IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRIPAWAN SINGH, JM &DR. A.L.SAINI, AM
ITA No. 322/SRT/2018
(/ Assessment Year: (2004-05)
(Virtual Court Hearing)

N Core Cables, Gala No.7, Plot No.10,Primier Industrial Area, Kachigam, Daman-396210, U.T. of Daman & Diu	**Vs.**	Assistant Commissioner of Income-tax, Vapi Circle, Fortune Square-II, 7thFloor, Room No. 704, Daman Road, Chala, Vapi-396191
PAN/GIR No.: **AAEFN 7954 N**		
(Assessee)		**(Respondent)**

Assessee by : Shri A Gopalakrishnan, C.A
Respondent by : Shri Vinod Kumar– Sr.-DR
Date of Hearing : 31/05/2022
Date of Pronouncement: 04/08/2022

O R D E R PER DR.

A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee, pertaining to assessment year 2004-05, is directed against the order passed by the Learned Commissioner of Income Tax(Appeals) Valsad ['CIT(A)' for short], dated 28.02.2018, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act'), dated 29.12.2006.

2. The grounds of appeal raised by the assessee are as follows:-

"01. The order of assessment is contrary to the facts and prejudicial to the assessee.

02. On appreciation of the facts and circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned Assessing Officer of not granting deduction to the assessee u/s 80IB of the Income tax Act.

03. On appreciation of the facts and circumstances of the case and interpretation of law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned Assessing Officer in treating the income earned by the assessee as income not eligible for deduction U/s 80IB. The action of the Learned Commissioner of Income Tax (Appeals) in concluding that the assessee has not carried out any manufacturing activity is contrary to the facts of the case on record and hence deserves to be deleted.

04. On appreciation of the facts and circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in holding that the assessee firm has not caried out any manufacturing activity at its industrial undertaking at Daman on or before 31.03.2004.

05. The assessee craves leave to add, amend, modify or alter the above grounds of appeal at any stage of appellate proceedings."

3. Succinct facts are that assessee is a partnership firm engaged in the business of manufacturing of insulated cable, coper scrap, AC, DC wire set, stranded copper wire, wiring harness and PV tape and sleeve. The assessee filed its return of income for the year under consideration, declaring a total income of Rs. NIL, on 07.10.2004, wherein, an amount of Rs.8,00,308/-, was claimed as deduction u/s 80-IB of the Act. The return of income was processed u/s 143(1) of the Act. The return of income was accompanied by computation of income and audited accounts along with audit report in Form No: 3CB, 3CD and 10CCB. Thereafter, the case of the assessee has been picked for scrutiny, as per the Board's Instruction No. 10/2004. Therefore, notice u/s 143(2) of the Act was issued on 13.01.2005 and served upon the assessee. The notice u/s 142 of Act was issued on 27.07.2005 requiring the assessee to furnish-various details. In response to notices u/s 143(2) and 142 of the Act, assessee attended office of the assessing officer and submitted required details. The assessing officer observed that assessee has started its business activity from the accounting period relevant to Assessment Year 2004-05. As such, the year under consideration is the first year of business activity of the assessee. The assessing officer observed from the return of income, the assessee has claimed depreciation on fixed assets. Ongoing through the case records of the assessee, it was noted by assessing officer that assesses is not utilizing the power in its unit, therefore, during the assessment proceedings, a

show-cause letter was issued on 03.11.2006 stating as to why the claim made u/s 80-IB of the Act should not be disallowed under the Provisions of section 80-IB(2)(IV) of the Act and why same should not be taxed?

4. In response to the above show-cause notice, the assessee has filed a written submission before assessing officer along with necessary details on 20.11.2006, wherein it has stated that, as the electricity connection has not been released by the Electricity Department, it has used generator for generating the power, which was hired from M/s Nangalwala Impex (Pvt) Ltd, in the period from 15.02.2004 to 31.03.2004. In this regard, assessee has submitted the confirmation letter of M/s Nangalwala Impex Pvt. Ltd, which is the sister concern of the assessee. Further, on going through the return of income for the year under consideration, it was observed by the assessing officer that undertaking has made job work from M/s, Nangalwala Chemical Industries at Alwar for copper drawing and making rubber cable. Therefore, during the assessment proceedings, a show-cause letter was issued on 21.12.2005, stating as to why its claim made u/s 80-1B of the Act should not be disallowed?

5. In response to the above show cause notice, the assessee has filed a written submission on 26.12.2006, which is reproduced below:

> *"Initially our client do not have the facility for manufacturing of rubber cable but, it has best technical know-how for manufacturing of rubber cable. It has taken order and executed the same by way of manufacturing done by M/s. Nangalwala Chemical Industries of Alwar, under the direct supervision of one of the partner Mr.* Naresh *Agarwal. Mr Naresh Agarwal is in this line since last 10 years. He is the main technical person of our client's unit. As the manufacturing process has been carried out by M/s Nangalwaia Chemical Industries, under the direct supervision and control and with the aid of technical know how of our client, our client is the manufacturer."*

6. The assessing officer has gone through the submission of the assessee and observed that assessee is not doing any manufacturing activity and it is doing job work from M/s Nangalwaia Chemical Industries, which is the sister concern of the assessee. The assessing officer observed that Mr Naresh Agarwal is the common partner in both the firms namely M/s Nangalwala Chemical Industries as

well as in M/s N-Core Cables. Therefore, AO noted that it was in the knowledge of Mr. Naresh Agarwal that the manufacturing activity for the assessee undertaking is done by M/s Nangalwala Chemical Industries and assessee undertaking is not doing any manufacturing activity as manufacturing activity was carried out under the supervision of Mr. Naresh Agarwal. In view of the above, activity of the unit of the assessee was not considered as a manufacturing activity by assessing officer therefore, assessing officer disallowed the claim of deduction u/s 80IB of the Act to the tune of Rs.8,00,308/-.

7. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A), who has confirmed the action of the Assessing Officer. Aggrieved by the order of Ld. CIT(A) the assessee is in appeal before us.

8. Shri A. Gopalakrishnan, Learned Counsel for the assessee begins by pointing out that assessee received orders from customers to supply the goods to them and the assessee executed these orders by way of manufacturing done by M/s Nangalwala Chemical Industries of Alwar, under the direct supervision of one of the partners. Mr. Naresh Agarwal is the main technical person of company`s client's unit. The assessee used its own Technical know-how, own process for manufacturing, own raw material and under the direct supervision of one of the partners therefore deduction under section 80IB can not be denied just because part good was manufactured at other place. This happened because electricity connection was not provided by Electricity Department on time. When the electricity connection was available to the assessee on 30.03.2004, the assessee never used outside premises for manufacturing purposes. The ld Counsel also submitted that in the event it is held that the manufacturing activity has taken place at Naganwala Impex Private Limited Alwar under the supervision of the Partner, even then the assessee shall be considered to be engaged in the business of manufacturing and deduction u/s 80IB is allowable in view of the decisions of the Jurisdictional Bombay high Court in the case of Anglo French Drug Co. (Eastern) Ltd reported in [1991] 57 TAXMAN 008 (BOM).

9. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

10. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record. Regarding power connection, ld Counsel submits that admin, of U. T. of Daman & Diu has sanctioned the power connection on 01.03.2004 subject to submission of occupancy certificate of the building. Thereafter the agreements were entered into with the Electricity Department on 23.03.2004 for the release of power connection and ultimately power was released on 30.03.2004. Thus, even if the assessee operates the machinery for one day on 31.03.2004 and manufactures items, it is eligible for deduction u/s 80IB of the Act. Therefore, as per ld Counsel, this critical evidence has been overlooked and ignored by the lower authorities while concluding that power has not been used for manufacturing. The Learned Counsel also pleaded that ld CIT(A) did not confine scope of adjudication up to the direction given by Hon`ble ITAT, which is against the principle of natural justice.

11. About plant and machinery, ld Counsel submits that entire machinery has been transported in a truck by the supplier and installation of commissioning of Plant and Machinery was done by the employees of the assessee within 5 to 10 days because of their past experience. The Purchases of raw materials has never been disputed by the AO either in the original assessment order or in the remand report. The assessee sufficiently substantiated the diesel purchase bills and the AO has not controverted the same except to point out some discrepancy in the invoice number, which is third-party evidence and not at all in the control of the assessee. The assessee has given exhaustive details of manufacturing process, number of working hours required to manufacture the items sold, copy of the audited balance sheet disclosing the purchases and sale and installation of plant and machinery before all the authorities and the same has not been found to be false at any stage.

Further the books of accounts had been produced before the AO during the course of assessment proceedings and has been duly verified. The observations made by ld CIT(A) are general in nature. The assessee had submitted Permanent Certificate of Registration as an SSI unit obtained from DIG, Daman specifying the date of commencement of production as 02.03.2004, vide Paper Book Page 24 to 39.The Assessee's manufacturing activity consisted of (i) canvassing of orders, (ii) preparation of specifications of the material to be supplied to Formula Cables and electrical on the basis of orders, (iii) placing orders for the manufacture of rubber cables with Nangalwala chemicals Ind. (iv) to ensure that the manufacturing process is carried on by Nangalwala chemicals, under the direct supervision of the Partner Mr. Naresh Agarwal, the Partner and (v) to have a check over the quality control of Cables manufactured and assuring that the end products conform to specification as per customers order giving performance and guarantee to the customer. Further the Payment of cable making charges Rs. 46,518/- Paid to Nagalwal Chemical has been debited to Profit and Loss Account, vide Page 79 of the Paper Book. We note that decision of the Honorable Bombay high Court in the case of Penwalt India Ltd reported in [1991] 58 TAXMAN 133 (BOM) wherein on a similar situation the Hon'ble High Court has held that assessee in that case qualify for the relief u/s 80-I of the Act. In this regard it is submitted by ld Counsel that section 80-I is pari-materia to section 80-IB of the Act and therefore is squarely applicable to the facts of the case of the assessee as well. The findings of the Hon`ble Court is reproduced below:

> ***"6.*** *It cannot perhaps be disputed on the basis of the decisions relied upon that the expression 'engaged in manufacture' indicates that the assessee should be directly involved in the manufacturing process and it will not include the cases where he gets the goods manufactured totally by an outside agency. Incidentally, the Madras High Court in its decision in Chillies Export House Ltd.'s case (supra) referred to the Allahabad High Court decision in the case of Bulbu Prasad Amarnath v. CST [1964] 15 STC 46 wherein it was held that it is not merely the person who manufactures but even the person who had the goods manufactured would be entitled to the benefit of the definition. In so doing the learned Judges referred to 33, Halsbury's Laws of England, Third Edn. 'Revenue', paragraph 407, wherein it was said that a person is deemed to make goods or to apply a process if the goods are made, or the process is applied, by another person to his order under any form of contract other than a purchase. Therefore, we have to proceed on the basis of the decisions cited that an assessee would be said to be*

engaged in manufacturing activity if he is doing a part of the manufacturing activity by himself and for the rest of it engages the services of somebody else on a contract other than a contract of purchase.

7. *Coming to the facts of the instant case, we find from the facts found by the Tribunal that the assessee's manufacturing activity consisted of (i) canvassing of orders, (ii) preparing of designs and drawings on the basis of orders, (iii) placing orders for the manufacture of machinery with Turner Hoare, (iv) to see that the manufacturing process is carried on by Turner Hoare under the direct supervision of the assessee-company and (v) to have a check over the quality control and last but not the least to be responsible for the proper functioning of the machinery and guarantee after sale service for a stipulated period. Out of so many activities, except for one activity, namely, getting the machinery manufactured through Turner Hoare, all other activities are admittedly undertaken by the assessee-company. In the circumstances, we find no difficulty in agreeing with the Tribunal that the assessee is engaged in the business of manufacture sugar and tea machinery and is accordingly qualified for relief under section 80-I. In the above view of the matter, we answer the 3rd and the 4th question is also in the affirmative and in favour of the assessee.*

8. *There would be no order as to costs."*

12. On the identical facts, our view is fortified by the judgment of the Hon'ble Bombay high Court in the case of Anglo French Drug Co. (Eastern) Ltd reported in [1991] 57 TAXMAN 008 (BOM) wherein pursuant to Circular No. 347 issued by CBDT the Hon`ble Bombay High Court has clearly held that manufacturing at third party premises using their machinery under the supervision and control of an assessee amounts to manufacturing by the industrial undertaking. While holding as such the honorable court followed its own decision in the case of CIT v. Neo Pharma (P.) Ltd. [1982] 137 ITR 879 and Calcutta High Court in the case of Addl. CIT v. A. Mukherjee & Co. (P.) Ltd. [1978] 113 ITR 718. The relevant findings of the Hon`ble Court is reproduced below:

*"**3.** In our judgment, the answer to this question is squarely covered by the judgment of our High Court in the case of CIT v. Neo Pharma (P.) Ltd.[1982] 137 ITR 879. In this case, it was held that although the plant and machinery employed for the purpose of manufacture belonged to Pharmed and the services of certain employees were also utilised in that process, the manufacturing activity was really that of the assessee. It is not necessary that the manufacturing company must manufacture the goods by its own plant and machinery at its own factory. If in substance the manufacturing company has employed another company for getting the goods manufactured by it under its own supervision or control, the assessee can be considered as a company engaged in manufacture of goods and, thus, an industrial company. Mr. Dalvi has also invited our attention to the fact*

that in Neo Pharma (P.) Ltd.'s case (supra), the Division Bench of our Court had relied upon the judgment of the Calcutta High Court in the case of Addl. CIT v. A. Mukherjee & Co. (P.) Ltd. [1978] 113 ITR 718 , and the Board has already accepted the correctness of the said judgment in A. Mukherjee & Co. (P.) Ltd.'s case (supra) in its Circular No. 347 dated 7-7-1982 (See Taxmann's direct Taxes Circulars, Vol. 1, 1985 edn., p. 1112), Mr. Dalvi is right in this submission.

4. *Mr. Jetly, the learned counsel for the revenue, has submitted that the assessee cannot be considered as a manufacturing company as the assessee did not depute its own staff at the factory and did not exercise supervision over the manufacturing activity undertaken by Roche Products Ltd while manufacturing pharmaceutical goods for the assessee. It is not absolutely necessary that the assessee must depute the supervisory staff or exercise direct supervision over the manufacturing process of the kind suggested by the learned counsel. It is sufficient if on an overall view of the matter it is found that it was the assessee-company was the real manufacturer and the assessee had merely employed the agency of some one else through whom the goods were caused to be manufactured. It is also not necessary that the assessee must pay the wages of the workers employed in the manufacturing process. We have considered the factual data in this case in the light of the judgment or our High Court in Neo Pharma (P.) Ltd.'s (supra) and we are of the view that the Tribunal was right in the view which it took. In the result, we answer both the questions in the affirmative and in favour of the assessee."*

13. From the above judgment of the Hon`ble Bombay High Court in the case of Anglo French Drug Co. (Eastern) Ltd(supra), it is abundantly clear that it is not necessary that the manufacturing company must manufacture the goods by its own plant and machinery at its own factory. If in substance the manufacturing company has employed another company for getting the goods manufactured by it under its own supervision or control, the assessee can be considered as a company engaged in manufacture of goods and, thus, an industrial company. Therefore, we note that in the assessee`s case under consideration, assessee received orders from customers to supply the goods to them and the assessee executed these orders by way of manufacturing done by M/s Nangalwala Chemical Industries of Alwar, under the direct supervision of one of the partners. The assessee applies own technology, standard process, own raw material, own quality control/check, and the goods are manufactured as per the specification given by customers. Based on these facts and circumstances, we note that assessee is entitled to get deduction under section 80-IB of the Act. Hence, we direct the assessing officer to allow deduction under section 80IB of the Act, to the tune of Rs. Rs.8,00,308/-

14. In the result, appeal filed by the assessee is allowed.

Order is pronounced on 04/08/2022 by placing the result on the Notice Board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat/ / Date: 04/08/2022
Dkp Outsourcing Sr.P.S./SAMANTA
Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS
ITAT, Surat