**IN THE HIGH COURT AT CALCUTTA**
**Special Jurisdiction**
**Original Side**

**Present:-** **Hon'ble Mr. Justice I. P. Mukerji**
**Hon'ble Mr. Justice Protik Prakash Banerjee**

**ITA 144 of 2018**

**Principal Commissioner of Income Tax, Central – I, Kolkata**
**Vs.**
**M/S. Sona Vets Private Ltd.**

| | | |
|---|---|---|
| **For the Appellant** | **:** | **Mr. Smarajit Roy Choudhury,**<br>**Mr. Manabendra Nath Bandopadhyay, Advs.** |
| **For the Respondent** | **:** | **Mr. J. P. khaitan, Sr. Adv.**<br>**Mr. Sanjay Bhowmick,**<br>**Ms. Swapna Das,**<br>**Mr. Siddhartha Das, Advs.** |
| **Judgment on** | **:** | **27.02.2020** |

**Protik Prakash Banerjee, J.**

**1.** ITA No.144 of 2018 is an appeal under Section 260A of the Income Tax Act, 1961 referred to hereinafter as "the said Act", at the instance of the Revenue which is the appellant. It is levelled against the order dated November 30, 2016 passed by the Learned Income Tax Appellate Tribunal, "A" Bench, Kolkata in IT(SS)A No. 19-22/Kol/2016 relating to Assessment Years 2009-2010, 2010-2011, 2012-2013 and 2013-2014.

**2.** By the said order the learned Tribunal was pleased to uphold the decision of the Commissioner of Income Tax (Appeals) and dismiss the appeals of the Revenue. In effect, the learned Tribunal held that the activity of making poultry feed, as carried on by the Assessee, was not a mere process of mixing, but that of manufacture. It was held that the Assessee was itself carrying on the complete activity, id est, from mixing, grinding till pollicisation of all the ingredients and that the raw materials once consumed thus, could not be reconverted into the same position, and that its utility got changed.In such view of the matter, the Learned Tribunal held that the action of the Assessing Officer of disallowing the

deduction claimed by the Assessee under Section 80-IB (5) was not justified.

**3.** This court, while admitting the appeal, had framed the following substantial question of law: -

> "Whether the conclusion arrived at by the Tribunal that production of poultry feeds constitutes manufacture is perverse or not?"

**4.** To appreciate why deduction was sought by the Assessee, we need to look at the relevant clauses of Sections 80-IB and 80-IE of the said Act. Section 80-IB provides, inter alia, as follows: -

> *"(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections 2[(3) to 3[(11), (11A) and (11B)]] (such business being hereinafter referred to as the eligible business), 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 such percentage and for such number of assessment years as specified in this section.*
>
> *(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:*
>
> *****************************************************************
>
> *(5) The amount of deduction in the case of an industrial undertaking located in such industrially backward districts as the Central Government may, having regard to the prescribed guidelines10, by notification in the Official Gazette, specify in this behalf as industrially backward district of category 'A' or an industrially backward district of category 'B' shall be, –*

*(i) hundred per cent of the profits and gains derived from an industrial undertaking located in a backward district of category 'A' for five assessment years beginning with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains of an industrial undertaking:*

*Provided that the total period of deduction shall not exceed ten consecutive assessment years or where the assessee is a co-operative society, twelve consecutive assessment years:*

*Provided further that the industrial undertaking begins to manufacture or produce articles or things or to operate its cold storage plant or plants at any time during the period beginning on the 1st day of October, 1994 and ending on the 11[31st day of March, 2004];*

*(ii) hundred per cent of the profits and gains derived from an industrial undertaking located in a backward district of category 'B' for three assessment years beginning with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains of an industrial undertaking:*

*Provided that the total period of deduction does not exceed eight consecutive assessment years (or where the assessee is a co-operative society, twelve consecutive assessment years):*

*Provided further that the industrial undertaking begins to manufacture or produce articles or things or to operate its cold storage plant or plants at any time during the period beginning on the 1st day of October, 1994 and ending on the 11[31st day of March, 2004]."*

**5.** The word "manufacture" has been defined with effect from April 1, 2009, by Section 2(29-BA) as follows: -

***"2(29BA) "manufacture" with its grammatical variations, means a change in a non-living physical object or article or thing,-***

***(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or***

***(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."***

**6.** The Assessee gave, established and proved the following particulars about the manner in which it produced poultry feed, from the raw materials/ingredients such as maize, soya, raw rice bran, deoiled cakes, meat and bone meal, fish meal, shell grit, rice polish and edible oil and

micro-ingredients such as Di Calcium phosphate, limestone powder and salt, which were mixed with vitamins, chemicals, minerals such as iron, copper, iodine, manganese, zinc and cobalt, amino acids, anti-oxidants, antibiotic drugs, cocktail enzyme, phytase enzyme and growth promoter, among other things, and cooked and cooled to produce the poultry feed: -

(i) Receiving the individual Raw Materials and other inputs after proper quality check.

(ii) Storage of the input materials in different silos-bins.

(iii) Weighing of input materials according to formula by the computer.

(iv) Feeding of the input materials into the Batch Weigher.

(v) Grinding of the input materials by Hammer Mills.

(vi) Controlling the size of the ground material by adjusting the size of the grinding sieve.

(vii) Transporting the ground materials to the Batch Mixer.

(viii) Adding micro-ingredients and minerals to the ground materials before mixing. This is also done by the computer as per a formula.

(ix) Adding oils and other fats like tallow, to the ground materials.

(x) Mixing the materials.

(xi) Conditioning the material at a temperature of 85 degrees centigrade with the help of dry steam coming from the boiler.

(xii) Pelleting the conditioned material by pressing it through a die.

(xiii) Cooling the hot pellets released from the pellet mill, in a cooling tower.

(xiv) Crumbling the pellets according to size.

(xv) Sieving the pellets to remove over-sized pellets and dust.

(xvi) Weighing the finished product -poultry feed in an automatic weigher.

(xvii) Packing the poultry feed in gunny or PP bags.

(xviii) Dispatching the poultry feed.

**7.** As is apparent from the above, the method of producing the poultry feed requires grinding, mixing, roasting and blending, in proper proportions and ratio by usage of labour, machinery and pulverizer that is to say, through mills and/or small factories where these inputs are roasted, ground, mixed and blended. However, it is also not disputed that the chemical composition of none of the inputs is altered or any new compound generated by this – even though the finished product, being poultry feed, has a utility separate and distinct from the rice bran, or oil or bone meal or any of the inputs before they were combined to make the new product, poultry feed. By way of an example, it is impractical to expect chickens to feast on Di calcium phosphate or even raw maize gluten whereas they naturally eat the pellet sized poultry feed produced by the Assessee.

**8.** In the above factual conspectus, the appellant Revenue tried to impress upon us that this could never be anything more than a process of "mixing" and never "manufacture", since the mechanism of manufacture required that a new product – id est, a product with a different chemical composition than the individual inputs used to make it – be produced as

the end result. In other words, it submitted that the term manufacture occurring in Sections 80-IB(2) and (5) as also 80-IE, necessarily requires that the end product of the manufacturing process is to be completely different from ingredients, as regards its chemical composition, integrant structure or its use. However, it is argued that in the instant case, it may be seen that the composition of the end product is merely that of a mixture of the individual components which went into the process, and that such components are not intrinsically changed, enhanced or modified in the process of production. All the ingredients used in the Poultry feed are basically items which are even otherwise independently used for poultry feed. In the instant case, the whole process amounts to just mixing together of all the different ingredients. The use of end product is also no different from the use of maize, soya, vitamins or minerals etc. which are by themselves in wide use as food for poultry and animal husbandry. Thus the basic reasoning on which a process can be stated to be 'manufacture', as distinct from mere 'processing", does not hold true in this case.

**9.** In support of the above contentions, the Revenue has cited the order of the Income Tax Appellate Tribunal, Hyderabad Bench in the case of **Venkateswara Feeds & Feeds—v—ACIT**, in ITA No.493 (Hyd)/2005 among other income tax appeals, and more particularly, paragraph 17.5 of the said order, to demonstrate what was held to be "manufacture" in a similar matter, which reads as follows: -

> *"17.5. In the conversion, whether the identity of the commodity before and after it undergoes various process/changes remain the same. In manufacturing a new and different article must emerge from the original substance and new substance does not mean that merely a change in the substance is effected. Manufacture and production implies that something is brought into existence which is different from its components Moreover, the term 'processing' is distinguishable from the term 'manufacture' and mere processing does not amount to change losing its original identity whereas in manufacturing, the original articles lose their identity. In the case under consideration, doing something to substance to change or alter their form can be termed as processing and does not amount to manufacture as a production of new substance does not mean merely to produce some change in the substance. There is no change in the basic component except*

> *a physical change in the structure and shape in the form of pellet as no new substance comes into existence."*

**10.** On the other hand, the learned advocate for the Assessee first brings to the notice of the Court that this is not the first year in which deduction was sought on the ground that what the Assessee was doing by producing poultry feed was manufacture – the record shows that it had been claiming deduction under Section 80-IB of the said Act from Assessment Year 2001-02 onwards and it has regularly been assessed to tax the income tax authorities and allowed such deduction when assessment was done under section 143(3) of the said Act, but without there being any incriminating material the Assessing Officer has disapproved the claim of the Assessee under Section 153A assessment. If deduction had been allowed holding the activity of the Assessee as being 'manufacture', when the same activity is carried on, without there being a change in the law or pronouncement making the activity something other than manufacture, the Assessee submits, it is not open to the Revenue to disapprove of such deduction. In support of its contention the Assessee has relied upon the order of the Income Tax Appellate Tribunal at Kolkata in the case of **ACIT-CC-XXVII, Kolkata—v—Kanchan Oil Industries Limited**, which is similar to the facts and circumstance of this case. I would think that an order passed by the Income Tax Appellate Tribunal is binding on all income tax authorities in Kolkata in respect of assessments made with relation to activities carried on in West Bengal by the Assessee which alone are at issue, rather than an order passed by the Income Tax Appellate Tribunal at Hyderabad which would bind the authorities in Andhra Pradesh or Telengana, as the case may be.

**11.** More to the point, and with far more binding effect than what the Income Tax Appellate Tribunal at Hyderabad had held, the Assessee has cited several judgments of the Hon'ble Supreme Court, which the Revenue

appears to have ignored since none, it appears, has told them that the law declared by the Hon'ble Supreme Court is binding on every civil and judicial authority in India, including revenue authorities, and this would override what a statutory tribunal has decided in Hyderabad for the authorities in respect of the State which the said tribunal has been formed for. The judgments cited are as follows: -

11.1. ***CST—v—Pio Food Packers*** *reported in* ***(1980) Supp SCC 174***: the Hon'ble Supreme Court while determining as to what would amount to a manufacturing activity held that the test for determination whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity, but is recognized in the trade as a new and distinct commodity.

11.2. ***Aspinwall and Co. Ltd.—v—Commissioner of Income Tax*** *reported in* ***(2001) 251 ITR 323 (SC)*** where a Bench comprising three Hon'ble Judges of the Hon'ble Supreme Court was pleased to hold

> "The word 'manufacture' has not been defined in the Act. In the absence of a definition of the word 'manufacture' it has to be given a meaning as is 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."

11.3. ***Income Tax Officer—v—Arihant Tiles and Marbles P. Ltd*** *reported in* ***(2010) 320 ITR 79 (SC)*** where the Hon'ble Supreme Court was pleased to hold, by a bench comprising three Hon'ble Judges, that where there are various stages through which the marble blocks have to go through before they become polished slabs and tiles, there is certainly an activity which will come in the category of "manufacture".

11.4. ***Commercial Tax Officer—v—Jalani Enterprises*** *reported in* ***2011 (266) ELT 294 (SC)*** was relied upon by the Assessee for the limited point of establishing that when ingredients were 'grinded' (sic for 'ground') and mixed, and a new product separately known to the commercial world comes into existence, then the individual ingredients lose their own identity and character, and therefore this amounts to manufacture even though the chemical composition is not altered. The exact words in this case, which was determination of which entry would be applicable for levying sales tax on Jaljeera, are as follows: -

> "Each one of the contents of the product referred to above and relied upon by the High Court would indicate that most of the items used in the manufacture of Jaljira are nothing else but spices. They are grinded and mixed. When spices are grinded and mixed, it gives rise to a new product,

> which is a mixed masala. Different ingredients are used in preparation of Masala after grinding and mixing several ingredients and when they are so grinded they lose their own identity and character and a new product separately known to the commercial world comes into existence. Sales tax is levied on sale of commercial commodities, therefore, individual spices could be termed as different commercial commodities. When they are grinded and mixed they give rise to a separate commercial commodity altogether which could be taxed separately."

11.5. ***Commissioner of Income Tax—v—Vinbros and Co.*** *reported in* ***(2012) 349 ITR 697 (SC)*** the Hon'ble Supreme Court was pleased to approve and follow the above decisions and lay down, as a general rule, that "the generally accepted test to find out whether there was manufacturing was to see whether the application of processes brought out a change to take the commodity to a commercially different and distinct commodity that it could no longer be considered as the original commodity."

**12.** The combined effect of the above and reading them together with the new definition of "manufacture" which is there in the said Act from April 1, 2009, as stated in paragraph 5 above, it will be clear that all that is necessary to take an activity out of the realm of mere process to that of manufacture, would be that "the application of processes brought out a change to take the commodity to a commercially different and distinct commodity that it could no longer be considered as the original commodity". This also satisfies the first limb being Section 2(29-BA)(a) of the said Act, and the definition having two disjunctive clauses, it is clear that there does not have to be change of chemical composition of the end product from that of the original ingredients, to take an activity out of the purview of an ordinary process and constitute manufacture as argued by the Revenue. This is in accordance with the law laid down by the Hon'ble Supreme Court in catenae of judgements including those referred to in paragraph 11 and its sub-paragraphs above.

**13.** As apparent from the facts on record as in paragraphs 6 and 7 of this judgment, where I have set out and dwelt at length on the stages of the process involved, and the end product and its separate commercial

utility and identity from that of the original ingredients, it is clear that poultry feed is not merely rice bran or maize or vitamins or minerals but a mixture of all in calculated proportions through a process involving mills and manufacturing by the use of machinery which run on electricity and where the end product being the pellet is wholly different from each of the ingredients and results in a product which is commercially different and distinct as a commodity so that it cannot be considered as any of the original commodities which were used as ingredients.

**14.** As a result, the question of law framed by this Court as in paragraph 3 of this judgment is answered against the revenue and it is held that the conclusion of the learned tribunal that production of poultry feeds constitutes manufacture is not perverse. Consequentially, appeal of the Revenue is dismissed and the order of the learned tribunal is confirmed. The Revenue shall bear the costs of the appeal assessed at 1000 GMs.

**(PROTIK PRAKASH BANERJEE, J.)**

**I. P. Mukerji, J.:**

I have had the privilege of reading in draft the judgment prepared by my brother. I am in full agreement with the reasons given and the conclusions reached by his lordship. There is precious little that I can add to the judgment. Nevertheless, I think that a few observations would be relevant.

One has to ascertain the meaning of the words used to define "manufacture" in Section 2(29BA) of the Income Tax Act, 1961. The meaning conveyed by the sub-section is absolutely clear. So is the intention of the legislature expressed in the words in the sub-section. Section 2(29BA) is as follows:

> ***"2(29BA) "manufacture" with its grammatical variations, means a change in a non-living physical object or article or thing,-***
>
> ***(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or***
>
> ***(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."***

In sub-section (b) the legislature describes the resultant product as one with a "different chemical composition" or "integral structure". In sub-section (a) there is no reference to a different chemical or structural product. Therefore, sub-section (a) conceptualizes an end product which is new and distinct from the substance or substances which are used to produce it and something which is new and has a different name, character and use without undergoing a chemical or structural change or transformation. Say, for example in the making of steel, carbon is added to Iron to lend it strength. Steel is composed of Iron and a small percentage of carbon. Neither of the elements undergoes any chemical or structural change. The process is manufacture.

In **Income Tax Officer Vs. Arihant Tiles and Marbles P. Ltd.** reported in **(2010) 320 ITR 79 (SC)** the Supreme Court held that marble blocks undergoing polishing in an industrial process which resulted in production of tiles, underwent manufacture. Similarly, in **Commercial Tax Officer Vs. Jalani Enterprises** reported in **2011 (266) ELT 294 (SC)** jaljeera made out of various ingredients undergoing the grinding process was held to be manufactured.

My brother has analysed in detail the industrial process by which poultry feed is made by the assessee and has rightly come to the conclusion that it is manufacture.

I would dismiss this appeal (ITA 144 of 2008) answering the questions against the revenue and in favour of the assessee.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

**(I. P. Mukerji, J.)**