

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
(INCOME TAX)
ORIGINAL SIDE

ITAT NO. 156 of 2015
GA NO.3673 of 2015

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-10
-VERSUS-
M/S A. P. EXPORT

For the Appellant: Mr R. N. Bandopadhyay, Adv.,
Mr Aniket Mitra, Adv.

For the Respondent: Mr J. P. Khaitan, Sr Adv.,
Mr Pratyush Jhunjhunwala, adv.

Hearing concluded on: June 22, 2018.

Date: June 27, 2018.

The Hon'ble **JUSTICE SANJIB BANERJEE**
And
The Hon'ble **JUSTICE ABHIJIT GANGOPADHYAY**

ABHIJIT GANGOPADHYAY, J. : –

In this appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the said Act) the Principal Commissioner of Income Tax (hereinafter

referred to as the Revenue) has challenged the judgment and order dated April 30, 2015 passed by the Income Tax Appellate Tribunal, “C” Bench, Kolkata (the Tribunal, in short, hereafter) in I.T.A No. 1038/KOL/2008 for the assessment year 2004-05.

2. The matter relates to Section 10B of the said Act as has been substituted by the Finance Act, 2000 with effect from April 1, 2001.
3. The assessee filed its return on October 18, 2004 disclosing a total income “Nil”. The return was selected for scrutiny by the Revenue and notices under Sections 143(2) and 142(1) were issued. In compliance with the said notices, the assessee appeared before the Assessing Officer (AO, in short, hereafter) and the hearing was held on different dates and the assessee filed the requisite details.
4. The assessee is an exporter of garments who claimed deductions of Rs. 25,40,164.00/- (Rupees twenty five lakh forty thousand one hundred and sixty-four only) under Section 80HHC and of Rs. 2,17,79,599.00 (Rupees two crore seventeen lakh seventy nine thousand five hundred and ninety-nine only) under Section 10B of the said Act. Section 10B of the said Act provides for certain benefits to hundred per cent export oriented undertakings against export of articles or things etc.
5. The AO disallowed the claim for deduction under Section 10B of the said Act. The reason for disallowing the deduction by the AO was that the assessee,

according to the AO, did not manufacture or produce any article or thing in course of its export. The AO perceived such position from the audit report produced by the assessee. The AO found that the assessee purchased readymade garments produced by others and exported the same.

6. Before the AO the assessee declared as follows:

“A.P. Exports purchased Semi-finished Garments from local markets.

Then it perform various manufacturing function according to para 9.30 of EXIM policy 2002-07 (copy enclosed) like Finishing, Labelling, hanger & P/P Bags packing of each finished and manufactured piece of garment. Then according to buyer/customers requirements these manufactured garments are packed in specified quantity eg; Doz/pieces in cartons and finally exported earning valuable Foreign Exchange for the Country.”

7. The assessee firm, is located in the Falta Special Economic Zone (SEZ, in short) and the Development Commissioner of the said SEZ approved the unit of the assessee firm under the hundred per cent E.O.U scheme for the production of diverse garments.

8. As the AO had disallowed the exemption claimed under Section 10B of the said Act and assessed total tax payable by the assessee as Rs.84,16,206/- (Rupees eighty four lakh sixteen thousand two hundred and six only) the assessee filed an appeal before the Commissioner of Income Tax (Appeals)-XIV (CIT (A), in short, hereafter). In the said appeal the assessee disclosed its activities towards manufacturing to show that such activities would amount to manufacturing. Such activities were ironing, packing, affixing

bar code labels, emblem graphics, affixing stickers, putting silica gel pouch inside the packets, putting heat treated emblem on some of the garments etc.

9. Thus the question which arose before CIT (A) was whether such activities by the assessee in respect of the semi-finished garments were to be considered as 'manufacturing'.
10. In the appeal against the assessment order before the CIT (A) the assessee submitted that the term 'manufacture' had not been defined in the said Act and to gather its meaning, the assessee quoted extensively from several other Statutes which defined the term 'manufacture' or 'production' relevant to the activity governed by those Statutes. The assessee also cited certain judicial pronouncements made in *Addl. CIT v. A. Mukherjee* (113 ITR 718 Kolkata), *M/s. Bejbarua Tea Company v. CIT* (220 ITR 530), *CIT Gujarat v. Ajay Printer* (58 ITR 811) and the judgments reported in 119 ITR 145 and 235 ITR 5 and an unreported judgment of this court in ITA No. 657 of 2008 (*Commissioner of Income Tax v. M/s. Ektara Exports Pvt. Ltd.*).
11. The CIT (A) held that it could not be said that the assessee had not manufactured or produced any article and further held that the firm was eligible for the exemption.
12. Against the order of the CIT (A), the Revenue filed an appeal before the Tribunal as aforesaid.

13. The Tribunal in its order dated April 30, 2015 has held that the assessee procured semi-finished garments; on the semi-finished garments the assessee firm affixed or stitched various stickers, including heated/pressure stickers to improve the look and the semi-finished garments were then ironed and packed in poly poplin bags along with hanger putting them in export-worthy saleable condition. Silica gel was used to safeguard those garments from moth or odour. The said garments were then bar-coded and tagged in the final stage and then packed in cartons and thereafter the garments were exported by the assessee firm. The expenses incurred on account of above mentioned processes were duly reflected in the books of accounts and had been verified by the AO.
14. The Appellate Tribunal noted some definitions of the term 'manufacture', including the definition given in clause 9.32 of rules and regulations relating to EOUs framed by the Government of India which is as under:

“Manufacture” means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labeling, re-conditioning, repair, remarking, refurbishing, testing, calibration, re-engineering. Manufacture, for the purpose of this policy shall, also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture and mining.”

15. The Appellate Tribunal has also considered the definition of manufacture under Section 2(f) of the Central Excise Act, 1944.

16. The Tribunal considered the following cases: *Additional C.I.T v. West Bengal III, Kolkata* (reported in 113 ITR 718), *Bejbarua Tea Company Private Limited v. C.I.T* (reported in 220 ITR 530), *CIT Gujrat v. Ajay Printer* (reported in 58 ITR 811), a judgment reported in 119 ITR 145 of this court, another judgment reported at 235 ITR 5 and a further judgment of the Allahabad High Court in *C.I.T v. Talwar Khullar Private Limited*. It also noted the judgment and order in *Ektara Exports Pvt. Ltd.* (supra).
17. The Appellate Tribunal dismissed the appeal filed by the Revenue as it found no infirmity in the order of the CIT (A), holding that the claim of the assessee for exemption for under Section 10B of the Act was rightly allowed.
18. At the hearing before this Court the appellant (i.e. the Revenue) has submitted that the assessee was not a manufacturer and the term 'manufacture' cannot be applied in respect of its so called hundred per cent export oriented undertaking.
19. Though the appellant has framed three questions, it has pressed only one question stating the same to be a substantial question of law.
20. The question is as follows: "Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in facts as well as in law in holding that the assessee was carrying on manufacturing activity for claiming

deduction under Section 10B of the Income Tax Act though the tax auditor in the Tax Audit Report categorically mentioned that it is a trading concern and no consumption of raw material had taken place.”

21. This question as framed by the Revenue has two parts: one relates to the manufacturing activity for claiming deduction and the other relates to the assessee being a trading concern as per the tax audit report. The appellant has restricted itself to the first part relating to manufacturing activity and no submission has been made in respect of the second part i.e. the trading concern and the tax audit report part.
22. In support of its case, the appellant has referred a judgment of the Supreme Court reported in 1987 (32) ELT 231 (S.C.) (*Regional Director, Employees State Insurance Corporation v. Ram Chandar*). In the said judgment, the Supreme Court discussed the term ‘manufacture’ and while doing so it was observed, “If by a process a different entity comes into existence then it can be said that this was manufactured.” The Supreme Court followed a judgment reported in 1985 (20) E.L.T. 179 (SC) (*Empire Industries Limited v. Union of India*) wherein it was observed that “manufacture is complete as soon as by the application of one or more process, the raw material undergoes some change. If a new substance is brought into existence or if a new or different article having a distinctive name, character or use result from particular processes, such process or processes would amount to manufacture. Whether in a particular case

manufacture has resulted by a process or not would depend on the facts and circumstances of the particular case. There is no doubt that the process must bring into existence a new item or a new commodity known differently in the market as such by people who use or deal with that good.”

23. The appellant has relied on another judgment reported in (2001) 251 ITR 323 (*Aspinwall and Co. Ltd. v. Commissioner of Income Tax*) wherein the Supreme Court while deciding a matter under the said Act observed that “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. This court while determining as to what would amount to a manufacturing activity held in *Deputy CST v. Pio Food Packers* reported in [1980] 46 STC 63 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. It was observed (page 65):

“Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place.”

24. In the course of the hearing, the respondent has relied on the view expressed in similar circumstances by this court in *Ektara Export Pvt. Ltd.* The respondent has relied on another unreported judgment in ITAT No. 184 of 2013 (*Commissioner of Income Tax v. M/s. Jaytee Exports*) dated March 6, 2014. In that judgment the earlier judgment of *Ektara Export* has been relied upon. The respondent has relied on a case reported in 75 ELT 520 which is also not applicable in the present matter as the question as to the term ‘manufacture’ was viewed in a wholly different context. In that judgment it was held that the expression ‘manufacture’ was given a special definition under Section 2(f) of the Central Excise Act, 1944.
25. Considering the above facts and circumstances we find that though the revenue has made a sincere endeavor to show that the activities and functions of the assessee cannot come within the meaning of what in common parlance is known as manufacture, the several orders of this court go in favour of the assessee as the definition given in clause 9.32 of rules and regulations relating to EOU framed by the Government of India leans in favour of the assessee. It is the admitted position and also the

finding on facts by the CIT (A) and the Tribunal that the assessee performed some functions on the garments received by it though all functions were not performed on all the garments but some or the other functions were performed on the garments received by the assessee. The definition as aforesaid includes re-packing, re-conditioning, re-furbishing etc. and it goes to the extent of refrigeration. This shows that the definition of manufacture is very wide and includes a large number of functions and activities. The fact-finding authorities below noted the functions performed by the assessee. That the functions were performed also gets support from the finding of the Tribunal that the expenses incurred on account of the said functions performed by the assessee were reflected in the books of accounts which were verified by the AO. The Supreme Court, in the judgment in *Empire Industries*, held that whether there was any manufacture or not would depend on the facts and circumstances of the particular case. Considering the functions performed by the assessee on the garments, it cannot be said that such functions undertaken by the assessee do not come within the meaning of the term 'manufacture'. Further, nothing is found from the finding on facts by the CIT (A) and the Tribunal which can be termed as perverse. At any rate, when two specialised fora found the activities involved to be a process of manufacture, this court cannot easily interfere therewith.

26. For the reasons as aforesaid the appeal fails. This court does not interfere with the order of the Appellate Tribunal which has upheld that the claim of

the assessee for exemption under Section 10B of the Act.

27. ITAT No.156 of 2015 and GA No.3673 of 2015 are dismissed. There will be no order as to costs.
28. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Abhijit Gangopadhyay, J.)

I agree.

(Sanjib Banerjee, J.)