IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCHES 'A', JAIPUR
BEFORE S/SHRI R.K. GUPTA, JM and SANJAY ARORA, AM

I.T.A No. 779/JP/2011
Assessment Year: 2001-02

The Asstt. CIT , Circle- 2, Alwar	**Vs**	Bhiwadi Cylinders (P.) Ltd. , E-925, Industrial Area, Bhiwadi, Alwar – 301 001 [PAN: AABFP 4997 J]
(Revenue-Appellant)		**(Assessee-Respondent)**

Revenue by	Miss. Roshanta Kumar Meena, Jr. DR
Assessee by	Shri P.C. Parwal, CA-AR

Date of hearing	12/04/2012
Date of pronouncement	27/04/2012

O R D E R

Per Sanjay Arora, AM:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income-tax (Appeals), Alwar ('CIT (A)' for short) dated 23-06-2011, partly allowing the assessee's appeal contesting its assessment u/s 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 30-03-2004 for the assessment year (A.Y.) 2001-02. The Revenue's appeal bears five grounds, which we shall take up in seriatim.

2. The first ground is in respect of the trading addition for Rs. 5,22,352/-. The same was made by estimating the trading (gross) profit for the year at 26% (of the sales turnover) as against the disclosed gross profit rate of 24.71%, in view of the unexplained decline therein with reference to the immediately preceding year, where at the same stood at 27.77%. The inference as to non-explanation was as the assessee had failed to produce

the books of accounts in spite of being specifically called for by the Assessing Officer (AO). In appeal, the assessee contended that the books of accounts had in fact been produced before the AO, though there had been a lapse in attending on a particular date. The books of accounts have been duly maintained, rather, stand audited; it having furnished the audited accounts along with the audit report thereon with its return. There has been an error by the AO in taking the gross profit for the immediately preceding year, i.e., A.Y. 2000-01, at 27.77%; the same being actually at 23.13%, as is evident from the copy of the final accounts for the current year, which contain the corresponding figures for the preceding year as well. The ld. CIT(A) was of the view that in view thereof, no grievance by the Revenue could stand and, accordingly, deleted the trading addition. Aggrieved, the Revenue is in appeal.

3. Before us, like contentions were raised by either side, each relying on the order by the authority below as favourable to it.

4. We have heard the parties, and perused the material on record.

4.1 In our view, no definite findings, other than by inspecting the records could have been issued with regard to the question as to whether the assessee had in fact produced the books of accounts, as called for, before the AO during the course of the assessment proceedings, and which forms the basis of his disturbing the assessee's book results for the year. The assessee's plea regarding non-invocation of section 145(3) by the AO, so that no addition on trading account could be made, is without merit inasmuch as if no books of accounts have been actually produced, how could the same be rejected by the AO?. The question is not of their maintenance, but their production before the AO for his verification in substantiation of the assessee’s declared results as well as claims preferred per its return of income. This is particularly so as the AO has reiterated the non-production of the books of account before him during the assessment proceedings vide para 1 of his remand report dated 25-07-2006 (PB page 20-22). We, in fact, wonder why the books of accounts could not have been produced before the AO during the remand

proceedings; the books of account having been admittedly maintained, and available with the assessee. The same would at once dissolve the controversy. The ld. CIT(A) has not issued any findings in the matter, deleting the addition on the basis that the gross profit rate for the preceding year was in fact at 23.23%, and not at 27.77%, as stated by the AO. The assessee had returned better trading results for the current year vis-a-vis the immediately preceding year. The same no doubt is a valid argument, and which we approve of in principle. However, again, we find that the AO has reiterated that on the basis of the material on record, i.e., the return for the preceding year, the assessee's gross profit rate is at 27.77%, and not 23.23% as claimed by the assessee, supporting the same on the basis of the audit report in Form No. 3 CD for that year, where at point #32 the Auditor is required to mention the same, enclosing a copy thereof along with his remand report aforesaid. Again, we find the controversy unnecessary. All that was required of the ld. CIT(A), in view of the categorical findings by the assessing authority, to call for the assessee's assessment records for the preceding year as well as the current year, and issue definite findings after hearing both the parties. There is no need in fact to refer to the final accounts for the current year inasmuch as it cannot be verified on the basis thereof whether the assessee's return for the preceding year corresponds thereto. Also, it is a common practice to regroup the accounts for better presentation from time to time. In fact, the ld. AR conceded before us that the tax audit report for the preceding year does in fact state of the gross profit rate for that year as at 27.77%, further corroborating the claim of the Revenue; the same being required to be certified by the Auditor. Rather, it may be necessary, where the accounts of the preceding year disclose an ostensible gross profit rate at 23.23%, to verify the auditor’s working, which is to be given credence, so that a mistake therein, though not ruled out, cannot be lightly inferred. The requirement in law is to furnish profit and loss account, i.e., as a single account. It is for this reason that the law requires the trading result/s, as disclosed by the assessee’s accounts for the relevant year, to be furnished separately, duly authenticated by the Auditor, including its working. In fact, the Auditor would have made the working for the current year on similar lines as well.

4.2 The matter is entirely factual, and one on which there should have been, rather, no dispute whatsoever at all. We, accordingly, restore this matter back to the file of the first appellate authority to issue specific findings of fact, clearly stating the material/s on which he relies as well as his reason/s in so finding, meeting the case of the party/s against whom he decides, both with reference to the reason/s advanced as well as the material/s being relied upon by the parties before him, after affording proper opportunity of being heard thereto. Reference in this context is made to section 250(6) of the Act, prescribing clearly the ingredients which an order by the first appellate authority has to satisfy. Where additional materials are relied upon, the procedure u/r. 46A would have to be, in addition, observed. Further, we may also add that if the trading result for the preceding year is found to be at 27.77%, the same, again, would not by itself constitute a firm ground for effecting a trading addition for the current year. This is as the assessee may well be able to explain its book results for the current year with reference to its accounts, as well as the reason/s for the decline therein with reference to the preceding year. That is, an addition cannot automatically follow, and shall be required to be addressed on merits. Though the assessee is not in appeal, its cause cannot be allowed to be prejudiced for want of proper findings by the ld. CIT(A) on a matter precedent. As such, in our view, in the event of the trading results for the immediately preceding year being better than that for the current year, the assessee shall be allowed to present its case before the assessing authority by the ld. CIT(A), and adjudicate in the matter only subsequently. We decide accordingly. We may also clarify that if an appeal is preferred by the Revenue against the fresh order by the ld. CIT(A) in the ensuing proceedings, the same would not be hindered by section 268A of the Act, as the same would arise only in consequence to the present proceedings. We decide accordingly.

5. The second ground of the Revenue's appeal relates to deletion of the disallowance in the sum of Rs. 5.40 lacs paid to the three directors of the assessee company at Rs. 1.80 lacs each @ Rs. 1/- per cylinder. The basis for the same that found favour with the AO was that the payment was not supported by a resolution of the Memorandum of Articles.

Further, the same was not made at regular intervals but only at the end by way of credit entries at the end of the year. No cogent reasons had been stated by the assessee in support of the payment of the said handsome commission being paid to the directors for the first time, who are assessed to tax at a rate less than that applicable to the company. He sought support to the decision in the case of *McDowell & Co. Ltd. vs. CTO* (1985) 154 ITR 148 (SC). In appeal, the assessee relied on a number of case laws of various high courts to the effect that the Revenue cannot step into the shoes of a businessman, and that the legitimate needs of the business from its standpoint, and not that of the income-tax officer, who may have has his own subjective standards of reasonableness, is to be adopted. The company had exhibited an overall improvement in its performance during the year; it sales having gone up from Rs. 202.85 lacs to 368.08 lacs, and the net profit, despite charge of impugned commission, increased from Rs. 8.72 lacs to Rs. 32.96 lacs. The ld. CIT(A) allowed the assessee's claim on that basis, relying on the decision in the case of *Banyan & Berry vs. CIT*, 222 ITR 831 (Guj.) to meet the AO's reliance on the decision in the case of *McDowell & Co. Ltd. vs. CTO* (supra).

6. Before us, like contentions were raised by either side, each relying on the order of the authority below as favourable to it. The ld. AR would also draw our attention to the resolution of the Board of Directors dated 12-01-2001, whereat a resolution allowing commission to each director @ Re.1/- per cylinder repaired/produced during the current financial year (PB page 33). Further, he continued that the directors are also in fact subject to tax at same rate as assessee-company, so that there is no tax motivation in the booking the said expenditure, which represents a genuine business expenditure.

7. We have heard the parties, and perused the material on record. The first thing that strikes us is the nature of the liability: *is it contractual*? We do not think it as so. This is as the resolution under reference only authorizes the payment of what it terms as commission to *all* (without even specifying their number) the directors at a defined rate per unit of production or output. There is no reference to the services rendered or to be

rendered, and concomitant terms and conditions. The ingredients of and, thus, for an enforceable contract in law to come into existence, are completely missing. Could the directors, for example, get the same enforced through a court of law? Reference in this context may be drawn to the decision in the case of *CIT v. Lakshmipati Singhania* (1973) 92 ITR 598 (All.). At the same time, we do not think that the payment is *ex gratia*, precluding its deduction for that reason, but has its genesis in the working results of the company and, thus, the working of the three directors. The directors, as it appears, are working directors, stated to have sufficient work experience. The same, thus, is in the nature of an incentive allowed by the Board, which is vested with all the powers of management, to the directors, as it appears, in appreciation of their services, and in view of the encouraging operational results of the company. This would also account for the fact that the resolution authorizes the payment on a retrospective basis, being in relation to the `production' from an anterior date, the commencement of the year, as the incentive to the directors would be payable only on assessing the profitability of the company achieved during the year. In fact, as we see it, the same is only a manner of working out the incentive, and may as well have been stipulated at a flat rate of Rs. 1.80 lacs for each director. Deduction in its respect would thus stand to be allowed even though the resolution creates no binding obligation in law on the company. No issue *qua* commercial expediency, in our view, arises under the circumstances; the same being itself suggested by the overall improvement in performance, and has even otherwise been adequately met by the ld. CIT(A), with the assessee also relying on a host of case law in relation thereto - the law on which is trite - before him. The question of differential tax rate, also raised by the AO, which though is contested by the assessee on merits, is of no relevance as he has not made out any case u/s. 40A(2)(a). No other infirmity, factual or legal, has been brought to our notice by the ld. DR. We, accordingly, hold the amount as allowable, and of its disallowance as having been rightly deleted by the ld. CIT(A). The Revenue fails on its Gd. 2 before us.

8. The Revenue's third ground relates to the restriction of the disallowance in respect of traveling expenses by the ld. CIT(A) to Rs. 35,000/-, i.e., from Rs. 72,365/- made by the AO.

9. We have heard the parties, and perused the material on record. We find that the authorities below have made *ad hoc* estimates in view of the inability of the assessee to substantiate its claim in this regard in full. The AO has worked out the same at 10%, and which has been restricted to almost one half by the ld. CIT(A), whose action we find as not unreasonable; the assessee having submitted the details of the expenditure before him (PB pg. 55-57), so that it is stands confirmed. We decide accordingly.

10. The fourth ground is in respect of the deletion of the disallowance in the sum of Rs. 27,820/- made by the AO on account of business adjustment.

11. We have heard the parties, and perused the material on record. While the AO effected the same, stating the absence of details as the reason, it stood explained by and on the assessee's behalf before the ld. CIT(A), that the same is only by way of journal vouchers, to balance the accounts where short payments are received, so that the (personal) accounts of the business associates, being customers (oil companies) to whom cylinders are supplied, have been squared up by writing off the differences, being for minor sums. The nature of the expenditure is apparent from the nomenclature of the account itself, even as the assessee had duly furnished the relevant vouchers, also placing the same on record (PB pgs. 40 – 54). No interference at our end is, under the circumstances, warranted. We decide accordingly.

12. The last and final ground of the Revenue's appeal is in respect of the direction by the ld. CIT(A) to allow deduction to the assessee-company u/s. 80IA of the Act. While the AO denied the assessee's claim on the ground that it is not engaged in any manufacturing activity, the ld. CIT(A) opined differently; the assessee submitting that the

operations carried out by it result in a new article or thing, i.e., a gas cylinder from an unusable and broken cylinder, which forms input to the assessee's `manufacturing operations'. Even if the same is not considered as `manufacturing', the same would be covered by the term 'production', which also finds mention in section 80IA, and which has been held by the courts as having been used in juxtaposition to the word 'manufacture', and to be of a wider import. The assessee is also in fact registered with the District Industries Centre ('DIC' for short). The output is subject to payment of central excise duty. The claim stood allowed to the assessee on that basis. Aggrieved, the Revenue is in appeal.

13. Like contentions were raised by the assessee before us, each relying on the order of the authority below as favourable to it, besides on case law.

14. We have heard the parties, and perused the material on record.

14.1 Without doubt, there has been no examination of the assessee's claim for deduction u/s. 80IA by Revenue at any earlier point of time. We find that while the AO has rejected the assessee's claim on the preliminary ground of the same being not a manufacture activity, the ld. CIT(A), whose action is under challenge before us, has allowed the claim on the basis that the assessee's process does indeed amount to manufacture. The issue is primarily factual, i.e., of an inferential fact, based on primary facts.

14.2 We may first consider the nature and scope of the activities being undertaken by the assessee. Reference to case laws, if at all, would come only later, i.e., on the basis of the parity of facts of the case or the application of the ratio of the decisions, which again can only be on the basis of facts. Toward this, we firstly observe no dispute with regard to the primary facts, having been rather conveyed by the assessee itself or through the tax audit report (refer: the assessment order; PB pages 11, 21, 30 & 31). The assessee

receives gas cylinders in a unsuable state from, as it appears, oil companies on job work basis. The work undertaken by the assessee includes:

(a) fixing a ring at the top of the cylinder;

(b) putting a footring at the bottom of the cylinder;

(c) welding the cylinder where there is a leakage; and

(d) testing the cylinder at a particular temperature.

The gas cylinder, rendered thus fit for being used as such is restored back to the supplier, raising a bill for processing charges. The process is claimed to amount to manufacture inasmuch as a new marketable commodity in the form of usable gas cylinder has come into existence. All the ingredients of manufacture, i.e., use of raw material and consumable stores, power, labour, equipment etc. are thus present. Reliance is placed by the assessee on the decisions in the case of *Indian Cine Agencies vs. CIT* 220 CTR 223 (SC) [(2009) 308 ITR 98] and *Vijay Ship Breaking Agencies vs. CIT*, 219 CTR 639 (SC) [(2009) 314 ITR 309], wherein it has been clarified that the word `new' does not find mention in the section, so that it is not a necessary condition for the relevant product to be considered as being either manufactured or produced.

The Revenue's case, on the other hand, is that the assessee is only undertaking repair work. As against a net weight of LPG cylinder at 14 kgs., the consumption of HR sheet per cylinder is only at 2.79 kgs., so that the same is not used for its manufacture, i.e., at 14 kg (net). The said sheet is in fact used only for footrings. The assessee is only repairing by removing the deficiencies, including the attachment of peripherals. In fact, the tax audit report itself describes the activity as heat treatment of the LPG cylinders. The apex court in the case of *Tamil Nadu State Transport Corporation Ltd vs. CIT* (2001) 252 ITR 883 (SC) has in the context of claim for deduction u/ss. 80HH and 80J, affirming the view of the hon'ble Madras High Court, clearly specified that retreading of tyres does not result in production of any new article or thing.

14.3 The terms `repair', `manufacture' and `production' have not been defined by or under the Act. The same are not terms of art, but one of common day use; the hon'ble

courts of law having themselves relied on their plain, natural, common user to elicit and elucidate their meaning.

a). The word `repair', one of common day use, stands defined as: `to restore to good condition'. It has been further explained by stating that if you *repair* something that has been damaged or is not working properly, you mend it; further explaining that a repair is something you do to mend a machine, building, piece of clothing or other thing that has been damaged or is not working properly (Collins English dictionary, third edition, page 1309).

b). The word `manufacture' has been explained by the hon'ble apex court time and again. As held in the classical decision in the case of Dy. CST v. Pio Food Packers (1980) 46 STC 63 (SC):

`*…Commonly, manufacturing is the end result of one or more process through which original commodities are made to pass. The nature and extent of processing may vary from one case to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes 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*.'

c). With regard to production, as explained in *CIT v. N.C. Budharaja & Co*. (1993) 204 ITR 412 (SC): (pgs. 423, 424)

`*The word "production" or "produce" when used in juxtaposition with the word "manufacture" takes into bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods*.'

In *Vijay Ship Breaking Agencies vs. CIT* (supra), as well as *Indian Cine Agencies vs. CIT* (supra), the apex court has confirmed its understanding of the term `production' as conveyed in the case of *CIT v. N.C. Budharaja & Co*. (supra). Referring to and relying on its said earlier decision, it held that the word "production" does not derive its color from the word "manufacture", further relying on the dictionary meaning of the term, *as being*

something that is brought forth or yielded naturally or as a result of effort or work. The decision in the case of *CIT v. N.C. Budharaja & Co*. (supra) stands thus affirmed by it.

14.4 Without doubt, the assessee is engaged in processing of unusable gas cylinders, though there is nothing to indicate that the gas cylinders are completely `broken'; in fact, none of the processes stated to have be undertaken address the same. However, as apparent, it is only where the processing leads to a commercially new product that it can be said that manufacture has taken place. The scope of `processing', which however does not qualify for deduction under the relevant section, as it may for other sections, stands explained and dealt with at length by the hon'ble courts, as in the case of *Chillies Exports Ltd. v. CIT* (1997) 225 ITR 814 (SC); *Ujagar Prints vs. Union of India* (1989) 179 ITR 317; *CIT v. Oceanic Exports Co*., 219 ITR 293 (Ker.). In the instant case, the raw material and finished product is only a gas cylinder, the assessee by its processes removing the deficiency/s, as by way of welding the joints, and effecting improvements, as by way of fixing the bottom and/or the top ring. *Can, one may ask, an article or thing be manufactured or produced twice over*? In fact, as it appears, the raw material consumed is not uniform per unit (i.e., per cylinder), so that it is not each and every gas cylinder processed that is fitted with these peripherals, which functionally only facilitate the handling of the gas cylinder, but only where required. Again, though apparent, it needs to be emphasized that these peripherals are not being joined or affixed for the first time; the gas cylinders having been already manufactured or produced once, and being treated or processed only on their having become unable to be so used, on account of user as such, so that, firstly, the said peripherals stood fixed to the cylinder when originally produced, all of which cannot be said to be afflicted with the same deficiency. In some both the top and bottom rings may have to be fixed, while in others, none, while in some others one or both may require being welded at the joints or properly aligned/straightened, as where they stand dislocated or gone out of shape. Fixing for all assumes a standardized deficiency, a practical impossibility; the assessee's mandate, as apparent, being to undertake the relevant processes as required to rectify the deficiency

attending the gas cylinders. The only process, uniformly applied, is the heat treatment, i.e., heating to a particular temperature. The basic character or use of the article or thing is, in any case, not changed, and remains the same. The assessee is thus only engaged in processing old gas cylinders for others at a charge, rendering it fit for being used again as one, i.e., in conformity with the safety standards as applicable, also fitting the peripherals parts as required. That is, in repair, by definition, and the user of some materials would not detract from the essence or the substance of the work or the transaction. Here, again, it may be emphasized that the gas cylinder having been (already) produced only as one such, it is only made of the sheet (raw material) of the required quality, weight and thickness, i.e., as prescribed, which is not changed, but subject to being fixed to remove the deficiencies that may have cropped therein from user as such, viz. leakages at joints, etc., by welding, heating. The same cannot, by any score, amount to manufacture of a gas cylinder. In fact, without doubt, the company to whom the cylinder is to be supplied would only subject it to rigorous testing for safety prior to issuance of fitness certificate/ `okay' seal thereto. Nothing has been produced, and the reliance on the decision in the case of *Vijay Ship Breaking Agencies vs. CIT* (supra), is again misconceived. When the word `new' is referred to as a necessary or implied condition of manufacture or production, what is mean is not in `form' but in sum and substance, i.e., in terms of its character, use, etc. This aspect in fact stands explained by the apex court in *Vijay Ship Breaking Agencies vs. CIT* (supra) itself, clarifying that by the use of the word `new' in *CIT v. N.C. Budharaja & Co*. (1993) 204 ITR 412 (SC), what is meant was that a distinct and different article emerges as a result of the subject activity. It would be apparent from the contours of the word `production' stated in the said case (refer para 14.3 (c) above) that no article or thing as such has been produced. The sum and substance of the decision in the case of *Indian Cine Agencies vs. CIT* (supra) is also the same, each of which has to be read in the context of the facts and circumstances of each case, with even a single fact altering the situation, even as explained by the apex court, *inter alia*, in its celebrated decision in the case of *Padmasundara Rao (Decd.) and Ors. vs. State of Tamil Nadu* (2002) 255 ITR 147 (SC); *State Financial Corpn. v. Jagdamba Oil Mills* AIR 2002 SC

834 [refer: (2009) 121 ITD 352 (Chennai)(TM) (pgs. 365, 366)]. The elucidation of the term `production' in *CIT v. N.C. Budharaja & Co*. (supra) remains applicable to date, with the recent decisions by the apex court, in our view, only delinking the `production' from `manufacture', so that the article or thing being produced may not necessarily have its origin in a manufacturing process or activity. The article may thus stand to be produced in any manner, and not necessarily through manufacture, and does not impact the essential, qualifying attribute that an article or thing, which did not exist earlier, must, nevertheless, be produced or come into being as a result of the activity under reference, for it to be considered as a case of production. *Rendering a particular thing fit for being used for which it stand already produced or manufactured, i.e., restoring it to good and workable condition, once again, is essentially a repair*.

14.4 In our considered view, therefore, the assessee's activity only amounts to repair, for which inference we have examined its scope and content. Reliance on case law, without drawing parity of facts, is of little moment. We may, further, to illustrate the point by way of examples, where the underlying activity or process under reference has been considered to be not a manufacture or production:

- Retreading of tyres: *Tamil Nadu State Transport Corporation Ltd vs. CIT* (2001) 252 ITR 883 (SC). Likewise, in the two cases by the hon'ble Madras high court reported at: ITR Vol. 253, pages 53 and 396.

- the job work undertaken to make case sets for watches by welding glas and case: *P.A. Time Industries v. Dy. CIT*, 101 ITD 132 (Chd.).

- Heating raw bitumen to obtain solid bitumen: *CIT v. Sri Meenakshi Asphalts*, 266 ITR 626 (Mad.)

- Electroplating: *CIT v. Hindustan Metal Refining Works (P.) Ltd*., 128 ITR 472 (Cal.); *Titanor Components Ltd. v. Dy. CIT*, 72 ITD 514 Del.)

- Cutting and polishing of uncut raw diamonds: *CIT v. Gem India Mfg. Co*. (2001) 249 ITR 307 (SC)

- Production of mineral water; both the raw material and final output being only drinking water: *Acqua Minerals (P.) Ltd. vs. Dy.CIT* 279 ITR (AT) 106 (also at 96 ITD 417)

- Roasting and grinding of chicory roots into chicory powder: *Sea Eagles Chicory v. CIT* (2002) 255 ITR 178 (SC)

14.5 Before parting, we may also address some of the collateral factors, which weighed with the first appellate authority in rendering his impugned decision. That is, the assessee's reliance on its registration by the DIC as well as by the Excise Department. The same were admittedly produced before the first appellate authority for the first time, and who has even not stated his reasons for their admission, even as the assessee has also not stated any, being only available with the assessee at the relevant time. The mandatory procedure under rule 46A having not been followed, the same cannot form the basis or even a part of the basis of his decision. Therefore, in our view, if we were to find that the same require consideration, i.e., that the assessee's case, as found by us, would stand to be modified on the basis of these materials, we would have to remit the matter back the file to the AO for the purpose, else not, being infructuous. In our view our clear finding as to the assessee's processes as amounting only to processing by way of carrying out repairs, it would not stand to be impacted in any manner by the said material. Further on, even on merits, an industrial unit would also be entitled to registration with DIC even where engaged in the processing, as an electroplating or a heat treatment unit for example, so that the same by itself is of little consequence. Similarly, the registration with the Excise Department is vide the assessee's letter dated 7-01-2002, i.e., valid only for the subsequent period. No excise has been either paid or demanded from the assessee by the Excise Department for any year and, in any case, for the current, for us to consider the assessee to have made out any *prima facie* by showing the excise returns. In fact, the levy of excise, though on manufacture or production, is only with reference to the product, as for example, a gas cylinder. Now the same could well be actually manufactured or produced, in which case no doubt it would be a case of being so, while in the instant case though the output is a usuable gas cylinder, the same emanates not as a

result of its manufacture or production, but on subjecting a gas cylinder, rendered unusable on account of certain, defined, defects, and only on its user as such, i.e., a gas cylinder, to some processes leading to their removal, so that it is rendered usable. A particular article or thing may become dysfunctional for want of a single part of insignificant value, so that the criterion of the product being rendered usable or workable, once again, would not make it any less a repair; rather, is repair by definition. As such, restoration, for consideration to the file of the AO, is not deemed necessary in the facts and circumstances of the case. Without prejudice to the foregoing, our findings being appealable, we may also add that even independent of the same, no claim u/s 80IA would lie inasmuch as the same is only in respect of an undertaking or enterprise that:

(a) develops or begins to operate infrastructure facilities; or

(b) provides telecommunication services; or

(c) develops industrial parks in the Special Economic Zone; or

(d) generates power or commences transmission or distribution of power.

The assessee's case, clearly, does not fall under any of these categories. There has been thus an error on the part of both the assessee and the Revenue in treating the claim as one u/s. 80IA of the Act, which may though lie under some other section. As such, even if our finding as to the assessee processes as being not manufacture or production is set aside or reversed in an appeal, the matter would have to necessarily go back to the file of the AO for consideration of the assessee's case on merits, even as we would have been obliged to do in case of returning a positive finding with regard to the manufacture or production. This is also for the reason that apart from the principal condition of manufacture or production, processing being admittedly not a relevant criterion, the relevant sections, though *para materia*, stipulate independent conditions to be satisfied, i.e., which do not find mention in section 80IA of the Act, and would need to be independently examined for their satisfaction. Reference by the ld. CIT(A) to the assessment for AY 2005-06 is again of no moment. The assessment order for that year is not on record, and neither any argument with reference thereto was made during hearing. The facts for that year may

well be different, even as the principle of *res judicata* is not applicable to the proceedings under the Act.

15. In the result, the appeal of the Revenue is partly allowed.

Sd/-	Sd/-
(R.K. GUPTA)	(SANJAY ARORA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Jaipur
Dated: April 27, 2012

*Mishra
Copy to:
1. The ACIT, Circle- 2, Alwar
2. M/s. Bhiwadi Cylinders (P.) Ltd., Alwar
3. The CIT (A), Alwar
4. The CIT concerned
5. The D.R., I.T.A.T.
6. Guard File (ITA No.779/JP/2011)

By Order

(ASSISTANT REGISTRAR)
ITAT, Jaipur Benches