

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI GEORGE GEORGE K. : JUDICIAL MEMBER
AND
SHRI B.C. MEENA : ACCOUNTANT MEMBER

ITA No. 3643/Del/2013

Asstt. Yr: 2009-10

DCIT, Cir 4(1),
New Delhi.

Vs Legancy Foods Pvt. Ltd.,
C-48, Kailash Apartment,
Kailash Colony, New Delhi.
PAN/GIR No. AAACL 9887 F

(Appellant)

(Respondent)

Appellant by : Shri S.N. Bhatia DR
Respondent by: Dr. Rakesh Gupta Adv.

ORDER

Per B.C. Meena, A.M:-

This is department's appeal assailing the CIT(A)-VIII, New Delhi's order dated 28-3-2013 relating to A.Y. 2009-10. The sole effective ground raised is as under:

"Whether in the facts and circumstances of the case, the Ld CIT(A) erred in deleting the addition of Rs. 6,58,66,937/- made by the A.O. by disallowing the claim of the assessee u/s 80IC"

2. Brief facts of the case are that the assessee had set up a unit at Baddi in Himachal Pradesh for packaging of Horlics, Boost for Glaxo Smithkline Consumer Healthcare Ltd. The assessee filed its return of income claiming deduction u/s 80IC of Rs. 6,59,69,287/- @ 100% on the profits of the eligible business alleging that it was engaged in the activity of

manufacturing of Horlics & Boost. The AO disallowed the claim of deduction u/s 80IC, inter alia, by observing that in from 3 CD of the audit report the nature of business was shown as "rendering services of job work" (packaging of Horlics, Boost for M/s Glaxo Smith Kline Consumer Healthcare Ltd.), which was not the manufacturing activity as defined in sec. 2(29BA) of the I.T. Act. In doing so the AO rejected the explanation of the assessee that the claim was allowed from the starting of business in 2005-06 and in scrutiny assessments for A.Y. 07-08 & A.Y 08-09.

2.1. In first appeal before the CIT(A), the assessee had filed a petition under rule 46A requesting for admission of additional evidences in the form of flow chart of manufacturing process, ledger account of M/s Ridge Construction, copy of certificate of deduction of sales tax, and other evidences, which were admitted by the CIT(A) vide order dated. 27.02.2013 and called for the remand report from the AO.

2.2. Before the Id. CIT(A) the assessee, inter alia, submitted that:

- (i) It had set up its manufacturing unit at Baddi in the state of Himachal Pradesh which qualifies for deduction u/s 80IC. The assessee is into this very business since A.Y. 2005-06 & had been allowed the deduction u/s 80IC in respect of its profits derived from this very industrial undertaking since then in the year of the profits, so much so that this claim was examined in Scrutiny Assessment in A.Y. 2007-08 & thereafter the claim was allowed in Assessment u/s 143(3). Claim was allowed in A.Y. 2008-09 also.
- (ii) The assessee is contract manufacturer and has entered into an Agreement/MOU with M/s Glaxo Smith Kline Consumer

Healthcare Ltd (OSKCH) since 13.07.2004 according to which raw-materials for the manufacturing of Energy Drinks namely Horliks & Boost were to be supplied by M/s GSKCH & thereafter the assessee appellant would do processing by using its own Plant & Machinery followed by packing of final products. The raw-materials supplied by M/s GSKCH and others, are Skimmed milk powder, whey powder, Fine crystalline sugar, Dry vitamin premix. Ascorbic Acid which are raw materials for Horliks. Raw materials supplied for Boostre Fortified Base, Fine crystalline sugar, Cocoa powder, Cocoa flavor DC 499, Cocoa flavor DC 497, Vanilla Flavor De 110. These raw materials upon processing are converted into Horlicks & Boost. Detailed Note on manufacturing process was filed before the Ld. A.O. during the course of assessment proceeding together with copy of Product Process Flowchart which would show the various stages through which various types of the raw-materials pass & are subjected to mechanical processing. These evidences are enclosed in the paper book also.

- (iii) The assessee was registered with Central Excise according to which also, products manufactured by appellant are treated as manufacturing. A Fresh process flow chart is enclosed explaining in greater detail the entire manufacturing process and it may be appreciated that inputs and outputs are different in all respects viz. technically & commercially. Sec.80IC is available where the industrial undertaking manufactures/ produces articles or things. It means that deduction is available if articles or thing is either manufactured or produced & the articles or things may not

necessary be manufactured. It may be seen that the physical properties, chemical properties & commercial properties of the main raw materials undergo a change after the processing & once products are manufactured, items of raw-materials can not be restored to their original positions. That means all the above properties undergo change to the extent of irreversibility. Final product is known technically & commercially by different names than those of the raw-materials. In fact CBEC vide its circular No. 7/90 dated 07.03.1990 has also explained on the basis of the report of Chief Chemist that when the above said inputs are mixed, a new product different from raw-material emerges & it can not be considered as simply re-packing.

2.3. In support of contentions that it was engaged in manufacturing and production, the assessee had placed reliance on the ratio of decisions in the cases of:

- (i) Arihant Tiles and Marbles (P) Ltd [2010] 320 ITR 79;
- (ii) DCIT vs. Benjamin Cheri an (2011)10 ITR (Trib)521 (Chennai);
- (iii) ITO vs. Natural Frangrances (2010) 27 Taxmann.com 292(Del); &
- (iv) Deepkiran Foods P. Ltd. vs. ACIT, AIT-2013-26-IT AT (Ahmd.)

2.4. The Id. CIT(A) allowed the claim of deduction u/s 80IC, by deleting the addition in question, inter alia, observing as under:

“I have considered the submissions of the appellant, findings of the AO and the facts on record. The remand report of the AO and the rejoinder filed by the appellant has also been considered. Perusal of the remand report shows that the AO

after considering the additional evidences furnished by the appellant has again held that the appellant was not entitled for deduction u/s 80IC, since the appellant could not prove that it was engaged in manufacturing activity.

The main issue involved is regarding the fact that whether the activity carried on by the appellant was a manufacturing activity. In order to avail deduction under section 80IC, an assessee has to fulfill the conditions contemplated in the section, therefore, it is imperative to take note of the relevant statutory provisions. The relevant part of section 80-IC, reads as under:

"Special provisions in respect of certain undertakings or enterprises in certain special category States.

80IC(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (2), 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, as specified in sub-section (3).

(2) This section applies to any undertaking or enterprise,

(a) which has begun or begins to manufacture or produce any article or thing, not being any article or thing specified in the Thirteenth Schedule, or which manufactures or produces any article or thing, not being any article or thing specified in the Thirteenth Schedule and undertakes substantial expansion during the period beginning (ii) on the 7th day of January, 2003 and ending before the 1st day of April, 2012, in any Export Processing Zone or Integrated Infrastructure Development Centre or Industrial Growth Centre or Industrial Estate or Industrial Park or Software Technology Park or Industrial Area or Theme Park, as notified by the Board in accordance with the scheme framed and notified by the Central Government in this regard, in the State of Himachal Pradesh or the State of

Uttaranchal; or

(b) which has begun or begins to manufacture or produce any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule, or which manufactures or produces 'any article or thing, specified in the Fourteenth Schedule or commences any operation specified in. that Schedule and undertakes substantial expansion during the period beginning

(ii) on the 7th day of January, 2003 and ending before the 1st day of April, 2012, in the State of Himachal Pradesh or the State of Uttaranchal; or

(3) The deduction referred to in sub-section (1) shall be

(i) in the case of any undertaking or enterprise referred to in sub clauses (i) and (iii) of clause (a) or sub-clauses (i) and (iii) of clause (b), of sub-section (2), one hundred per cent of such profits and gains for ten assessment years commencing with the initial assessment year;

(ii) in the case of any undertaking or enterprise referred to in sub clause (ii) of clause (a) or sub-clause (ii) of clause (b), of subsection (2), one hundred per cent of such profits and gains for five assessment years commencing with the initial assessment year and thereafter, twenty-five percent (or thirty per cent where the assessee is a company) of the profits and gains".

Perusal of the section would reveal that subsection (1) of section 80IC provides a deduction in respect of profit and gains derived by an undertaking or enterprises from any business referred to in sub-section (2), while computing the total income of an assessee. Sub-section (2) has further sub-sections and in the case of the appellant, the clause applicable is 80IC (2) (b) which provides that assessee has begun or begins to manufacture any article or thing, which are not specified in Thirteenth schedule. It means assessee should not manufacture any article. or thing which is specified in thirteenth schedule. Apart from this, the activity of manufacture should commence

between the period 7th day of Jan 2003 and ending on 1st April 2012. It should be at the place notified by the Board in accordance with the scheme.

The fact which is essential for examining the case of an assessee about the admissibility of deduction under sec. 80-IC is whether it manufactures or produces any article or thing. According to the Assessing Officer, expression "manufacture" has been defined in section 2(29)(B)(a) which reads as under:

"(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 ".

The stand of the AO is that the activity carried out by the assessee was not manufacturing and there was no chemical change in the composition of the raw material. The appellant has placed in the written submissions a flow chart exhibiting the activities carried out by it before producing altogether distinct saleable commodity which has its own identification in the commercial world.

In the case of India Cine Agency, Hon'ble Supreme Court has considered the judgment rendered in the case of Sesa Goa (supra) and all other decisions on the point which contemplate the meaning of expression "manufacture" as well as "production". The relevant discussion made by the Hon'ble Court reads as under:

"2. As noted above, the core issue is whether activity undertaken was manufacture or production.

3. In *Black's Law Dictionary (5th Edition)*, the word "manufacture" has been defined as, "the process or operation of making goods or cipy material produced by hand, by machinery or by other agency; by the hand, by machinery; or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations,

whether by hand labour or machine". Thus by process of manufacture something is produced and brought into existence which is different from that, out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (See Dy. CST (Law), Board of Revenue (Faxes) Coco Fibres [1992J Supp. I SCC 290).

4. *Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class 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. Process in manufacture or in relation to manufacture implies not only the production but also*

various stages through which the raw material is subjected to change by different operations. it is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See Collector of Central Excise v. Rajasthan State Chemical Works [1991] 4 SCC 473) = (2002-TIOL-66-SC-CX).

7. To put it differently, the test to determine whether a particular activity amounts to 'manufacture' or not is: Does a new and different good emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its character, use and name, whether be it the result of one process or several processes- 'manufacture' takes place and liability to duty is attracted.

Etymologically the word 'manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view, is a question depending upon the facts and circumstances of the case. (See Empire Industries Ltd. v. Union of India [J985]33 SCC 314) = (2002-TIOL-27-SC-CX)."

In the instant case it is observed that the appellant had entered into an agreement with M/s Glaxo Smith Kline Consumer Healthcare Limited (GSKCH) for production of "Boost & Horlics". Raw material was to be supplied by M/s GSKCH. The

appellant was to provide for necessary infrastructure, machinery, labour, & suitable storage space for all the material and finished products. The raw materials supplied to the appellant were in the form of skimmed milk powder, fine crystalline sugar, dry vitamin premix, ascorbic acid & other raw materials for production of Horlics. For production of Boost the raw materials supplied were Fortified Base, Fine crystalline sugar, Cocoa powder, Cocoa flavor DC 499, Cocoa flavor 497, Vanilla Flavor De 110. After undergoing various manufacturing processes the raw materials are converted into the final products. The manufacturing process of Horlics involves two stages which have been described as under by the appellant:

"Manufacturing process for sweetened milk powder.

*Materials are weighed as per manufacturing formula & transferred from drums into blender through pneumatic conveying system. Sequence of addition is-half qty of Skimmed milk powder, whey powder, total qty of Fine Crystalline sugar, ascorbic acid, Dey vitamin premix, finally remaining SMP. After conveying above batch is mixer, mixing is done for 15 Mins. Composite sample is collected for analyzing vitamin-C. After completion of mixing, powder is discharged in plastic drums having polyliner. Afterwards it is transferred to warehouse for captive consumption. The mixed powder is named as **Part-B** or Sweetened milk powder which is further issued to production for blending with PartJ4. **Part-B** itself is not a saleable product.*

ii. Manufacturing process of Horlics:

Materials are weighed as per manufacturing formula & transferred from drums in to blender through pneumatic conveying system. Sequence of addition is-186kg Malt based intermediate (Low fat), 186 kg Malt based intermediate (high fat) followed by 199 kg sweetened milk powder and then after 186 kg Malt based intermediate (low fat), 186 kg Malt based intermediate (High fat). Post addition of all the material mixing

is done for 5 minutes. The finished product is discharged & flows with gravity through screw conveyor into vibro sieve. Sieved product is passed through metal separation system. Afterwards packing is done in Jars & Pouches by Jar Filling machine From Auto pack and Pouches by Bosch machine.

As regards the manufacture of Boost the two stages involved are as under:

i. Manufacture of flavored fortified base

Material are weighed as per manufacturing go formula & transferred from drums into blender through pneumatic conveying system. Sequence of addition is 575 kg (5 drums) fortified base for Boost, pre-blend of fine crystalline sugar, cocoa powder & coca flavor DC-499, COCA FLAVOR dc-497, vanilla flavor DC-11 0 and 460 kg (4 drums) of fortified base for Boost. After conveying one batch is mixer, mixing to be done for 1 minutes at 5.5 RPM Composite sample is collected for analyzing BFC. Afterwards it is transferred to warehouse for captive consumption. The mixed powder is named as Part-B or flavored fortified base for Boost. Part-B itself is not a saleable product

ii. Manufacturing process of Boost:

Material are weighed as per manufacturing formula & transferred from drums into blender through pneumatic conveying system. Sequence of addition is- 460 kg Boost, 237 kg flavored fortified base for boost followed by 4.09 kg glucose granules (yellow) & 4.09 kg glucose granules (orange) and then after 460 kg Boost Base. Post addition of all the material, mixing is done for 3 minutes. The finished product is discharged & flows with gravity through screwconveyor onto vibro sieve (3x3mesh). Sieved product is passed through metal separation system.

After wards packing is done in Jars & Poches by jar

filling machine from auto pack and pouches by Bosch machine. "

Perusal of the above facts show that the raw materials acquired by the appellant after undergoing extensive processes which involve the use of machinery are converted into Horlics & Boost. There is a distinct change of one object to another for the purpose of making it marketable. A new product has been brought into existence which is distinctly different from the raw materials which are used and is a commercially different commodity. A different commodity having a distinct name and character emerges from the raw material after undergoing various processes in the form of mixing, blending, sieving etc. at different temperatures. The final product is entirely different commercially from the raw material used. The chemical composition has also undergone change. Labour and machinery have also been utilized for production of the final product. In view of the above it is clear that the appellant is engaged in manufacturing and production. The Hon'ble Supreme Court in the case of CIT vs Oracle Software India Ltd. has held as under:

"10. In our view, if one examines the above process in the light of the details given hereinabove, commercial duplication cannot be compared to home duplication. Complex technical nuances are required to be kept in mind while deciding issues of the present nature. The term "manufacture" implies a change, but every change is not a manufacture, despite the fact that every change in an article is the result of a treatment of labour and manipulation. However, this test of manufacture needs to be seen in the context of the above process. If an operation/process renders a commodity or article fit for use for which it is otherwise not fit, the operation/process falls within the meaning of the word "manufacture". Applying the above test to the facts of the present case, we are of the view that, in the present case, we are of the view that, in the present case, the assessee has undertaken an operation which renders a blank CD fit for use for which it was otherwise not fit. The blank CD is an

input. By the duplicating process undertaken by the assessee, the recordable media which is unit for any specific use gets converted into the programs which is embedded in the mastiff media and, thus, the blank CD gets converted into recorded CD by the afore stated intricate process. The duplicating process changes the basic character of a blank CD, dedicating it to a specific use. Without such processing, blank CDs would be unfit for their intended purpose. Therefore, processing of blank CDs would be unfit for their intended purposes. Therefore, processing of blank CDs dedicating them to a specific use, constitutes a manufacture in terms of section 80IA(12) read with section 33B of the IT Act"

Similarly, in the case of CIT v. Emptee Poly-Yarn P. Ltd. (supra), the Hon'ble Supreme Court has followed the decision in the case of CIT vs. Oracle Software India Ltd (supra), and held in paragraph 8 as under:

"Applying the above test to the facts of this case, it is clear that POY simpliciter is not fit for being used in the manufacture of a fabric. It becomes usable only after it undergoes the operation/process which is called thermo mechanical process which converts POY into texturised yarn, which, in turn, is used for the manufacture of fabric. One more point needs to be mentioned. Under the Income Tax act, as amended in 2009, the text given by this court in Oracle Software's case (2010) (1) Scale 425' has been recognized when the definition of the word "manufacture" is made explicit by the Finance (No.2) Act, 2009, which states that "manufacture" shall, inter alia, mean a change in bringing into existence of a new and distinct object or articles or thing with a different chemical composition or integral structure. Applying this definition to the facts of the present case, it may be mentioned that the above thermo mechanical process also beings about a structural change in the yarn itself which is one of the important tests to be seen while judging whether the process is manufacture or not. The structure, the character, the use and the name of the

product are indicia to be taken into account while deciding the question whether the process is a manufacture or not".

Perusal of facts on record also show that the appellant was registered with the excise department wherein it has been stated by the excise department that the appellant was engaged in manufacturing. Perusal of the audit report of the excise department shows that it has clearly been mentioned that the appellant was engaged in the manufacture of Malt Based Foods and was falling within chapter 19 of CETA attracting central excise duty. The Hon'ble Supreme Court in the case of Arihant Tiles & Marbles Pvt .Ltd. 320 ITR 79 (SC) has observed that when the activity undertaken by the assessee involves levy of excise duty then to say that the said activity does not amount to manufacture or production U/S 801A will have disastrous consequences. It is also pertinent to note that the appellant had been allowed deduction U/S 801C from A.Y. 2005-06 to A.Y. 2008-09 in respect of the profits by the AO, therefore in view of consistency also following the decision of the Hon'ble Supreme Court in the case of Radhaswami Satsang the deduction claimed by the appellant is allowable. In view of the findings above that the appellant is engaged in the process of manufacturing and production and in view of the judicial decisions on the subject discussed above and also in view of the fact that the deduction has been allowed to the appellant in the earlier years it is held that the appellant is entitled to the claim of deduction under the provisions of section 801C. The disallowance made by the AO is deleted.”

3. We have considered rival submissions of both the sides and have gone through the entire material available on record. The assessing officer disallowed the claim of deduction u/s 801C by observing that assessee was not engaged in manufacturing activity. Therefore, the main issue involved is whether the activity carried on by the appellant was a manufacturing activity. To examine whether the assessee had to fulfill the conditions

contemplated u/s 80IC, it is imperative to take note of the relevant statutory provisions. Sub-section (1) of section 80IC provides a deduction in respect of profit and gains derived by an undertaking or enterprises from any business referred to in sub-section (2), while computing the total income of an assessee. Sub-section (2) has further sub-sections and in the case of the assessee, the clause applicable is 80IC (2) (b) which provides that assessee has begun or begins to manufacture any article or thing, which are not specified in Thirteenth schedule. It means assessee should not manufacture any article or thing which is specified in thirteenth schedule. Apart from this, the activity of manufacture should commence between the period 7th day of Jan 2003 and ending on 1st April 2012. It should be at the place notified by the Board in accordance with the scheme.

3.1. Admittedly the assessee was registered with the excise department. In the audit report of the excise department the assessee has been shown to be engaged in the manufacture of Malt Based Foods, falling within chapter 19 of CETA attracting central excise duty.

3.2. In our considered opinion the Id. CIT(A) in coming to the conclusion that assessee was engaged in the activity of manufacturing and production, eligible for deduction u/s 80IC, has drawn support from various judicial pronouncements and elaborately taken into consideration the facts of the case. It is also not disputed that assessee has already been allowed deduction u/s 80IC in earlier years from A.Y. 2005-06 to A.Y. 2008-09. No change in facts for the assessment year in question has been brought on record. In this view of the matter we see no reason to interfere in the order of CIT(A) on

the issue in question. Accordingly, order of CIT(A) is upheld.

4. In the result, revenue's appeal is dismissed.

Order pronounced in open court on 22-08-2014.

Sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Dated: 22-08-2014.

MP

Copy to:

- (1) Assessee
- (2) AO.
- (3) CIT(A)
- (4) CIT
- (5) CIT(DR)

Sd/-
(B.C. MEENA)
ACCOUNTANT MEMBER