97. The Assessing Officer passed an order of assessment disallowing claim under Section 80HH and 80I and 80IA on the ground that the activity of processing is not an industrial activity. An Appeal was preferred by the assessee before the Commissioner of Income Tax (Appeal), who by order dated 16th February, 2000 was pleased to dismiss the Appeal. The assessee aggrieved preferred an Appeal before the ITAT which was numbered as ITA No.1324/MUU/2000. By order dated 11th July, 2000 the learned Tribunal held that texturing and twisting of yarn amounts to manufacture and consequently allowed the Appeal. The questions now framed arise from this order.

3. What we are called upon to answer firstly, is whether twisting and texturising of POY amounts to manufacture or production of a distinct article. We may at once note that a learned Bench of this Court in **Commissioner of Income Tax vs.Bipinali Textiles Pvt. Ltd., 189 ITR 61** placing reliance on

the Circular dated November 22, 1985 of the Central Board of Direct Taxes noted that the said circular has clarified that the activities of twisting and crimping of yarn are also to be treated as manufacturing activities. These instructions, it was held, are binding on the Department. In the light of that the Application for reference was dismissed.

4. At the hearing of this Appeal on behalf of the appellants their learned Counsel submits as under:-

(a). there is a distinction between the words "process" and "manufacture" or "production". By a process the item processed undergoes some change, but every change does not amount to manufacture or production. If by a process the commodity continues to retain a substantial identity then it cannot be said that manufacture has taken place.

(b). Under the Central Excise Act, even process may amount to manufacture in certain circumstances because of the definition given to manufacture in Sec.2(f) of the Central Excise Act. The word "manufacture" includes any process, incidental or ancillary to completion of a manufactured product. But process can be included in manufacture or production of an article or thing under the Income

Tax Act, only if the word 'process' has been specifically mentioned in a particular section. Reliance has been placed on the following judgments which will be adverted to the extent necessary in the course of the judgment. **India Hotels Co. Ltd. & Ors. vs. C.I.T., 245 ITR 538; D.D. Shah & Brothers vs. Union of India & Anr., (2006) 283 ITR 486 (Raj) and CIT vs. M/s.Tara Agencies 292 ITR 444 (S.C.).**

5. It is then stated that Partially Oriented Yard (POY) is manufactured from any polymer which can be melt-spun, e.g. polyester, nylon, polypropylene, etc. These Polymers which are available in the form of chips are melted in the spinning head by hot grid and the ploymer melt is then passed through spinnerettes to get filaments. The filaments are solidified with the help of chilled air and are wound at a speed of about 2500 to 400 mts./min on a suitable package. POY is already having all the characteristics of Yarn. POY is filament yarn of manufactured fibres that has not been drawn all the way immediately after fibre formation. The drawing (draw stretching) is completed as part of the draw texturising process. This is a less costly way of processing these yarns than full drawing followed by texturing. The term textured yarn is explained as term used broadly to describe filament yarn that has been treated to

change its hand, increase bulk and/or increase stretch Synonym; Crimped yarn. It is also a generic term for filament or spun yarns that have been given notably greater apparent volume than conventional yarns of similar fibre or filament count and linear density(ASTM). ASTM categorizes textured yarn as one type of bulk yarn, the others being bulky yarn and crimped yarn. ASTM further subdivides textured yarns into High-Bulk Yarn, Loopy Yarn and Stretch Yarn. The specific processes used to texture yarns include Air Jet Texturing, False Twisting, Gear Crimping, Knit Deknit and the Stuffer Box Method.

. It is submitted that it is quite evident that POY is a form of manufactured yarn and even after twisting and texturising, it continues to be yarn and even its name does not change and it continue to be called yarn. The assessee gets POY from other manufacturing units for the purpose of twisting and texturising. It is not producing or manufacturing POY on its own. Sections 80HH, 80I and 80IA refer to manufacture or production of new article or thing. They contemplate that the articles which are produced or manufactured are something new and different from raw material which are used for the production of these material. The process of texturising and twisting only makes the fibre stronger and better suitable for knitting of different type of fabrics. They do not, however, involve the conversion of yarn into something else. They only introduce durable crimps, coils, loops or other fine distortions along the length of the filaments and it also results into further molecular orientation of POY. But after all these processes, components of the yarn remain the same and nothing different emerges. In such a case, it can not be said that any manufacturing activity has been carried out.

6. On the other hand on behalf of the respondent their learned Counsel submits that firstly in so far as twisting is concerned, this Court already has taken a view in **Bipinali Textiles Pvt. Ltd.** (supra). Reliance is placed on the material considered and set out in the order of the Tribunal as also the report submitted by Prof. (Dr.) M.D. Teli, Head of Division, Division of Technology of Fibres and Textile Processing, U.D.C.T., Matunga, Mumbai-19 dated 10th July, 1999 (which the Tribunal also considered) which would show that POY when it undergoes the process of twisting and texturising results into different products which in the commercial trade are treated differently. Reliance is also placed on various judgments to contend as to what amounts to manufacture. If these tests are considered considering the material on record it would be clear

that both the processes of twisting and texturising amount to manufacture.

7. We may first consider from the various judgments of the Supreme Court as to the meaning of expression "manufacture". In **Aspinwall & Co. Ltd. vs. Commissioner of Income Tax, Ernakulam, (2001) 7 S.C.C. 525** the Supreme Court noted that the word "manufacture" has not been defined in the Act. Therefore, it has to be given a meaning as understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to a manufacturing activity. The contention urged by the Revenue that the assessee was doing a manufacturing process in that case was rejected by holding that "the process is a manufacturing process when it bring 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."

. "Manufacturing" activity was also explained in **Deputy Commissioner of Sales Tax (Law) Board of Revenue(Taxes) Ernakulam vs. M/s. Pio Food Packers, 1980 Supp. S.C.C. 174.** The Court noted as under:-

> "The generally prevalent test is whether the article 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 more processes through which the original commodity is made to pass......... But it is only when the change, or a series of changes take the commodity to the point where commercially it can be no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place."

. In **Commissioner of Income Tax, Orissa & Ors. vs. M/s. N.C. Budharaja & Company & Anr., 1994 Supp. (1) S.C.C. 280** the Supreme Court noted "the words "manufacture" and "production" have received extensive judicial attention both **under** this Act as well as Central Excise Act and the various Sales Tax

Laws. The word "production" has a wider connotation than the word "manufacture". While every manufacture can be characterised as production, every production need not amount to manufacture." Reference was made to that judgment in Deputy CST vs. Pio Food Packers (supra).

8. On behalf of the Revenue it was sought to be contended that there is a distinction in the words "process" on the one hand and "manufacture" or production on the other. Reliance was placed in the judgment of **Collector of Central Excise, Jaipur vs. Banswara Syntex Ltd. 1996 (88 E.L.T. 645 (S.C.).** The issue before the Supreme Court was whether doubling or multifolding of the single yarn brings into existence a new product. On the facts there the Court held that in the manufacture of single ply yarn an excisable item comes into existence and it becomes liable to pay excise duty at that stage itself and that the respondents could not be allowed to contend that levy of excise duty is postponed to a point of time when the yarn is removed after doubling or multifolding. The Court also held that mere doubling or multifolding of the single yarn does not bring into existence a new product.

7. In **Commissioner of Central Excise, Mumbai-V vs. Swastik Rayon Processors 2007 (2-9) E.L.T. 163 (S.C.)** the point involved was whether process of

twisting and doubling of cellulosic filament yarn Tariff Item 1811 (u) with a spun yarn (Tariff item 1814 (n) comprising polyester and Viscose amounts to manufacture within the meaning of Section 2(f) of the Central Excise Act. The Court noted that in Banswara Syntex Ltd. (supra) the Court had held that the doubling or multi folding of yarn does not result in the emergence of a new commodity. The Court proceeded to observe that the process of twisting and doubling of cellulosic filament yarn does not result in a new commodity.

. Counsel for the Appellant had, however, strenuously argued that considering the judgment in **Commissioner of Income-tax vs. Tara Agencies, (2007) 292ITR 444,** the issue of manufacture or production has been reconsidered and in that context the earlier view taken will have to give way to the view as explained in Tara Agencies (supra). The issue before the Supreme Court was whether blending of tea results in bringing into existence a new commodity and, therefore, amounts to manufacture or production. The Court noted that the word "manufacture" has not been defined under the Income Tax Act, but had been defined in Section 2(f) of the Central Excise Act, 1944. The Court also referred to the dictionary meanings of the word "manufacture" in Black's Law Dictionary and Halsbury's Laws of England as also the dictionary meaning of the words

"Production" and "Process". On behalf of the Revenue it was argued that the activity of the respondent namely blending of tea, packaging and selling the same does not amount to manufacture or production of commercially new and different product and the activity at the highest may amount to a processing of tea which is an intermediate stage in the final product. The benefit under Section 35B(1A) was only applicable if there was manufacture or production, but not mere processing and consequently the activities of blending of tea, packaging and selling the same does not amount to manufacture or production. It is in that context that the Court considered the various judgments. The Court held that the Section incorporated the terms "manufacture" and "production" but omitted the term "processing" and consequently the assessee there could not get the benefit of Section 35(1A)(b) of the Income Tax Act. After so holding the Court went on to observe as under:-

> "The processing is only an intermediate stage of production and/or manufacture. The processing of tea of the respondent assessee falls short of either manufacturing or production, therefore, because of the language of Section 35B(1A) of the Income-tax Act, the respondent assessee cannot be extended the benefit which has

been extended to the assesses in Nilgiri's case."

It is thus clear that the Court has not in any way departed from the meaning of the word "manufacture" or production as earlier explained in its judgment. All that the Court held was as the word "processing" was not included in the Section, and that processing of tea falls short of manufacturing or production.

. Reference was also made to the judgment in **Commissioner of Income Tax vs. Gem India Manufacturing Co. 249 ITR 307.** The issue there was cutting and polishing of raw diamonds and whether the same amounts to manufacturing or production of goods. The Supreme Court held that the polished diamond is not a new article or thing. There was also no material on record upon which such a conclusion could be reached.

7. On behalf of the Revenue learned Counsel has also relied on other judgments including **Commissioner of Income Tax vs. Jaypee Dyeing House, 239 ITR 418** where this Court took a view that silk cloth, printed, bleached or dyed cannot be said to have been manufactured. In **D.C. Shah vs. Union of India & Anr., 283 ITR 486** the issue was whether blending of ore amounts to manufacture. Considering the various judgments the Rajasthan High Court held

that applying the test as to whether the processing of the original commodity brings into existence a commercially different and distinct commodity held . That test has not been satisfied. In **Commissioner of Income Tax vs. Premier General Traders (P) Ltd., 242 ITR 654** this Court on the facts there held that the process undertaken by the Assessee cannot be regarded as processing of manufacture of articles or things. In **India Hotels Co. Ltd. & Ors. vs. C.I.T. 245 ITR 538 (S.C.)** the assessee sought the benefit of investment allowance under Section 32A of the I.T. Act contending that the assessee was an industrial company engaged in manufacturing activity as it was running a flight kitchen engaged in the production of food packages. The Court held that the activity does not amount to manufacture or production as the raw material is at the most processed so as to make it edible.

8. Whether processing of twisting or texturising of yarn amounts to manufacture may now be considered from the material placed on record. We have the expert opinion of Dr. Teli, Head of Division, Division of Technology and Fabrics and Textile Processing, UDCT., who has given the various physical properties of POY on the one hand and textile twisted yarn on the other hand This was considered by ITAT . Reference has been made to various publications. Regarding the properties of

twisted yarns and texturised yarns it was observed as under:-

> "Twisted yarn may have a usual or elevated extensibility and bulkiness. Textured yarns differ from initial yarns by high bulkiness, crimpiness, porosity, stiffness and some of them by high elastic extensibility. Goods of textured yarns feature good draping capacity and coverage, air permeability, moisture absorption and evaporation."
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> End uses of Twisted yarns:-
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> (i) Utilised in weaving and knitting.
>
> (ii) For industrial purposes (Cord, insulation, sieves, nets, etc.)
>
> (iii) For consumer goods (buttonholing, fringe, embroidering, etc.)
>
> (iv) Manufacture of lacs and cards (Parachutes, decorative, etc.)
>
> (v) Cordage (cable, ropes, etc.)
>
> (vi) Threads (sewing, footwear and saddlers).
>
> End uses of Textured yarns:
>
> Textured yarns are largely used in the knitting industry for manufacturing hosiery, sportswear, outerwear and others. They are

successfully used for manufacturing underwear, dressings, suitings and coatings, blankets, carpets, draperies, etc.

. Dealing with POY it was observed as under:-

"POY does not have any purposeful use except as input material for texturising. The Application of POY includes manufacture of texturised yarn and twisted yarn.This is done either by draw texturising process or entangling the filament using the air jet."

Physical properties of POY have also been set out. It was opined that Textural/Twisted Yarn are totally different and new products as compared to POY, which is just input material or feedstock material.

. ITAT Ahmedabad Bench "A" in **Nishit Synthetics (P) Ltd. vs. Income-tax Officer, 1984 Volume 7 Income Tax Tribunal Decisions 436** has quoted in extensio the expert opinion on the twisting of yarn. We may only produce the following aspect quoted: In his Mather lecture, title "Twisted Structures", Treloar observed as under:-

"Twist is essential to provide a certain minimum coherence between fibres, without a yarn having a significant tensile strength cannot be made. This coherence is dependent on the frictional forces brought into play by the lateral pressures between fibres arising from the application of tensile stress along the yarn axis. With the introduction of continuous filament yarns, however, the role twist must be reconsidered. In continuous filament yarns, twist is not necessary for the achievement of statutory resistance to abrasion, fatigue, or other types of damage associated with stresses other than a simple tensile stress, and typified by the breakage of individual filaments, leading ultimately to total breakdown of the structure. High twist produces a 'hard' yarn, which is highly resistant to damage of this kind. The role of twist in continuous filament yarn is, thus, to produce a coherent structure that cannot readily be disintegrated by lateral stresses.

From the engineering standpoint, the interesting thing about this structural function of twist is that, in contract to most structure-building techniques, it produces its effect without significantly increasing the flexural rigidity or residence to bending of the system."

9. The Central Board of Direct Taxes by communication dated 22nd November, 1985 addressed to Shri C.D. Patel, M.P., after seeking the opinion of the Ministry of Law and the Additional Solicitor General opined as under:-

> "the process of dyeing mercerising, dyeing, printing, water-proofing, etc., conducted in cotton fabrics, woollen fabrics and manmade fabric would amount to manufacturing".

It is also set out that the Commissioner of Income-tax, Surat has been informed of this opinion by a separate communication of 23rd January, 1986. The office of the Inspecting Assistant Commissioner of Income-tax clarified that twisting and crimping of yarn is a manufacturing activities are also to be treated as manufacturing activities.

. In Harmonised Commodity, Description and Coding System Explanatory Notes, Second Edition (1996) Volume 2 Sections VI - XI Chapters 30- 63 of World Customs Organization Textured Yarns are explained as under:-

> "Textured yarns are characterised by having either a high bulk or a very high extensibility. The high elasticity of both

types makes them especially suitable for use in the manufacture of stretch garments (e.g. tights, hose, underwear) while the high bulk yarns give fabrics softness and warmth of touch."

The notification by the Government of India, Ministry of Finance dated 3rd April, 1996 for the purpose of Central Excise fixed excise on POY at Rs.90/- per Kg. and Polyester Filament Yarn, drawn twisted or textured or both at Rs.98 per Kg. By Notification of 10th February, 1986 textile yarn was exempted from the duty of excise leviable under Section 3 of the C.E.S.T.

. A Division Bench of this Court in **Reliance Textile Industries Ltd. vs. Union of India, 1993 (63) E.L.T. 67 (Bom.)** noted considering the exemption notification that Government has clearly made a distinction between textured yarn and non-textured yarn. The base yarn undergoes certain processes of texturising to bring into existence the textured yarn which is a distinct and different commodity than the base yarn.

. In Fairchild’s Dictionary of Textiles, 7th Edition, POY is explained as under:-

"Filament yarn of manufactured fibres that has not been drawn all the way immediately after fibre formation. The drawing (drawstretching) is completed as part of the draw texturing process. This is a less costly way of processing these yarns than full drawing followed by texturing."

"Textured Yarn" is explained amongst other as under:-

"A term used broadly to describe filament yarn that has been treated to change its hand, increase bulk, and/or increase stretch."

In the Textile Institute, Textile Terms & Definitions, Ninth Edition, regarding "textured yarn" explained as under:-

"A continuous-filament yarn that has been processed to introduce durable crimps, coils, loops or other fine distortions along the lengths of the filaments."

It is not necessary to refer to other material already on record.

10. From the material considered it would be clear that POY has different physical and chemical

properties and when POY chips undergoes the process of texturising and/or twisting, the yarn i.e. twisted and/or texturised or both results in a product having different physical and chemical properties. In other words the process applied to POY either for the purpose of texturising or twisting constituted manufacture as the article produced is recognised in the trade as distinct commodity pursuant to the process it undergoes and which amounts to manufacture. Under the Central Excise Act, the Union of India itself treat the POY as distinct from POY, drawn twisted or textured or both. From all the material we have no hesitation in arriving at a conclusion that the process which POY undergoes in the process of texturising and twisting results into a new and distinct product and regarded in the Trade as distinct from the commodity involved in the manufacture. The process amounts to manufacture as the original commodity looses its identity. In view of our findings the view taken by the Tribunal will have to be upheld.

11. In so far as the second question is concerned, we have considered the impugned order of the Tribunal. We really do not find the issue of res judicata was considered. Considering our answer to question "A" we find no reason to answer Question "B" as the issue is merely academic and is not required to be gone into in this Appeal.

Considering the above Appeal dismissed.

(R.S.MOHITE, J.) **(F.I.REBELLO, J.)**