ORDER OD 1-6

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

ITA/51/2019
M/S UNICORN INDUSTRIES
VS
PRINCIPAL COMMISSIONER OF INCOME TAX

ITA/52/2019
UNICORN INDUSTRIES
VS
PRINCIPAL COMMISSIONER OF INCOME TAX KOL 01

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ITA/55/2019
UNICORN INDUSTRIES
VS
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-I

ITA/57/2019
UNICORN INDUSTRIES
VS
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-I

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 26th June 2024.

Appearance:

Mr. J. P. Khaitan, Senior Advocate
Mr. Akhilesh Kumar Gupta, Advocate
Ms. Swapna Das, Advocate
... for appellant.

Mr. Tilak Mitra, Advocate
... for respondent.

1. Heard Sri J. P. Khaitan, learned senior advocate, assisted by Sri Akhilesh Kumar Gupta, learned counsel for the appellant and Sri Tilak Mitra, learned senior standing counsel for the respondent department.

2. These appeals were admitted by this Court on the following substantial questions of law:-

> *"i. Whether on the facts and in the circumstances of the case, it is an admitted fact that the subject pan masala is without any tobacco content?*
>
> *ii. If the answer to the first question is in the affirmative, whether pan masala without any tobacco content will fall within the purview of Entry 1 of Part A of the Thirteenth Schedule to the Income Tax Act, 1961?"*

3. The assessment years involved in the above-noted six income tax appeals are as under:-

| Sl. No. | Income Tax Appeal Number | Assessment Year |
|---|---|---|
| 1. | ITA/51/2019 | 2007-08 |
| 2. | ITA/55/2019 | 2008-09 |
| 3. | ITA/52/2019 | 2009-10 |
| 4. | ITA/53/2019 | 2010-11 |
| 5. | ITA/54/2019 | 2011-12 |
| 6. | ITA/57/2019 | 2012-13 |

4. The impugned common order dated 31.08.2018 has been passed by the Income Tax Appellate Tribunal, Kolkata, 'B' Bench, Kolkata in ITA

Nos.1962 to 1966/Kol/2016 (assessment years 2007-08, 2008-09, 2009-10, 2011-12 and 2012-13). The above-noted ITA/53/2019 arises from the impugned order dated 25.01.2019 in ITA No.48/Kol/2016 (assessment year 2010-11) passed by the Income Tax Appellate Tribunal, Kolkata, 'A' Bench, Kolkata, in which the ITAT has followed its above-noted impugned order dated 31.08.2018 passed in respect of the above-noted five assessment years. In the impugned order, the ITAT has also noted that common questions of fact and law are involved in all the appeals and accordingly, the ITAT heard all the five appeals together and one appeal separately following its common order. All the aforesaid six appeals were filed by the Revenue before the ITAT challenging the order of the CIT(Appeals).

5. Since common questions of law and fact was involved in all these appeals, therefore, with the consent of the learned counsel for the parties, all the above-noted income tax appeals have been heard together, treating ITA/51/2019 as the leading appeal.

**Facts**

6. Briefly stated, facts of the present case are that the appellant assessee established an undertaking in industrial area situate in Khasra No.786/1064 notified by the Central Board of Direct Taxes by Notification No.41 [F. NO.142/35/2003-TPL] dated 06.02.2004 under Section 80-IC(2)(a) of the Income Tax Act, 1961 [hereinafter referred to the Act, 1961]. The unit was established by the appellant/assessee for

manufacture of mouth freshener (Pan Masala) not containing any tobacco or catechu. The aforesaid unit commenced production with effect from 27.06.2006. The appellant/assessee obtained registration under the Central Excise Act, 1944, Central Sales Tax Act and also under other applicable laws.

7. As per Form B (certificate of registration) under Rule 5(1) of the Central Sales Tax Rules, the raw materials used for manufacturer of mouth freshener (Pan Masala) are as under:-

"Fennel, sugar coated fennel, sugar crystal, scented betel nuts, dry dates, coriander seeds, menthol, flower of lime, jintan, saffron, elachi powder."

8. In the assessment order also, the Assessing Officer noted the consumption of raw materials as:-

"Betel nut, crystal lime, fennel, menthol, flower gulkand, dry dates, sugar crystal, sugar fennel, coriander seeds, paraffin glycerine and sugar coated fennel."

9. In the assessment order for the assessment year 2007-08 (internal page 8), the Assessing Officer recorded a finding regarding product of the appellant/assessee to be Pan Masala (Mouth Freshener). At internal page 16 of the assessment order, it noted that the assessee has manufactured 1,59,529 kgs of mouth freshener during the financial year 2009-10. **Thus, as per case of the revenue, the appellant/assessee had established a unit on 27.06.2006 in an area**

**notified under Section 80-IC(2(a) of the Act, 1961** (notified by notification no. 41 dated 06.02.2004) and **started manufacturing mouth freshener** (Pan Masala) **from the raw materials aforementioned which neither contained tobacco nor catechu**.

10. The assessee claimed deduction under Section 80-IC(2)(a) of the Act, 1961 which was rejected by the Assessing Officer on grounds, **firstly,** that the process applied by the assessee does not amount to manufacturer and **secondly**, the product of the assessee does not find mention in Schedule 14. Aggrieved with the assessment order, the assessee filed separate appeals before the Commissioner of Income Tax (Appeals) which were allowed and it was held that the process applied by the assessee amounts to manufacture and the assessee is entitled for deduction under Section 80-IC(2)(a) of the Act, 1961. Aggrieved with the orders of the Commissioner of Income Tax (Appeals), the revenue filed separate appeals before the Income Tax Appellate Tribunal, which have been allowed by the impugned orders.

11. In the impugned orders, the ITAT held that the process applied by the assessee is manufacture but the product of the assessee shall stand excluded for deduction in view of part B of the Thirteenth Schedule to the Act, 1961. The conclusion/findings recorded by the ITAT in the impugned order are reproduced below:-

> *"... **We adopt the above detailed discussion mutatis mutandis to decline Revenue's first and foremost plea qua "manufacturing" aspect to conclude that the assessee can be safely held to have***

***manufactured / produced its pan masala in the specified unit site in Sikkim.***

*10. Next come the Revenue's latter arguments based on inter-play of impugned section 80IC deduction provision vis-à-vis operation of the restrictive covenant enshrined in Thirteen Schedule's negative list read with positive list of the Fourteenth Schedule (supra) relevant to the specified list of article(s) or thing(s) in issue. We find first of all that hon'ble apex court's latest constitutional bench's decision in Commissioner of Customs vs. Dilip Kumar Roy Civil Appeal No.3327 of 2017 decided on 30.07.2018 has gone into a very elucidate discussion on the issue of basic tenets of literal or strict interpretation to be adopted with regard to a taxing statute, their interplay, purposive construction (para 25) as well as application of equitable principles to inter alia conclude* ***that there is no room for intendment in such a fiscal statute and regard must be had to clear meaning of the words and the matter should be governed wholly by the language incorporated therein****. Their lordships' make it clear that one has to strictly look ... used without any scope for searching intendment or for drawing any presumption. Hon'ble highest court of the land thereafter came to the core issue i.e. in the event of ambiguity in an exemption notification, should the benefits flowing therefrom be construed in Revenue's or to the subject/ assessee favour. Their lordships sum up answer of the reference made in para 51 that an exemption provision in a taxing statute is to be interpreted strictly. It is the assessee's burden to show that his case comes within the specified parameters envisaged in the exemption clause or notification and any ambiguity in such a provision has to be interpreted in Revenue's favour.*

*11. Coupled with this, their lordship earlier decision in Raghunath Bareza vs. PNB (2007) 135 Company Cases 163 (SC) holds that it is a cardinal principle of interpretation of a statute that the words used therein by the legislative are to be understood in their natural, ordinary or popular sense and construed as per their grammatical meaning unless such a construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. Their lordships further in invoked "Golden Rule" of interpretation that the words*

*of a statute must prima facie to be given their ordinary meaning. We find it very much relevant at this stage that their lordships yet another judgment in Smt. Tarulata Shyam v (1977) 108 ITR 345 (SC) also made it clear that it is the fundamental rule of taxation that where there is no scope for importing into the statute words which are not there, such an important word would be not to construe but to amend the statute. And also that even if there is any casus omisus, the defect can be remedied by the legislation alone and not by judicial interpretation.*

*12. We keep in mind all these settled legal principles to avert to the taxpayer's impugned section 80IC deduction claim.* ***There is hardly any dispute by now that it has manufactured "pan masala" in its specified unit situated in Sikkim state. Its claim throughout was that "pan masala" is covered in 7th Item Part-B in the Fourteenth Schedule*** *(applicable for the stare of Sikkim) to be "Food processing including agro-based industries, processing preservation & food packaging of fruits and vegetables (excluding conventional grinding/ extraction units). We are of the view that the above Item in the positive list is meant to promote food processing including of agro based industries, processing, preservation & food packaging of fruits and vegetables only.* ***We go by ordinary grammatical meaning of food processing to be "the process by which food is processed for consumption by humans*** *or animals" as per Collins English dictionary therefore. We repeat that the Assessing Officer threw sufficient light as per suitable references; sector-wise, that "pan masala" does not find place in National Food Processing policy as well. The assessee's section 80IC deduction claim therefore fails to satisfy the requisite test of its inclusion in positive list of specified articles or things prescribed in Item No.7, Part-B, Fourteenth Schedule to section 80IC(2) of the Act. It therefore fails to discharge its burden to be covered under the impugned deduction provision as per hon'ble apex court's constitutional bench's ratio hereinabove.*

*13.* ***It further transpires that the assessee's manufactured item "pan masala" forms part of Thirteenth Schedule Part-A (for the state of Sikkim) comprising of a negative list at serial No.1 reading "tobacco products (including cigarettes, sigma and gutka etc.)***

***rather. The question as to whether pan masala is included in tobacco products or not stands answered by the legislature itself in part-B in the same schedule very much containing the crucial expression "tobacco and tobacco products including cigarettes and pan masala.*** *It is thus clear that legislature's clinching expression "etc" used in former part-A is inclusive in nature which is sufficiently answered in part-B of the very schedule wherein the tobacco products category includes "pan masala" since "etc" has been omitted to be used. We observe therefore that the legislative intention is explicitly clear that it had sought to exclude tobacco products as segment including cigarettes and pan masala from the ambit of section 80IC of the Act.* ***We apply necessary implication in these facts and circumstances to hold that "pan masala" definition used in para-B of the Thirteenth Schedule is included in tobacco products would also cover part A thereto describing very categories of tobacco products to be not eligible for section 80IC deduction.*** *We conclude in these peculiar facts and circumstances that the assessee's impugned claim fails to clear the rigor of the above negative list in Thirteenth Schedule Part-1 Item No. 1 applicable for Sikkim. We further are of the view that an item covered in the negative list cannot be held to have been simultaneously included in the positive is as such an interpretation would lead to absurdity in interpretation of the two limbs of section 80IC deduction provision. We accordingly restore Assessing Officer's action making assessee's deduction claim of ₹436,98,603/ ... assessment year 2007-08."*

**Submissions:-**

12. Learned Counsel for the assessee/appellant submits as under:-

i) It is admitted case that the provision applicable to the assessee is Section 80(2)(a)(i) of the Act, 1961. Assessee's unit was situated in the notified area which started manufacturing with effect from 27.06.2006.

ii) The product manufactured by assessee does not fall under any of the items in Part A of Thirteenth Schedule to the Act, 1961.

iii) Tribunal has read Part B of Thirteenth Schedule which is applicable to the State of Himachal Pradesh and State of Uttaranchal, whereas Part A is relevant for the State of Sikkim where the unit of the assessee was established in a notified area. The Tribunal has committed a manifest error to read Part B in Part A of the Thirteenth Schedule which is wholly impermissible.

iv) Section 80-IE was inserted by Finance Act, 2007 which is applicable to units established in North Eastern States after 01.04.2007 but before 01.04.2017. Since the assessee's unit was established and came into production much prior to 01.04.2007, therefore, Section 80-IE has no application in the case of the appellant/assessee.

13. Mr. Tilak Mitra, learned senior standing Counsel for the respondent submits as under:-

i) Section 80-IC(2)(b) read with Fourteenth Schedule to the Act, 1961 shall be applicable to the case of the assessee even though the assessee established its unit in a notified area under Section 80-IC(2)(a) of the Act, 1961. On being asked for the logic behind

the above noted submissions learned senior standing counsel could not answer.

ii) The ITAT has correctly passed the impugned order and therefore it requires no interference.

14. No other arguments have been advanced by learned Counsels for the parties before us except the arguments aforenoted.

**Discussion and findings**:

15. We have carefully considered submissions of learned Counsel for the parties and perused the paper book.

16. We find that undisputed facts of the case are that the appellant/assessee has established its unit in an area notified by the Central Board of Direct Taxes by notification no. 41 dated 06.02.2004 under Section 80-IC(2)(a) of the Act, 1961. The product manufactured by the appellant/assessee is mouth freshener (Pan Masala) and its ingredients/raw materials do not include tobacco in any form. Thirteenth Schedule under Section 80-IC(2) of the Act, 1961 is in three parts **namely** Part A, Part B and Part C. **Part A is** for the State of Sikkim, **Part B** relates to the State of Himachal Pradesh and Uttaranchal and **Part C** relates to the Jammu and Kashmir. In the present case, we are concerned with Part A which is for the State of Sikkim.

17. Sub-section (1) and sub-section (2) of Section 80IC of the Act, 1961 and Part-A of the 13th Schedule are relevant for the purpose of the present case which are reproduced below:

> ***"80-IC. (1)*** *Where the gross 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****-*
>
> *(i) on the 23rd day of December, 2002 and ending before the 1st day of April, [2007], 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 Sikkim; or*
>
> *(ii)* ***on the 7th day of January, 2003 and ending before the Ist day of April, 2012,*** *in any Export Processing Zone or Integrated Infra- structure 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*
>
> *(iii) on the 24th day of December, 1997 and ending before the Ist day of April, 2007, 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 any of the North-Eastern States;*

*(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-*

*(i) on the 23rd day of December, 2002 and ending before the 1st day of April, "[2007], in the State of Sikkim; or*

*(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*

*(iii) on the 24th day of December, 1997 and ending before the 1st day of April, 2007, in any of the North-Eastern States."*

*THE THIRTEENTH SCHEDULE*

*[See sections 80-IB(4) and 80-1C(2)*

*LIST OF ARTICLES OR THINGS*

***PART A***

*FOR THE STATE OF SIKKIM*

| *S. No.* | *Article or thing* |
|---|---|
| *1* | ***Tobacco and tobacco products*** *(including cigarettes, cigars and gutka, etc.)* |
| *2.* | *Aerated branded beverages* |
| *3.* | *Pollution-causing paper and paper products.* |

18. The provisions of section 80-IC(2) are plain and unambiguous. While **clause (a)** of Sub-section (2) of Section 80-IC **applies to an undertaking or enterprise manufacturing or producing any article or thing**, established within a specified period **in an area notified by the Central Board of Direct Taxes**, Clause (b) applies to undertaking

or enterprise producing any article or thing specified in the 14th Schedule. Clause (a) of sub-section (2) further makes it clear that it is applicable to any industrial undertaking or enterprise which begins to manufacture or produce **any article or thing** not being any article or thing specified in the 13th Schedule. Therefore, clause (a) of sub-Section (2) of Section 80IC is applicable to any undertaking or enterprise established in an area notified by the Central Board of Direct Taxes to manufacture or produce any article or thing except those specified in the 13th Schedule. Part-A of the 13th Schedule is applicable for the State of Sikkim, whereby tobacco and tobacco products (including cigarettes, cigar, gutkha etc.), aerated branded beverages and pollution causing paper and paper products have been excluded. Except these items any undertaking or enterprise established in a notified area within specified dates to manufacture or produce any article or thing, is eligible for deduction under Section 80IC(3) of the Act, 1961. Entry-1 of Part-B of the 13th Schedule applicable to the State of Himachal Pradesh and State of Uttaranchal, provides the article or thing "tobacco or tobacco products including cigarettes and pan masala". The word 'pan masala' used in Entry 1 of Part B is not incorporated in Part-A of the 13th Schedule (for the state of Sikkim). Once the Legislature has not included pan masala in Part-A for the State of Sikkim, then it was not open for the ITAT to read the aforesaid entry-1 of Part-B in Entry-1 of Part-A. The finding recorded by the ITAT that the item manufactured by the appellant/assessee is included in

tobacco products, is totally baseless and beyond the provisions of Section 80IC(2) read with the 13th Schedule to the Act, 1961.

19. For all the reasons aforestated, the impugned orders of the Income Tax Appellate Tribunal, "B" Bench, Kolkata dated 31.08.2018 passed in ITA No.1962, 1963, 1964, 1965 and 1966/Kol/2016 (Assessment Years 2007-08, 2008-09, 2009-10, 2011-12 and 2012-13) and the impugned order passed in ITA No.48/Kol/2016 (Assessment Year 2010-11) dated 25.01.2019 by the Income Tax Appellate Tribunal, "A" Bench, Kolkata, in respect of mouth fresheners (pan masala) cannot be sustained and is hereby set aside. Both the substantial questions of law are answered in favour of the assessee and against the revenue. It is held that the appellant assessee is entitled for deduction under Section 80-IC(2)(a)(i) read with Section 80-IC(3) of the Act, 1961.

20. All the appeals being ITA/51/2019, ITA/52/2019, ITA/53/2019, ITA/54/2019, ITA/55/2019 and ITA/57/2019 are hereby allowed to the extent indicated above.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

S. Kumar/mg/As.