आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Shri, M. Balaganesh, Accountant Member

ITA No.1962 to 1966/Kol/2016 Assessment Years :2007-08 to 2009-10 & 2011-12 to 2012-13

DCIT/ACIT, Circle-3(2), Gangtok, Aayakar Bhawan, Income TaxOffice, Bhanupath, Nr. White Memorial Hall, P.O. Raj Bhawan, Gangtok-737 103, Sikkim	**V/s**.	M/s Unicorn Industries, 3, Rajnigandha Bunglows, B/h Sant Kabir School, Drive-in-Road, Thaltej, Ahmedabad (Manufacturing Unit at Khasra No.786/1064, Opp. Nayabvazar, Majhigaon, Jorthang,, South Sikkim-737121 [**PAN No.AABFV 9520 G**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	None
राजस्व की ओर से/By Revenue	Shri G. Hangshing CIT-DR & Shri S. Dasgupta, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	20-06-2018
घोषणा की तारीख/Date of Pronouncement	31-08-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These five Revenue's appeals for assessment year(s) 2007-08 to 2009-10 and 2011-12 to 2012-13 arise against the Commissioner of Income Tax (Appeals)-3 Ahmedabad is separate orders dated 01.08.2016 in case No. CIT(A)-3/Cir.3(3)/201/15-16 (former two assessment years) and dated 02.08.2016 in latter three assessment year(s) in case No. CIT(A)-3/Cir-3(3)/199-187/15-16, involving proceedings u/s. 143(3) r.w. 147 in first, second and fourth assessment year(s), u/s 143(3) r.w.s. 263 in third and u/s 143(3) of

the Income Tax Act, 1961; in short 'the Act' in last assessment year; respectively.

Cases called twice. None appears at assessee's behest. The registry had sent it an RPAD notice 25.04.2018. Postal authorities have returned back the same unserved with the remarks "mills closed". We thus proceed ex parte against the assessee

2. The Revenue's identical pleadings *qua* its first and foremost substantive grievance in these five appeals challenges CIT(A)'s action(s) reversing the assessment findings disallowing assessee's claim of section 80IC deduction claims involving figures of ₹436,98,601/-, ₹32,43,234/-, ₹80,97,963/-,₹57,051,53,98, ₹19,38,38,674/-;(assessment year-wise) respectively, as deleted during the lower appellate proceedings. The Revenue states very fairly that at the outset that all the relevant fact qua the above sole issue are identical in these five assessment year(s). We therefore treat **ITA 1962/Kol/2016** for assessment year 2007-08 as the "***lead***" case.

3. We now come to relevant facts. The assessee stated to be engaged in manufacturing and trading activities. The relevant manufactured items is "pan masala". The Assessing Officer issued section 148 notice dated 03.03.2014 after forming reasons to believe that the instant taxpayer's business activity neither amounted to manufacture nor production of any article or thing u/s 80IC(2) and therefore its corresponding deduction claimed of ₹436,98,608/- resulted in escapement of taxable income from being assessed.

4. Case file suggests that assessee filed its objection petition dated 16.03.2015 challenging validity of reopening. The Assessing Officer declined the same in his separate order dated 30.03.2015 as reproduced in extempore in impugned re-assessment framed on 31.03.2011. He was of the view that the assessee inter alia not filed its return within the stipulated time of thirty days', section 142(1) notice stood issued on 07.05.2014 calling for relevant details followed by various hearings as well as the fact that the reopening reasons sufficiently quoted the corresponding proceedings in assessment year 2010-11 including the legal issue of section 80IC deduction alongwith

details of plant and machinery installed, labour employed, inconsistencies in consumption of raw material followed by analysis of purchase and sales; made it clear that the impugned recourse to section 148 proceedings had be validly undertaken.

5. The Assessing Officer thereafter came to assessee's profit and loss account. It had stated itself to be engaged in business of manufacturing "pan masala/mouth frershner"; as per the relevant sales, closing stock finished goods, raw material consumption and assets' depreciation details *qua* section 80IC deduction of ₹436,98,608/-. Its manufacturing unit as per records was at Khasra (No.786/1064; opposite Nayabazar, Majhigaon, Jorethang, Sikkim).

6. The Assessing Officer then issued a detailed show cause notice dated 05.03.2015 *inter alia* spelling out various clarification(s) sought from the taxpayer. Both the Learned Departmental Representatives are very fair in informing us at this stage that the Revenue's grievance is confined to assessee's section 80IC deduction claim only. We keep in mind the same to notice that the assessee's reply dated 16.03.2015; as per page 6 in assessment order in issue, *inter alia* pleaded that it had commenced its manufacturing operations from 24.04.2006 i.e. during the relevant previous year only. Its case was stated to be covered under Item seven Part-B of the Fourteenth Schedule of the Act comprising of a positive list of articles or things to be "food processing including agro based industries, processing, preservation and packing of fruits and vegetables (excluding conventional grinding / extraction units. Case file suggests that all this failed to evoke Assessing Officer's concurrence. He observed first of all that assessee's grinding activity in so-called manufacturing of "pan masala" stood excluded in the above "item 7 (supra). He then referred to Central Excise Department's notification dated 25.04.2007 prohibiting "pan masala" manufacturing in "Sikkim" vide its notification dated 25.04.2007 with effect from 01.04.2007. The Assessing Officer further held that "pan masala" could not be treated as a food item in view of National Food Processing policy specifying various projects namely fruits and vegetables, fisheries, meat and poultry products

milk, diary, Brewesy items, consumer industry's major products & plantation major products. He took note of the legislative developments incorporating section 80IE of the Act with effect from 01.04.2007 specifically excluding the above corresponding manufactured items in the relevant list.

7. The Assessing Officer further went for a very comprehensive and detailed discussion on manufacturing aspect of the issue. He observed that the same had to involve *inter alia* production of article from use of raw material by giving such material of new form, quality, properties by applying process upon the said raw material, material concerned to have undergone transformation into a new and different article commercially different from the initial raw material and that the relevant process must be connected with the ultimate production of goods only. The assessing authority further was of the view that assessee's Form 3CD containing capital assets nowhere indicated any factory building as well and therefore, it was not clear as to how it could be held to have been manufacturing its specified products. Its plant and machinery details also revealed mixer equipment of ₹35,000/- purchased from M/s Bhargaua Enterprise followed by batch coading electronics, wet paver grinder with electric motor, 3 seal machines with photo electric control to pack mouth freshner and oven with structure only involving all latter items gross value of ₹5,56,005/- to conclude that its main activity was that of mere packing mouth freshner's pouches only instead of having carried out any manufacturing as per the deduction provision in question. He noticed fluctuation in consumption of raw material purchases as well. Next came assessee's power and fuel consumption of ₹9,116/- only unreasonably high gross profit ratio, purchase suppliers to have either closed down their business or suspicious resulting its disallowance of deduction claim of ₹4,36,98,608/-. This followed disallowance of partners' remuneration of ₹47,250/- and treatment of fixed deposit interest income and excise incentive receipts of ₹1,300/- and ₹295,28,821/-as income from other sources.

8. The CIT(A) has reversed assessment findings as follows:-

"A. I find that effective from 01.04.2007, the Govt of India has notified that new unit which manufacture Pan Masala from 01.04.2007 will not be eligible for exemption as Pan Masala was shifted to negative list. I also therefore conclude that the converse is equally true. I find that manufacture of Pan Masala was covered as an exemption prior to 01.04.2007. I find that since the Appellant started manufacturing Pan Masala from 2006 the appellant squarely falls under the exemption from 2006. I find that the learned AO has totally misdirected himself in appreciating this simple evidence and basically digressed to irrelevant issues.
B. The very first issue to be decided is whether the Appellant is in business of manufacture of Pan Masala (Mouth Fresheners) and Wrist Watches?
1. I find that the Appellant Firm has produced all the relevant records and in some cases twice and thrice and also in Originals not only to the AO but also to the Appellate Authority. Based on the records I find that the Appellant firm is having valid registrations with
A. Central Excise Department
B. Sales Tax and VAT Department of the Govt of Sikkim.
C. Registration under the relevant provisions of the Industries Act (DIC) of the Govt of Sikkim
D. Service Tax Registration
All the above registrations are valid and are effective form the date / year of manufacture viz 2006.
C. I find that Gazetted Officers of the Ministry of Finance, Central Board of Excise and Customs have made sworn affidavits before the Hon'ble High Court of Sikkim certifying and confirming that the Appellant firm was engaged in the Manufacture of Pan Masala and Wrist Watches from the inception of the firm and also in the AY in question.
D. Be that as it may be, the Apex Court in Arihant Tiles & Marbles Pvt. Ltd. case ([2010] 186 TAXMAN 439 SC) by a Three Member Bench has settled this issue once and for all. The Apex Court held as follows in its concluding paragraph.

> 'Before concluding we would like to make one observation. If the contention of the Department is to be accepted, namely that thee activity undertaken by the respondents herein is not a manufacture, then, it would have serious revenue consequences. As stated above, each of the respondent is paying excise duty, some of the respondents are job works and the activity undertaken by them has been recognised by various Government Authorities as manufacture. To say that the activity will not amount to manufacture or production under Section 80IA will have disastrous consequences, particularly in view of the fact that the assessee in all the cases would plead that they were not liable to pay excise duty, sales tax etc. because the activity did not constitute manufacture. Keeping in mind the above factors, we are of the view that in the present cases, the activity undertaken by each of the respondents constitutes manufacture or production and, therefore, they would be entitled to the benefit of Section 80IA of the Income Tax Act, 1961.'

9. We have given our thoughtful consideration to Revenue's contentions *inter alia* pleading that the CIT(A) has erred in law and on facts in deleting section 80IC deduction disallowance in question after holding that the assessee had manufactured or produced it "pan masala" within the scheme of the Act. It is vehemently contended that this "pan masala" is an article or thing specifically included in the Thirteen Schedule and the instant taxpayer has failed to satisfy its case to be covered under item 7 part-B of the Fourteenth Schedule for Sikkim state. We find no force in Revenue's first argument. Learned Departmental Representative(s) are fair enough in not disputing. The fact remains that the assessee has been registered under the central excise department, Sikkim state government VAT law as well as Industries Department and under the service tax regime(s); right from the relevant previous year 2006-07 onwards. Case file suggests that the both the parties had also been entangled in yet another litigation before hon'ble jurisdictional high court (Sikkim) wherein the Ministry of Finance had itself filed its affidavit accepting the assessee to be a manufacturer. These clinching facts have gone unrebutted from the Revenue side. We thus hold that assessee has indeed manufacture "pan masala". This tribunal's co-ordinate bench decision in *DCIT vs. M/s Khushbu Industries* ITA 371/Lkw/2016 decided on 19.10.2016 has declined Revenue's similar argument in identical fact as follows:-

> "*4. The second ground taken by the Revenue relates to the claim of the assessee u/s 80IC, which was disallowed by the Assessing Officer but allowed by the CIT(A). The facts relating to this ground are that the Assessing Officer found that there had been search in the case of the assessee and during the course of search conducted at the residential and business premises, the statement of the employee of the assessee was recorded. The Assessing Officer, on the basis of the statement, took the view that the assessee was not doing any manufacturing or processing activity. It was only mixing and repacking various ingredients and selling these in the market. The Assessing Officer was not convinced with the reply of the assessee therefore, he took the view that the assessee has not complied with primary condition as given u/s 80IC of being engaged in manufacturing or processing. The Assessing Officer therefore, disallowed the claim u/s 80IC of the Act. The assessee went in appeal before the CIT(A) who examined the manufacturing process and the relevant evidence and came to conclusion that the assessee is engaged in manufacturing process whereas finished product is distinct from raw material and allowed the deduction to the assessee u/s 80IC by holding as under:*
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> > "6(5) The appellant's case can therefore be examined in light of the above judicial pronouncements to see whether the activity carried out by the appellant comes under the expression manufacture so as to be eligible for

claim of deduction under section 80IC of the Act. The evidences filed indicate that –

• The appellant was allotted a plot for setting up of an industrial unit at Integrated Industrial Estate, Pantnagar i.e. SIDCUL
• The unit is registered as a SSI. The registration has been granted to the appellant under the category of a "small" Unit engaged in "Manufacturing" activity.
• The products manufactured by the appellant are excisable products falling under the Central Excise Tariff Heading No.3302. However the appellant's unit being situated in a Notified area, was granted exemption from excise levy by virtue of Exemption Notification No.50/2003-CE dated 10.06.2003.
• The appellant has obtained an NOC from the Pollution Control Board, owing to effluent discharge from the manufacturing process undertaken by the appellant.
• The appellant is also registered under the Factories Act.
• The appellant was paying VAT on the products depending on the item produced and the VAT rates were different for different products and also for different raw materials. (6)(6)(i) The appellant is engaged in manufacture of Odoriferous Compounds and Industrial Perfumes. The appellant in its business activity consumes over 1500 raw materials and produces more than 500 finished goods, all different from each other. The finished goods manufactured by the appellant are used in various industries which include Skin care products, Detergents and toilet soaps, Consumer edibles, Incense Sticks and room fresheners etc, Industrial perfumes and Flavors used by pan masala and other industries. The manufacturing activity carried on by the appellant is explained as under – The process of manufacture involves, melting, grinding, mixing, stirring at optimal temperature to produce a distinct product. There is a proper reaction amongst the products to produce a distinct flavor or fragrance. It may be submitted that a perfume or a flavor may involve from as less as 10 to as much as 50 raw materials to manufacture the product. Furthermore, a raw material may have 0.1% to even 50% of the constitution of finished goods. The raw materials have to be added in a proper chronological manner and a proper formulation without which the finished goods cannot be produced.
6(6)(ii) Some of the features explained by the appellant outline the following significant characteristics –
• Mixing has to be done at controlled temperatures to get the desired chemical reaction. The finished goods are themselves a result of Chemical reactions only.
• Several raw materials used by the appellant are hazardous chemicals, which are not per se fit for human consumption or application. However scientifically derived formulations, whereby other chemicals and substances are mixed with such material, such that the hazardous properties are removed are used by the appellant.
• Several natural oils and flavours, which may otherwise rot/decay with passage of time, and are in concentrated form are required to be treated and blended with other chemicals etc. so as to render them usable in various types of industries and applications.
• Mixing cannot be done without proper lab testing techniques and without studying the behavioral pattern of various blends over a period of time, which may range from one hour to 15 days. The blended mixtures' properties change as some chemicals react over a period of time, while in some cases reactions are instant.
• Testing is done at each stage, by again reacting the finished products with other chemicals and substances, at various temperatures depending on the intended use of the finished product.

6(7) I find from the above that the finished goods manufactured by the appellant are totally distinct and different from the raw materials used in their manufacture. The price list of raw materials and finished goods is also totally different. Further, once the finished product is made, it is either a flavor or a fragrance and the same can, by no means, be either converted or separated back to raw materials stage. Further some

raw materials are received in solid state, some liquid and sum in lumps. Some are essential oils, some are aromatic chemicals, some are spices, some are spice, extracts and some are oleoresins. Thus all these types of raw materials are required to produce the finished goods. It may be submitted that these raw materials fall under various tariff classifications of Central Excise and hence differ in type, properties, product groups, usage etc. Whereas several raw materials are unfit for human consumption or inhalation or application, the finished goods were used for all these purposes. Therefore the finished goods had a distinct chemical composition, properties and usage, which can only be achieved through manufacture which inter alia included studied and controlled chemical reactions, multiple stages of testing, formulations, R & D etc.

6(8) The facts and evidences brought on record therefore clearly establish that the activity carried on by the appellant is manufacturing process where a finished product distinct from the raw material has come into existence. The appellant is registered with Excise Department. 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 under section 80IA of the Act will have disastrous consequences. The appellant has demonstrated that it is engaged in the manufacturing of article and things. It fulfills all the essential conditions for availing deduction under section 80IC of the Act. I therefore direct the AO to allow deduction of Rs.31,31,98,995/- to the appellant. The appellant gets consequent relief."

5. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below as well as the documents placed before us. The only question before us is whether the assessee is engaged in manufacturing activities to be eligible for deduction u/s 80IC of the Act. The provision of section 80IC although lays down various conditions to be complied with by an undertaking to be eligible for deduction u/s 80IC(3) of the Act but the Revenue did not raise any objection in this regard except that the assessee is not engaged in manufacturing or production of an article. Learned D. R. even though vehemently relied on the order of the Assessing Officer but did not deny that the assessee has not failed to comply with other conditions as stipulated u/s 80IC of the Act for the purpose of being eligible for deduction 80IC of the Act. His main thrust of the argument was that the assessee was not engaged in manufacturing or production of an article. He was simply mixing the various chemicals and on that basis he was claiming as if he is engaged in manufacturing or production of an article.

5.1 On the other hand, the Learned counsel for the assessee vehemently relying on the order of the CIT(A) contended before us that the assessee is very much engaged in manufacturing/production of an article. He was carrying on the manufacturing operation. He has submitted various documents and evidences before the Assessing Officer as well as before the CIT(A). The Assessing Officer could not appreciate this fact while the CIT(A) was able to appreciate the line of the industries in which the assessee is engaged. The assessee is engaged in manufacture of odoriferous substance. There are more than 1,500 raw materials which are being used for manufacturing. The finished goods produced are also more than 500 all of which are different from each other. The finished goods manufactured by the assessee are used in various industries which include (but are not limited to) skin care products, detergents and toilet soaps, consumer edibles, incense sticks and room fresheners, industrial perfumes and flavors used by pan masala and other industries. He furnished price list of the firm showing the nature and type of finished goods manufactured or produced and it was submitted that each of the above category of the product require the different chemical compositions and properties. For example, an essence of rose has to have different ingredients when it is used in a toilet soap, as an agarbatti compound, as a food flavor and as a perfume spray etc. He

submitted a flow chart in this regard and pointed out that the process of manufacture involves melting, grinding, mixing, stirring at optimal temperature to produce a distinct product. There is proper reaction amongst the products to produce a distinct flavor or fragrance. It was submitted that a perfume or a flavor may involve from as less as 10 to as much as 50 raw materials to manufacture the product. Furthermore, a raw material may have 0.1% to even 50% of the constitution of finished goods. The raw materials have to be added in a proper chronological manner and a proper formulation without which the finished goods cannot be produced. The mixing has to be done at controlled temperatures to get the desired chemical reaction. The finished goods are themselves a result of chemical reactions only. Several raw materials used by the assessee are hazardous chemicals, which are not per se fit for human consumption or application. However, scientifically derived formulations, whereby other chemicals and substances are mixed with the material, such that the hazardous properties are removed, are used by the assessee. Several natural oils and flavors, which may otherwise rot/decay with passage of time, and are in concentrated form are required to be treated and blended with other chemicals etc. so as to render them usable in various type of industries and applications. Mixing cannot be done without proper lab testing techniques and without studying the behavioral pattern of various blends over a period of time, which may range from one hour to 15 days. The blended mixtures' properties change as some chemicals react over a period of time, while in some cases reactions are instant. It was further submitted that the testing is done at each stage by again reacting the finished products with other chemicals and substances, at various temperatures depending on the intended use of the finished product. Thus, it was expressed that the industry requires high expertise, specialization and knowledge of organic as well as inorganic chemistry. It was submitted that all the finished goods are totally distinct, as is evident from the price list and all the raw materials are also totally different.

5.2 The assessee has also pointed out that the assessee is paying VAT depending on the item products and VAT rates were different for different products and also for different raw materials. The VAT Department has passed orders for all the years, including the year under appeal. The assessee has commenced the production on 04/10/2006 in a notified area as per Notification No.SO741(E) dated 28/06/2004. The assessee is engaged in manufacture of odoriferous compounds and industrial perfumes which are not specified in XIII Schedule. Our attention was also drawn towards the definition of 'manufacture' as given u/s 2(29BA) of the Act. The reliance was placed on the following case laws:
(i) CIT vs. Vinbros & Co. 349 ITR 697 (SC)
(ii) CIT vs. Vinbros & Co. 218 ITR 634 (Mad)
(iii) Shree Par Frangrances (P) Ltd. vs. Income Tax Officer 20 SOT 440 (Mum)
(iv) Natural Frangrances Bhimtal vs. DCIT Nainital, I.T.A. No.4183/Del/2011 (Del)
(v) DCIT Nainital vs. Natural Fragrances 219 TM 28 (Mag) (Uttaranchal)
(vi) CIT vs. Innovative Industries (Guj) I.T.A. No. 2570 of 2010
(vii) Income Tax Officer Udaipur vs. Arihant Tiles and Marbles (P) Ltd. 320 ITR 79 (SC)
(viii) Shree Veer Aromatic Herb Products vs. Income Tax Officer 147 ITD 86 (Del)
(ix) Madhu Jayanti International Ltd. vs. DCIT 137 ITD 377 Kolkatta (SB)
(x) Shree Bhavani Minerals vs. CIT, I.T.A. No.68/PNI/2013 (Goa)
(xi) Fiberfill Engineers vs. ACIT, I.T.A. No.1853/Del/2015
(xii) Aspinwall & Co. Ltd. vs. CIT [2001] 251 ITR 323 (SC)

5.3 Learned counsel for the assessee vehemently contended that if this Tribunal wants to verify whether the product or the article produced by the assessee is different from the raw material having the different market value and which cannot be reconverted into the raw material, this Tribunal can verify the same by visiting the

industrial unit of the assessee. After having the discussion with D.R, we decided to call for the demonstration of the manufacturing process of the assessee in respect of one of the item and therefore, the case when it was initially fixed for 14/09/2016 when the detailed argument has taken place, adjourned the case for 15/09/2016 to see the demonstration of two of the products of the assessee i.e. sweet gulab and compound bela.

5.4 On 15/09/2016 the representative of the assessee appeared along with three chemical engineers of the assessee company having different chemicals in small bottles along with the induction and glass jars. The assessee first demonstrated how the sweet gulab is manufactured. The chemical engineer showed us 15 items out of which two were in solid form while 13 were in liquid form. He pointed out that the items brought by him for manufacturing 100 gms of sweet gulab were as under:

1. Aldehyde C 11 Undecylic 0.1
2. Aldehyde C 8 0.02
3. Aldehyde C 9 0.05
4. Benzophenone 10
5. Cis-3-Hexanol 0.05
6. Cis-3-Hexanyl Acetate 0.08
7. Citral 0.5
8. Citronellol 15
9. Damascone Beta 0.04
10. Geraniol 12
11. Geranium Chinese 4
12. Linalool 0.8
13. Phenyl Ethyl Alcohol 47
14. Rose Crystals 10
15. Rose Oxide Indian 0.
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5.5 He told us about each and every item and also pointed out that each of the items has to be put up in the jar in the same seriatim as it appeared in the list. If these items are mixed up in different order, the desired sweet gulab will not come and the product will be just a waste. Two items namely Benzophenone and rose crystals being solid were put in a jar and he applied heating process so that they can be converted Before us and before Learned D. R., the chemical engineer mixed up all these items in a glass jar in the same seriatim and ultimately brought us the smell of the product manufactured called sweet gulab, which was in liquid form. When we asked him to mix up these products in a different order, the chemical engineer showed us the reaction by mixing 3-4 raw materials in a different order. Similarly, the demonstration was also made in respect of the compound bela which is being made by using the following chemicals: 1 Aldehyde C 18 0.1 2 Benzyl Phenyl Acetate 2.4 3 Benzyl Alcohol 5 4. Benzyl Acetate 36.5 5 Benzyl Butyrate 0.5 6 DEP 36 7 Ebanol 0.2 8 Galaxolide 100% 2.1 9 Hexyl Cinnamic Aldehyde 1.7 10 Hedione 0.4 11 Indole 2.5 12 Linalool 6.1 13 Methyl Anthranilate 2.8 14 Folione 0.015 15 Phenyl Ethyl Alcohol 1.7 16 Sandela 2 17 S Absolute 0.1

5.6 The chemical engineer has also brought the small bottle showing the fragrance and the smell of the product which were handed over to Learned D. R. On the basis of the demonstration held before us, we noted that the product being produced by mixing the various chemicals is entirely different from the raw material. Its usage as well as the utility is different. It cannot be converted again in the same form of the raw material. It has resulted in the transformation of the object or the article which is entirely new and distinct having a different name, character and use. We noted that the provision of section 80IC was inserted in the statute by the Finance Act, 2003 with effect from 2004. Section 80IC nowhere defines the word 'manufacture' or 'production' of an article. We noted that the word 'manufacture' or 'production' of an

article or thing has also been used u/s 80IA as well as u/s 10B of the Act. Section 10B defined the word 'manufacture' for the purpose of the said section to include any – (a) process or (b) assembling or (c) recording of programme on disc, tape, perforated media or other information storage device. Thus, 'process' was included within the word manufacture for the purpose of sec. 10B. Explanation (iv) of the said sec. 10B further provided that the word 'produce' for the purpose of said section, in relation to any article or thing shall include production of computer programme. CBDT vide its circular no. 528 dated 16/12/1988 176 ITR ST. 154 explained the [provisions enacted by the Finance Act, 1988 under para 8.2 of the circular. In this circular, CBDT had clearly explained that the said new sec. 10B had been inserted in the statute book with a view to provide further incentive for earning foreign exchange so as to secure that the income of a 100% EOU shall be exempt from tax for a period of five consecutive assessment years falling within the block of eight assessment years. The exemption provided under this new section was similar to the one provided under sec. 10A of the Act to industrial undertaking operating under the free-trade zone. It was also clarified therein that the expression 'manufacture' for the purpose of both sections 10A and 10B of the said Act would include any processing or assembling or recording of programme on disc, tape, perforated media or other information storage device. 5.7 This definition of 'manufacture' was removed when sec. 10A and 10B of the Act were amended by the Finance Act, 2001 w.e.f. 01/04/2001. Sections 10A and 10B of the Act were further amended by the Finance Act, 2003 w.e.f. 01/04/2004 and the definition of 'manufacture' was inserted as under:-

"Explanation (iv) –

> For the purpose of this section, 'manufacture or produce' shall include the cutting and polishing of precious and semi-precious stones."

5.8 Under section 10B the definition of 'manufacture' was again amended to mean 'manufacture' shall have the same meaning as assigned to it in clause ® of section 2 of Special Economic Zone Act, 2005. Subsequently, Special Economic Zone Act, 2005 was passed by the Parliament in May, 2005, which was brought into effect w.e.f. 23/06/2005. Section 2(r) of Special Economic Zone Act defines the expression 'manufacture' as under:-

> "Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinct name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisci culture, poultry, sericulture, aviculture and mining".

5.9 This definition was adopted by the Legislature in section 10AA w.e.f. 10/02/2006 as adopted by the Special Economic Zones Act, 2005 by inserting Explanation 1(iii) to section 10AA of the Act which reads as under:- (iii) 'Manufacture' shall have the same meaning as assigned to it in clause (r) of section 2 of the Special Economic Zone Act, 2005.

5.10 As per the said definition 'process' is included in manufacture. Subsequently, by the Finance Act, 2009 w.e.f 1.4.2009, clause (29BA) was inserted in section 2 of the Income Tax Act, 1961defining the expression "manufacture" as under: "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 spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking." Where therefore any commodity is subjected to a process

or treatment with a view to its "development or preparation for the market", as, for example, by sorting and repacking fruits and vegetables, it would amount to processing of the commodity within the meaning of Section 8(3)(b) and Rule 13. The nature and extent of processing may vary from case to case; in one case the processing may be slight and in another it may be extensive; but with each process suffered, the commodity would experience a change. Wherever 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. The nature and extent of change is not material. It may be that camphor powder may just be compressed into camphor cubes by application of mechanical force or pressure without addition or admixture of any other material and yet the operation would amount to processing of camphor powder as held by the Calcutta High Court in Om Prakash Gupta Vs Commissioner of Commercial Taxes [16 STC 935 (Cal)]. What is necessary in order to characterize an operation as "processing" is that the commodity must as a result of the operation, experience some change. Here, in the present case, diverse quantities of ore processing different chemical and physical compositions are blended together to produce ore of the requisite chemical and physical composition demanded by the foreign purchaser and obviously as a result of this blending, the quantities of ore mixed together in the course of loading through the mechanical ore handling plant experience change in their respective chemical and physical composition, because what is produced by such blending is ore of a different chemical and physical compositions. When the chemical and physical composition of each kind of ore which goes into the blending is changed, there can be no doubt that the operation of blending would amount to "processing" of ore within the meaning of Section 8(3)(b) and Rule 13. It is no doubt true that the blending of ore of diverse physical and chemical compositions is carried out by the simple act of physically mixing different quantities for such ore on the conveyor belt of the mechanical ore handling plant, but to our mind it is immaterial as to how the blending is done and what process is utilized for the purpose of blending. What is material to consider is whether the different quantities of ore which are blended together in the course of loading through the mechanical ore handling plant undergo any change in their physical and chemical composition is a result of blending and so far as this aspect of the question is concerned, it is impossible to argue that they do not suffer any change in their respective chemical and physical compositions.

5.12 Thus, the Hon'ble Supreme Court accepted that there is change in chemical compositions after processing of the iron ore. From the said decision of the Apex Court, it is apparent that Hon'ble Apex Court held even blending of iron ore for the purpose of export involves change in the chemical and physical composition of iron ore. If we look to the facts of the impugned case of the assessee, we find that the assessee is mixing various chemicals either in liquid or solid form by applying a predetermined process and mixing them in a predetermined manner so that out of the mixing, entirely a new product come and its finished product technically after having the process of mixing has different names. There are different chemicals and the items which are being used for different product in a different proportion in a predetermined order of the mixing, as shown to us during the course of hearing and during the course of demonstration of two items, as given by us in the preceding paragraph, both the products manufactured are entirely different from the various chemicals and the items used by the assessee. These items so produced have a different name, different utility and they are being used for different purposes in soaps, detergents, edible items, juices etc. according to the fragrances and taste to be given to these items. These items so produced are different in physical appearance and chemical composition. We do not agree with Learned D. R. that there is not any change in physical and chemical composition of the output than the input as is being processed in the case of the assessee. If we go to section 2 sub-

section (29BC) inserted with effect from 01/04/2009, we find that clause (b) of this section clearly states that bringing into existence of new and distinct object or article or thing with different chemical composition or integral structure, tantamount to manufacture. Even though they remain in liquid form but it is not a case that all the ingredients which are being mixed are in liquid forms. The taste as well as the smell and the utility of the input and the output which we have seen during the course of demonstration in the court, are entirely different. In our opinion, in view of this clause and the decision of Hon'ble Supreme Court in the case of Chowgule & Co. (supra), it cannot be held that the assessee is engaged in these units in manufacturing.

5.13 Further, in CIT Vs N.C. Budharaja & Co. (1993) 204 ITR 412 (SC), Hon'ble Supreme Court further observed that the word "production" is much wider than the word "manufacture". It was said (page 423):

> "The word "production" has a wide connotation than the word "manufacture". While every manufacture can be characterized as production, every production need not amount to manufacture… The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in 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."

5.14 In Christian Mica Industries Ltd. Vs. State of Bihar (1961) 12 STC 150 (SC), Hon'ble Supreme Court defined the word 'production', albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word "production" in the Oxford English Dictionary, as meaning "amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort". For the wide definition of the word 'production', it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word 'production' since ore is 'a thing', which is the result of human activity or effort.

5.15 According to Webster International English Dictionary, the verb "produce" means to bring forward, beget, etc. The juxtaposition of the word "manufacture" with 'agriculture' and 'horticulture' is significant and cannot be lost sight of. The intention in employing the word "produced" obviously was to introduce an element of volition and effort involving the employment of some process for bringing into existence some goods. 5.16 In paragraph 7 of its in the case of Chowgule & C0 (P) Ltd. Vs. UOI (supra), Hon'ble Apex Court also considered the question whether the different brands of tea purchased and blended by the assesses for the purpose producing the tea mixture could be said to have been 'processed', after the purchase, within the meaning of the proviso to section 8(a), so as to preclude the assesses from being entitled to deduct their turnover under section 8(a), so as to preclude the value of the tea purchased by them. The relevant observations made by the Hon'ble Supreme Court in this respective are quoted and set out herein below for ready reference:

> "7. The Revenue however relied on the decision of the Bombay High Court in Nilgiri Ceylon Tea Supplying Co. Vs. State of Bombay [10 STC 500 (Bom HC)]. The assessees in this case were registered dealers in tea under the Bombay Sales Tax Act, 1953 and they purchased in bulk diverse brands of tea and without the application of any mechanical or chemical process blended these brands of different qualities according to a certain formula evolved by them and sold the tea mixture in the market. The question arose before the Sales Tax Authorities whether the different brands of tea purchased and blended by the assessee for the purpose of producing the tea mixture could be said to have been 'processed' after the purchase within the

meaning of the proviso to Section 8(a), so as to preclude the assesses from being entitled to deduct from their turnover under Section 8(a), the value of the tea purchased by them. The High Court of Bombay held that different brands of tea purchased by the assesses could not be regarded as 'processed' within the meaning of the proviso to clause (a) of Section 8, because there was "not even application of mechanical force so as to subject the commodity to a process, manufacture, development or preparation" and the commodity remained in the same condition. The argument of the Revenue before us was that this decision of the Bombay High Court was on all fours with the present case and if the blending of different brands of tea for the purpose of producing a tea mixture in accordance with a formula evolved by the assesses could not be regarded as 'processing' of tea, equally on a parity of reasoning, blending of ore of different chemical and physical compositions could not be held to constitute 'processing' of the ore. Now undoubtedly there is a close analogy between the facts of Nilgiri Tea Company case [10 STC 500 (Bom HC)] and the facts of the present case, but we do not think we can accept the decision of the Bombay High Court in the Nilgiri Tea Company case [10 STC 500 (Bom HC)] as laying down the correct law. When different brands of tea were mixed by the assessee in Nilgiri Tea Company case [10 STC 500 (Bom HC)] for the purpose of producing a tea mixture of a different kind and quality according to a formula evolved by them, there was plainly and indubitably processing of the different brands of tea, because these brands of tea experienced, as a result of mixing, qualitative change, in that the tea mixture which came into existence was of different quality and flavor than the different brands of tea which went into the mixture. There are, it is true, some observations in the judgment of the Bombay High Court which seem to suggest that if instead of manual application of energy in mixing the different brands of tea, there had been application of mechanical force in producing the tea mixture, the court might have come to a different conclusion and these observations were relied upon by the Assessee, since in the present case the blending was done by application of mechanical force, but we do not think that is the correct test to be applied for the purpose of determining whether there is 'processing'. The question is not whether there is manual application of energy or there is application of mechanical force. Whatever be the means employed for the purpose of carrying out the operation, it is the effect of the operation on the commodity that is material for the purpose of determining whether the operation constitutes 'processing' we are clearly of view that the blending of ore in the course of loading through the mechanical ore handling plant amounted to 'processing' of ore within the meaning of Section 8(3)(b) and Rule 13 and the mechanical ore handling plant fell within the description of "machinery, plant, equipment" used in the processing of ore for sale…… "

5.17 In deciding the said question, the Hon'ble Supreme Court after considering the judgment of the Hon'ble Bombay High Court in Nilgiri Ceylon Tea Supplying Co. Vs. State of Bombay [1959] 10 STC 500 (Bom), inter alia, observed as follows: (i) When different brands of tea were mixed by the assessee as in Nilgiri Ceylon Tea Supplying Co.'s case (1959) 10 STC 500 (Bom) for the purpose of purchasing a tea mixture of a different kind and quality according to a formula evolved by them, there was plainly and indubitably processing for the different brands of tea, because these brands of tea experienced, as a result of mixing, a qualitative change, in that the tea mixture which came into existence was of a different quality and flavor than the different brands of the tea which went into the mixture; (ii) There are, it is true, some observations in the judgment of the Bombay High Court which seem to suggest that if instead of manual application of energy in mixing the different brands of tea, there

had been application of mechanical force in producing the tea mixture, the court might have come to a different conclusion and these observations were relied upon by the assessee, since, in the present case, the blending was done by application of mechanical force, but that is not the correct test to be applied for the purpose of determining whether the operation constitutes is 'processing'. (iii) The question is not whether there is any manual application of energy or there is application of mechanical force. Whatever be the means employed for the purpose of carrying out the operation, it is the effect of the operation on the commodity that is material for the purpose of determining whether the operation constitutes "processing".

5.18 Therefore, Hon'ble Supreme Court, in construing the expression "processing" allowed the appeal of the assessee, in Chowgule & Co. Pvt. Ltd. (supra), holding, inter alia, that where any commodity is subjected to a process or treatment with a view to its "development or preparation for the market" it would amount to processing of the commodity within the meaning of Central Sales Tax Act, 1956. Hon'ble Supreme Court, in the said judgment, did not consider the expression "manufacture" since the question was decided only on the expression "processing". However, considering the judgment of the Bombay High Court in the case of Nilgiri Tea Co. [1959] 10 STC 500, Hon'ble Supreme Court observed that, for the purpose of producing a tea mixture of a different kind and quality according to a formula evolved by them, there was plainly and indubitably processing of the different brands of tea, because these brands of tea experienced, as a result of a qualitative change, in that the tea mixture which came into existence was of a quality and flavor from the different brands of tea which went into the mixture.

5.19 Hon'ble Kerala High Court had the occasion to consider whether assessee is engaged in the manufacture or production of an article or thing when assessee was exclusively engaged in blending, packaging and export of tea bags, tea packets and bulk tea packs in the case of Tata Tea Ltd. Vs. ACIT 338 ITR 285. Hon'ble High court noted in that case that the Revenue's stand is that manufacture or production had liberal meaning under the definition clause contained in section 10B of the Act until its deletion which covers even processing and, therefore, blending and packaging of tea for export was treated as 'manufacture' or 'production' of an article qualifying for exemption. Hon'ble Kerala High Court considered the contention of the assessee that the scheme of income tax exemption available to units in the SEZ u/s 10A of the Act and units in the free trade zone provided u/s 10AA of the Act and the exemption available to 100% EOU u/s 10B of the Act are very similar in nature and the wordings of the statutory provisions are similar in nature. Hon'ble Kerala High Court also considered the judgment in the decision of Supreme Court in Tara Agencies (292 ITR 444 (SC) relied upon by the Sr. Standing Counsel for the revenue, wherein Hon'ble Supreme Court clearly held that blending of tea does not amount to 'manufacture' or 'production' of an article or thing, but is only processing. Hon'ble High Court allowing the appeal of the assessee held that the assessee was exclusively engaged in blending and packing of tea for export and was not manufacturing or producing any other article or thing. It was recognized as a 100% EOU division and the Department had no case that the assessee's unit engaged in export of tea bags and tea packets was not a 100% EOU. If exemption was denied on the ground that products exported were not produced or manufactured in the industrial units of the assessee's 100% EOU, it would defeat the very object of section 10B of the Act. (similar to assessee's case). Further, industrial units engaged in the very same activity, i.e., blending, packing and export of tea in the special economic zones and free trade zones, would continue to enjoy tax exemption under section 10A of the Act and section 10AA of the Act respectively. The assessee was allowed exemption on the profit derived by its 100% EOU engaged in blending, packing and export of tea bags and tea packets. Hon'ble High Court held as under: "The finding of this court is that the purpose of

incorporation of section 2(r) of the Special Economic Zones Act, 2005, into section 10AA of the Income-tax Act is to provide a liberal meaning to the word "manufacture" which takes in even blending, refrigeration, etc. It was noticed by this court that the definitions of "manufacture" contained in the above definition clauses are very liberal which takes in even processing like blending. The contention of the counsel for the assessee is that the purpose of removal of the definition of "manufacture" from section 10B was not to provide a restricted meaning for that term contained in the main section because if that was so, then the Legislature would have only modified the definition clause. Further, the definition of 100 per cent export oriented unit even after the amendment is retained in the said section, which defines it as an undertaking which has been approved as a 100 per cent export oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of powers conferred by section 40 of the Industries (Development & Regulation) Act, 1951, and the Rules made under that Act. It is pertinent to note the products for which the assessee's unit is recognized as a 100 per cent export oriented unit are tea bags, tea in packets and tea in bulk packs. In fact, the assessee is exclusively engaged in blending and packing of tea for export and is not manufacturing or producing any other article or thing. Still it is recognized as a 100 per cent export oriented unit by the concerned authority within the meaning of that term contained in the definition clause of section 10B of the Income tax Act and the Department has no case that the assessee's unit engaged in export of tea bags and tea packets is not a 100 per cent export oriented unit. So much so, in our view, if exemption is denied on the ground that products exported are not produced or manufactured in the industrial unit of the assessee's 100 per cent export oriented unit, the same would defeat the very object of section 10B. Further, industrial units engaged in the very same activity, i.e., blending, packing and export of tea in the special economic zones and free trade zones, will continue to enjoy tax exemption under section 10A and section 10AA respectively. The still worse position is that the appellant would be denied of export exemption available under section 80HHC even to a merchant exporter. In our view, the decision of the Supreme Court in Tara Agencies' case [2007] 292 ITR 444 (SC) is not applicable for the purpose of considering exemption for industries in the export processing zones, free trade zones and to 100 per cent export oriented units covered by sections 10A, 10AA and 10B of the Income tax Act. Therefore, following the judgment of this court above referred to we hold that the assessee is entitled to exemption on the profit derived by its 100 per cent export oriented unit engaged in blending, packing and export of tea bags and tea packets. Consequently, we allow the appeals by reversing the orders of the Tribunal and by restoring the orders "Manufacture/Producer" of the tea for the purpose of Section 10A/10B of the I.T. Act, 1961?"

5.23 The brief facts in the case of Madhu Jayanti International Ltd. in ITA No. 1463/Kol/2007 were that the assessee was engaged in the business of manufacturing, processing, exporting and dealing in various commodities, more particularly tea, coffee, jute, pepper, chillies, cardamom, turmeric and similar other spices, etc. The assessee, as per the claim is a 100% EOU within the meaning of section 10B of the I.T. Act, 1961 and claimed exemption under that section. The assessee buys tea from auctions held in Tea Board recognized Auction centres at Kolkata, Guwahati, Siliguri, Cochin, Coimbatore and Coonoor. The assessee conceded the factual position that it imports small quantity of tea of the type and quality not produced in India. It further conceded the factual position that it does not grow or manufacture any tea. According to the assessee, tea so bought in different auctions is processed with a view to remove all dust and foreign substances and thereafter it blends different varieties of tea to make it of 'uniform and consistent' quality throughout the year. Thereafter, it is packed in consumer packets of 50, 100, 250, 500 or 1000 gms. Etc. or packed in the form of tea bags of 1.94 gms. Or 2 gms.

etc., as the case may be. The assessee claimed exemption u/s 10B of the Act in respect of its 100% EOU for export of manufactured jute bags, packet tea, tea bags, bulk tea, etc. The AO rejected the claim of assessee of exemption u/s 10B in respect of export of blending of tea. The rejection of exemption u/s 10B was confirmed by the CIT(A). When the matter went before the special Bench, Special Bench after discussion the relevant provisions as well as the various decisions of High Court and the Supreme Court held as under:-

The provisions of section 10AA of the Act was inserted on the statute book by the Special Economic Zones Act, 2005 w.e.f. 10.02.2006. Even prior to the enactment of the said SEZ Act, Special Economic Zones (including units therein) were all along treated like EQU / FTZ / EPZ for all purposes whatsoever and were dealt within the Exim Policy accordingly. Section 2(k) of the Special Economic Zone Act, 2005 defines the expression "Existing Special Economic Zone" to mean every Special Economic Zone which is in existence on or before the commencement of the said Act. Section 2(e) defines the expression "existing unit" to mean every unit which has been set up on or before the commencement of the said Act in an existing Special Economic Zone. In other words, admittedly all Special Economic Zones were also being governed by the Exim Policy prior to the enactment of SEZ Act, 2005. Clause (iii) of Explanation 1 to section 1OAA lays down that the expression "manufacture" shall have the same meaning as assigned to it in section 2(r) of the Special Economic Zones Act, 2005, which definition is as under: "Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandly, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining". In Exim Policy, the expression "manufacture" is defined, in paragraph 9.30 & 9.31 thereof almost in the same manner as in the Special Economic Zone Act, 2005, which is as under: "Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, repacking, polishing and labeling. Manufacture, for the purpose of this Policy, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining." But the only difference between the Exim Policy of 2002-07 and of 2000 is that words "and segregation" which were appearing in the definition of the expression 'manufacture" in the Exim policy of 2000 was deleted in the Exim Policy of 2002-07. Further, even in Prevention of Food Alternation Rules, 1955, it has been inter alia stated that “Tea used in the manufacture of flavoured tea shall conform to the standards of tea. The flavoured tea : manufacturers shall register themselves with the Tea Board before making flavour tea In The Tea (Distribution & Export) Control Order, 1957 issued by the Government of India, Ministry of Commerce & Industry (Department of Commerce) the expressions "flavour tea", "green tea" "instant tea", "packet tea" "quick brewing black tea", "tea" and "test bag" have been separately defined as distinct product. In Tea (Marketing) Control Order, 2003 issued by the ' Central Government, in exercise of the powers conferred by section 30(5)(3) of The Tea Act, 1953, the expressions "manufacturer", "Buyer", "Packet Tea", "Tea Bag",- "Green Tea", "Quick Brewing Black Tea", "Instant Tea" and "Made Tea" have also been distinctly and separately defined. Clause (29BA) was inserted in section 2 of the Income Tax Act, 1961 by the Finance (No.2) Act, 2009 w.e.f. 01.04.2009 to define the expression "manufacture" as under: "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 aforesaid definition of the expression "manufacture", although brought into the statute book w.e.f. 01.04.2009, was applied by the Hon'ble Supreme Court even for the assessment year 2001-02 in ITO v. Arihant Tiles and Marbles Pvt. Ltd. (2010) 320 ITR 79, 82 (SC) on the ground that Parliament had taken note of ground reality in inserting section 2(29BA) in the Income Tax Law. The said definition was again applied by the Hon'ble Supreme Court in CIT V. Emptee Poly-Yarn Pvt. Ltd. (2010) "Green Tea" means the variety of manufactured tea commercially known as green tea; 320 ITR 665,667 (SC). 33. The Assessee Company carries out its operations of blending, packaging and export of tea bags, tea packets and bulk tea packs in its modern factory, well equipped with all imported and sophisticated automatic plant and machineries with the help of over 100 workmen engaged on contract basis through M/s. Trot Pvt. Ltd. The manufacturing'. operations are carried in its said factory situated at 19/4A, Munshiganj Road (under Falta Export Processing Zone), Kolkata. We find from facts of the case that the details of turnover of the assessee shows Bulk Tea (0.94%), Packet Tea and Tea Bags .(99.06%),. as. per different descriptions, brand names and varieties, as listed APR. Assessee Company is duly registered as a 100% EOU by the Government of India, Ministry of Industry, Department of industrial Policy and Promotion Secretarial for Industrial Approvals, ECU Section in the state of West Bengal for manufacture of Packet Tea, Tea Bags/Bulk Tea with annual capacity of 3110 Mt. in terms of Registration Certificate dated 26th December, 1995, inter alia, with the condition that its 100% production (excluding rejects not exceeding 5%) would have to be exported and that its registered EOU Unit shall make value addition to a minimum extent of 79%. Undisputedly, the exported consumer products, blended by Assessee in its said factory premises is a case of substantial value addition, as compared to the unblended black tea in granule and dust form normally available for sale in the open retail market throughout India. The subject for consideration under sections 10A and/or 10B of the said Act is manufacture / production of tea ; the object being grant of benefits of tax exemption to exporters carrying out their operations in FTZ, EOU, EPZ & SEZ areas in accordance with the Exim Policy declared by the Government of India in Parliament and in the light of allied and governing laws; in the light of allied laws e.g. The Tea Act, 1953, The Prevention of Food Adulteration Act, 1953 read with Prevention of Food Adulteration Rules, 1955. The Tea (Marketing) Control Order, 2003, The Tea (Distribution & Export) Control Order, 2005 as well as the Rules and Regulations framed by the Tea Board and also Calcutta Tea Traders Association from time to time as discussed above. We find from the above facts and circumstances and case laws relied on by both the sides that the assessee was exclusively engaged in blending, packaging and export of tea bags, tea packets and bulk tea packs. The assessee's division enjoys recognition as a 100% EOU, which is granted by the Development Commissioner, Ministry of Commerce & Industry, Govt. of India. The assessee claimed exemption u/s. 10B of the Act for AYs 2000-01 onwards, which was granted upto the AY 2003-04. However, for the AY 2004-05, exemption was declined for the reasons that by the Finance Act, 2000, the definition of `manufacture' which included 'processing' contained in section 1OB of the Act was deleted w.e.f. 01.04.2001. The argument of the department is that manufacture or production had liberal meaning under the

definition clause contained in section 10B of the Act until its deletion which covers even processing and, therefore, blending "and packaging of tea for export was treated as 'manufacture' or 'production' of an article qualifying for exemption. We are of the considered view that the contention of the assessee that the scheme of income tax exemption available to units in the SEZ u/s. TOA of the Act and units in the free trade zone provided u/s, 10AA of the Act and the exemption available to 100% EOU u/s. 1OB of the Act are very similar in nature and the wordings of the statutory provisions are similar in nature is correct. We find that Hon'ble Kerala High Court also considered the judgment in-the decision of Supreme Court in Tara Agencies, supra relied on by the Ld. CIT, DR, wherein Hon'ble Supreme Court clearly held that blending of tea does not amount to 'manufacture' or 'production' of an article, but is only processing. We find that the assessee was exclusively engaged in blending and packing of tea for export and was not manufacturing or producing any other article or thing. It was recognised as a 100% EOU division and the Department had no case that the assessee's unit engaged in export of tea bags and tea packets was not a 100% EOU. If exemption was denied on the ground that products exported were not produced or manufactured in the industrial unit of the assessee's 100% EOU, it would defeat the very object of sections 10B of the Act. We, in view of the above, hold that when the products for which the assessee's unit is recognized as a 100% EOU are tea bags, tea in packets and tea in bulk packs and the assessee is exclusively engaged in blending and packing of tea for export may not be manufacturer or producer of any other article or thing in common parlance. However, for the purpose of Section 10A, 10AA and 10B, we have to consider the definition of the word "manufacture" as defined in Section 2(r) of SEZ Act, Exim Policy, Food Adulteration Rules, 1955, Tea (Marketing) Control Order, 2003, etc. We also find that the definition of 'manufacture' as per Section 2(r) of the SEZ Act, 2005 is incorporated in Section 10AA of the Income-tax act with effect from 10.02.2006. Hon'ble Kerala High Court in the case of Girnar Industries (supra) had held such amendment in Section 10AA to be of clarificatory in nature. The definition of 'manufacture' under the SEZ Act, Exim Policy, Food Adulteration Rules and Tea (Marketing) Control Order is much wider than what is the meaning of the term `manufacture' under the common parlance, and it includes processing, blending, packaging etc. In view of the above and respectfully following the decision of Hon'ble Kerala High Court in the case of Girnar Industries (supra) and Tata Tea Limited (supra), we "hold that the assessee is entitled for exemption under Section 10B of the Act on account of blending of tea. Similarly, in our view, the industrial units engaged in the very same activity i.e. blending, packing and export of tea in the free trade zone shall also be entitled to enjoy tax exemption under Section 10A of the Act. Accordingly, we answer the question referred in favour of the assessee by holding that the assessees who are in the business of blending and processing of tea and export thereof, in 100% EOUs are manufacturer/ producer of the tea for the purpose of claiming exemption u/s.10B of the Act. Further, assessees who are in the business of blending and processing of tea hi respect of undertakings in free trade zones are manufacturer/producer of tea for the purpose of claiming exemption u/s. 10A of the Act. We have examined and discussed the facts in the case of Madhu Jayanti International Ltd. and found that there is blending of tea and consequently the assessee is eligible for exemption u/s. 10B of the Act as prayed for. Their appeal for the AY 2004-05 is allowed. As regards other appeals and that of the interveners, the matters are restored back to the Division Bench, with directions to decide those appeals in the light of principle laid down herein, so far as the claim for relief u/s. 10A or 10B of the Act in

> accordance with law." 5.24 From the reading of para 35 of the aforesaid judgment we noted that the Special Bench in this case clearly held that the assessee was engaged only in processing and was not engaged in the manufacture or production but had ultimately under para 36 it took the view in view of the fact that the definition of 'manufacture' u/s 2(r) of the SEZ Act, 2005 which is incorporated in section 10AA w.e.f. 10/02/2006 includes 'processing'. Therefore, following the decision of Kerala High Court in the case of Girnar Industries and Tata Tea Ltd. (which was discussed by us in the preceding paragraphs) held that the assessee is entitled for exemption u/s 10B of the Act on account of blending of tea.

5.25 We have also gone through the decision of Hon'ble Supreme Court in Indian Cine Agencies Vs CIT 308 ITR 98. In this case the question before the Hon'ble Supreme Court was: When the assessee was engaged in the activity of cutting jumbo roll films into flat and small rolls in desired sizes, whether such activity undertaken by the assessee was manufacture or production? In this case, the Hon'ble Supreme Court after discussing various cases, the provisions of different Acts and the dictionary meaning took the view that the assessee was engaged in manufacture / production. While holding so under para 12 of its order, Hon'ble Supreme Court has given the same analogy for the purpose of eligibility of deduction under section 80HH and 80-I as has been given by the Kerala High Court in the case of Tata Tea discussed herein above for the purpose of section 10B, that if there was no manufacturing activity, then the question of referring to item 10 of Eleventh Schedule for the purpose of exclusion does not arise. From this judgment, thus, it is apparent that the Hon'ble Apex Court accepted that manufacture/production includes processing also.

5.26 We have also gone through the decision of Hon'ble Supreme Court in the case of ITO Vs. Arihant Tiles and Marbles Pvt. Ltd. 320 ITR 79(sc). In this case when the assessee was engaged in the activity of cutting and polishing of marble blocks, the question before the Supreme Court was whether the activities undertaken by the assessee would fall within the meaning of the words 'manufacture or production' in section 80-IA of the Income-tax Act, 1961? In this case, Hon'ble Supreme Court, after discussing the definition of 'manufacture' given in section 2(29BA) of the Income-tax Act, 1961 and also discussing the provisions of section 80- IA(2)(iii) and after going through various decisions, held as under:

> "22. Applying the above tests laid down by this Court in CIT Vs. N.C. Budharaja and Co. 204 ITR 412 (SC) to the facts of the present cases, we are of the view that blocks converted into polished slabs and tiles after undergoing the process indicated above certainly results in emergence of a new and distinct commodity. The original block does not remain the marble block, it becomes a slab or tile. In the circumstances, not only there is manufacture but also an activity which is something beyond manufacture and which brings a new product into existence and, therefore, on the facts of these cases, we are of the view that the High Court was right in coming to the conclusion that the activity undertaken by the respondents-assessees did constitute manufacture or production in terms of Section 80IA of the Income Tax Act, 1961. 23. Before concluding, we would like to make one observation. If the contention of the Department is to be accepted, namely that the activity undertaken by the respondents herein is not a manufacture, then, it would have serious revenue consequences. As stated above, each of the respondents is paying excise duty, some of the respondents are job workers and the activity undertaken by them has been recognized by various Government Authorities as manufacture. To say that the activity will not amount to manufacture or production under Section 80IA will have disastrous

> consequences, particularly in view of the fact that the assessees in all the cases would plead that they were not liable to pay excise duty, sales tax etc. because the activity did not constitute manufacture. Keeping in mind the above factors, we are of the view that in the present cases, the activity undertaken by each of the respondents constitutes manufacture or production and, therefore, they would be entitled to the benefit of Section 80IA of the Income Tax Act, 1961."
>
> *5.27 In this case also, Hon'ble Supreme Court took the view that cutting and polishing of the marble blocks is the activity which constitutes 'manufacture or production' as after processing marble block no more remains as marble block. This decision has also duly considered, in our opinion, whether the activity of processing is manufacture / production.*
>
> *6. In view of our aforesaid discussion, we hold that the assessee is engaged in manufacturing and production of an article and therefore, the assessee shall be entitled for the deduction available u/s 80IC of the Act. We accordingly confirm the order of CIT(A) as in our opinion, no illegality or infirmity is found in the order of CIT(A)."*

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 Cusoms 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 to the language 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 how 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 Rai 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 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 vs. CIT* (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 state 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 principle 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 list 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 ₹436,98,608/- in lead assessment year 2007-08.

14. Learned Departmental Representative(s) inform us at this stage that all other pleadings regarding plant and machinery as well as various remaining ancillary issues are not pressed since the Revenue has already succeeded on the main issue of section 80IC deduction. We accept the above lead case ITA No. 1962/Kol/2016 therefore.

15. Same order to follow in Revenue's remaining four appeals; ITA No.1963 to 1966/Kol/016 for assessment year(s) 2008-09, 2009-10, 2011-12 and 2012-13 challenging correctness of assessee's identical section 80IC deduction claims of ₹32,43,234/-,₹80,97,963/-, ₹570,515,398 and ₹193,838,674/- (assessment year-wise respectively) as it has come on record that the same pertains to very "pan masala" product manufactured in Sikkim unit without involving any distinction on facts or law.

16. The Revenue's instant five appeals are allowed.

Order pronounced in the open court 31/08/2018

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(M.Balaganesh)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

Kolkata,
*Dkp, Sr.P.S
दिनांकः- 31/08/2018 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Unicorn Industries, Kasra No. 786/1064, Opp. Nayabazar, Majhigaon, Jorethang, South Sikkim-737121
2. राजस्व/Revenue-DCIT/ACIT, Cir-3(2), Aayakar Bhawan, Income Tax Office, Bhanupath Nr. While Memorial Hall, P.O. Raj Bhawan, Gangtok-737103, Sikkim
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।