

National Construction Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Sep-07-1982

Reported in : (1983)3ITD677(Mum.)

Judge : K Viswanathan, P Dhillon

Appellant : National Construction

Respondent : inspecting Assistant

Judgement :

1. These are two cross appeals from the findings of the Commissioner (Appeals) that the assessee, a registered firm, engaged in construction of buildings is eligible for deduction under Section 80J of the Income-tax Act, 1961 ('the Act').
2. The assessee is a firm constituted under a deed of partnership dated 24-4-1974. The partnership business is constructing buildings on a plot of land allotted to them by the Government of Maharashtra at Nariman Point. The building would consist of several shops, offices, basements and garages, which were sold to various persons on ownership basis.
3. In the assessment proceedings for the assessment year 1979-80, for which the accounting year was the year ended 30-6-1978, the assessee claimed that they were entitled to deduction under Section 80J. The ITO held that the assessee was not eligible for the deduction, while, on appeal the Commissioner (Appeals), following the decisions of the Bombay Tribunal Benches in some other cases held

that the assessee was entitled to this deduction. However, he gave a finding that the industrial undertaking had started functioning in the accounting year relating to the assessment year 1975-76 and would be entitled to the deduction only up to 1979-80. While the department is aggrieved against the finding that the assessee is entitled to the deduction, the assessee is aggrieved against the finding of the Commissioner (Appeals) that the first year of such eligibility is the assessment year 1975-76.

4. We will first of all address ourselves to the question whether the assessee is entitled to the deduction. Shri Ramani, learned counsel for the assessee, had placed reliance on the decision of the Bombay High Court in the case of CIT v. Pressure Piling Co. (India) (P.) Ltd. [1980] 126 ITR 333 (Bom.) and the case of CIT v. N.C. Budharaja & Co.

[1980] 121 ITR 212 (Ori.). According to him, the Bombay High Court decision in the case of Pressure Piling (supra) is directly applicable on the point at issue since that was also a case of a construction company and the claim was regarding deduction under Section 80J. Reliance had been placed on the Orissa High Court decision to show that a construction activity is also an industrial activity. It has been submitted, on a factual plan, that in building construction work, the land is excavated at several places for laying the foundation on which the entire superstructure is erected. Wherever necessary, piles are laid for the foundation. The raising of columns, construction of walls, laying of roof, flooring, installation of sanitary system, laying of cables, fixing of doors and windows are the main requirements for the erection of a building. It was further submitted that at every stage some or other engineering process is involved and some kind of manufacture of one or the other article is produced. The components mainly used in the construction of buildings are cement, steel, sand, timber, etc. Several articles are processed or manufactured in the course of erection of a building. The finished product, which is distinct and different in shape from the raw materials used, cannot be anything but an article. Relying on the decision of the Orissa High Court, it is submitted that if a dam is an article, a building would certainly be considered as an article.

5. Shri Ramani then took us through the meaning of the word 'manufacture' as given in various dictionaries. He followed it up by citing several Supreme Court decisions to explain the expression 'manufacture' as understood in various sales tax and commercial tax Acts. He also referred to the decisions of the Bombay Tribunal wherein the Tribunal had accepted that these activities would constitute an industrial undertaking.

6. Shri Bhargava, for the department, had submitted that the assessee would not be considered as eligible for the deduction because the condition in Section 80J(4)(i) is not satisfied since the assessee is not producing or manufacturing an article. He also submitted that Clause (ii) of the said section is also not satisfied. There is no manufacture or production. A builder constructs a building. He does not manufacture a building. He also submitted that there is no evidence to show whether any intermediary article was manufactured by them. He attempted to distinguish the Bombay High Court decision in Pressure Piling's case (supra) stating that there the assessee was undertaking pile driving under a patented method. In the Orissa High Court case, he submitted that certain construction activities were involved like breaking up of boulders. On the other hand, he submitted that the department's case is squarely covered by another Bombay High Court decision reported in the case of CIT v. N.U.C. (P.) Ltd. [1980] 126 ITR 377 (Bom.).

7. After giving anxious consideration to the question we have come to the finding that the assessee is not entitled to the deduction. He will first cut out the requirements to be satisfied before an assessee could claim the deduction. The requirements are given in Section 80J(4), which is reproduced below :- (4) This section applies to any industrial undertaking which fulfils all the following conditions, namely :- (i) it is not formed by the splitting up, or the reconstruction, of a business already in existence ; (ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose ; (iii) it manufactures or produces articles, or operates one or more cold storage plant or plants, in any part of India and has begun or begins to manufacture or produce articles or to operate such plant or plants, at any time within the period of thirty-three years next following the 1st day of April, 1948, or such further period as the

Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking ; (iv) in a case where the industrial undertaking manufactures or produces articles, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power : We are omitting the provision and Explanations since they are not relevant for our purpose. Shri Bhargava had submitted that Clause (i) is also not satisfied since, according to him, the firm was formed by splitting up on existing business. We are unable to accept this submission because neither the ITO nor the Commissioner (Appeals) had referred to any fact on the basis of which we could examine this contention. A similar submission was made regarding Clause (ii) but, for the same reason, we will not pose to consider the same.

(i) the industrial undertaking manufactures or produces articles or operates cold storage plants ; (ii) it has begun to manufacture or produce articles or to operate such cold storage plants after 1-4-1948 within 33 years. It would be seen that the undertaking must generally have the object of manufacturing or producing articles and further it should have actually begun to do such manufacture or production of such articles. Looking at the section, it would be easy to understand that the operative words are 'manufacture' and 'articles'. There must be evidence to show that the activity of the assessee is an activity normally associated with manufacture or production. It must also be shown that what is manufactured or produced is article.

9. The question is whether the construction of buildings could be considered as manufacture. A case had been made out to show that since breaking up of boulders could be considered as manufacture, construction of building should also be given the same benefit. To our mind, to understand the meaning of the word 'manufacture', it is necessary to see the context in which it is used. There are several sections in the statute which use the word 'manufacture'. For example, Section 33 of the Act, dealing with the development rebate uses the word 'manufacture'. But, this is along with certain other expressions as, for example, in Clause (a) 'for the purposes of business of construction, manufacture or production'. A similar expression is also found in connection with the investment

allowance under Section 32A of the Act. Sub-section (2), Clause (b), Sub-clause (iii) uses identical expressions. The words 'construction' and 'manufacture' find a place there. In the definition of 'industrial company' in the Finance Act, the expression 'construction' is used in contradistinction to 'manufacture'. We will, for illustration, give the definition as found in the Finance Act, 1974, in Section 2(8)(c) : (c) 'industrial company' means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining ; 10. The above sections have been noticed only for the purpose of establishing that wherever the statute had intended that certain construction activities should also be included, that was separately mentioned. The Legislature has not rest content with the use of the expression 'manufacture' which otherwise should have been only the expression found if construction of buildings is also to be included in the manufacture. It would, therefore, appear to us that where the expression 'construction' is absent, it cannot be implied in the expression 'manufacture' and thus widen its ambit.

11. The two decisions relied on by the assessee do not cover the point at issue before us. We will first take up the Bombay High Court decision in the case of Pressure Piling (supra). The facts of the case were that the assessee carried on a business of laying foundations of buildings by a specialized patented method known as 'pressure piling'.

It would be noted that the company was not a construction company but its work was production of concrete structure which was used for construction. The Tribunal found that the assessee was using raw materials in the process of pressure piling and the final product was entirely different in form. On that score, the Tribunal held that the assessee was carrying on manufacturing activities. The High Court held that by subjecting the concrete mixture which consisted of several articles to certain process along with iron bars, something new was brought into being. By the piling process something new which ultimately formed part of the construction came into being. But at the time when it was brought into being it had complete independent existence and it was described as a pile which was more or less akin to a pillar. Then the High Court pointed out that the fact that when the

super-structure was constructed, the foundation, which was in the form of piles, got attached to the superstructure and became a part of the entire building, would not be material because the point of time with reference to which the applicability of Section 80J would have to be considered, was when the article was brought into being as a product.

Again, the High Court pointed out that though ultimately the piles became part of the building, that did not detract from the fact that before the superstructure was constructed, the pile was an independent product. These facts should be noticed. We would place considerable emphasis on the last part the finding. The Bombay High Court was considering the case of an assessee who was preparing the piles which were used in the construction. The Bombay High Court was not considering a construction company as such. That is why they had taken pains to explain that the fact that the piles were later used in construction of a building did not detract the assessee's claim. We, on the other hand, are considering the case of a construction company.

This decision, therefore, is not going to help in deciding this issue.

We can make it further clear by citing passages from the decision. It is observed : ...The crucial question which is to be decided in this case is whether the pile which is prepared at the construction site by the special process of pressure piling can be said to be an article. Mr.

Joshi supported the view taken by the Judicial Member of the Tribunal and, according to Mr. Joshi, unless a thing can be sold or supplied, it cannot be classified as an article and, in the instant case, the process of piling is in essence a part of the building activity. According to him, it is a part and parcel of the activity of construction or raising a building because the work of piling is done at the site itself. (p. 338-39) So, before the High Court, the case made out is that construction activities are not entitled to the deduction. This submission is met by the High Court by pointing out that what the assessee was making is only an article and it eventually being used in construction would not disentitle them. So, they observe in the next para : Now, it is difficult to see how the mere fact that an article is manufactured or brought into being at a particular site would be material for

determining whether the thing produced or" manufactured is an article....(p. 339) It is difficult, therefore, to see how the product which ultimately results from the piling process cannot be said to be an independent article. It is also not necessary that all articles must necessarily have the quality or the possibility of being sold and purchased across the counter or it must necessarily be transportable to another site before it can be classified as an article. A particular manufacturer specialising in the production of a particular product may, by way of a special facility to certain customers, undertake to produce and supply it at the site itself and, therefore, the site where the manufacturing process is carried on would be immaterial or irrelevant for the purpose of determining whether the product of the manufacturing process can be described as an article. (pp. 339-40) 12. Thus, it would be seen that the Bombay High Court was not considering construction at all, but they were considering an article which would be used in construction. This difference should not be overlooked, otherwise the ratio of the decision would be misunderstood.

The Bombay High Court's decision does not give a carte blanche to construction activities.

13. The Orissa High Court in the case of N.C. Budharaja & Co. (supra) was concerned with Section 80HH which allowed a deduction to an industrial undertaking which 'manufactures or produces articles' in a backward area. The High Court laid emphasis on the expression 'industrial undertaking' and so they observe : 'Industrial undertaking' has no statutory definition. Law is fairly settled that where there is an absence of a statutory definition, it would be open to look for the meaning by referring to the definitions in sister legislations and failing that, to, adopt the common parlance meaning. There can be no dispute that the business of a contractor who has undertaken the construction of an irrigation project would be an industrial undertaking for the purposes of the Industrial Disputes Act. The concept of industrial undertaking need not necessarily be confined to manufacture and production of articles. Even in the absence of either of them, in the strict sense there could be an industrial undertaking. The Tribunal in the instant case has clearly recorded a finding of fact that the assessee had undertaken manufacture of certain materials which it ultimately utilised in the construction of the dam and it worked for the ultimate production of a dam. Assessee's counsel

has canvassed that there is no warrant for the submission of learned standing counsel that a dam would not be an article. 'article', according to the Shorter Oxford English Dictionary, means 'a commodity, a piece of goods or property'. It need not be confined to movable property.

There would be no justification to hold that a dam is not an article in that sense of the term. We would reiterate here that there is considerable force in Mr. Rath's argument that it was not the intention of Parliament in Sub-section (2) (i) to exclude industrial undertakings which did not manufacture or produce articles, from the benefit even if one was an industrial undertaking not engaging itself in manufacture or production of articles, it could as well have the benefit if the work had begun after 31st of December, 1970, in a backward area. Clause (i) of Sub-section (2) was connected with the period and the area where the operation was to be undertaken and not the nature of operation. If the legislative intention was restriction with reference to the nature of the operation, clear provision would certainly have been made either by providing a definition or adding an Explanation. Learned counsel for both the parties have indicated to us that there is no direct precedent on the point. We have not, therefore, considered it necessary to refer to authorities cited by the Commissioner or the Appellate Tribunal.

(pp. 217-18) 14. The Orissa High Court decision is certainly an authority to say what is an industrial undertaking under Section 80HH. But, we cannot accept the extension sought to be placed by including construction of building as manufacture. What constituted manufacture in that case has been specifically emphasised by us in the passage quoted above. The italicized portion would show that the High Court was satisfied that in construction of a dam, some parts which are manufactured by the assessee were used. The High Court has not, we must point out, found the whole contention to be a manufacturing activity.

15. If this point is kept in mind, it would be apparent that the decision of the Bombay High Court in the case of Pressure Piling (*supra*) and the decision of the Orissa High Court have some parallels.

Both are activities in manufacturing an article which is eventually used in the construction. If the assessee was merely manufacturing an article which would be

used in construction and did nothing further in that activity, the two rulings would certainly apply. But it would not apply if it is only a part of the activity. This is made clear by the Bombay High Court in N.U.C's case (supra). They observe : A perusal of the said definition makes two things clear. Firstly, it makes a distinction between the activities of 'construction' and of 'manufacture or processing'. Secondly, it covers only that construction company which is engaged in the construction of ships and by necessary implication omits all other construction companies.

It should, therefore, be obvious to anyone that the Legislature has clearly indicated that it does not want to include in the said definition a company which is engaged mainly or otherwise in the construction of anything other than ships Prima facie, therefore, a company such as the assessee, whose business is to construct and/or repair buildings and factories will not be covered by the said definition. We should have, therefore, thought that the said definition being clear and unambiguous, there was no difficulty in holding that the assessee-company did not fall within the said definition. However, as has been pointed out earlier, the Tribunal has ignored the manifest implications of the said definition and by relying on the expression 'in the manufacture or processing of goods' contained in the said definition, has tried to fit the assessee-company in the said definition. For doing this, further, it has artificially divided the business of the assessee into two parts, viz., the manufacture of door and window frames and concrete slabs and the construction and repair of the buildings for which the said manufacture is done. As stated earlier, the making of door and window frames and of the concrete beams and slabs is admittedly in the process of the construction and repair of the buildings themselves. There is, therefore, no scope for dividing the business of the company into the said two parts, for neither the frames nor the slabs nor beams are manufactured or prepared independently of the buildings or sold as such in the market. It is this basic error which led the Tribunal to its incorrect conclusion. (pp. 379-80) 16. The Bombay High Court had before them a case of interpretation of an 'industrial company' under Section 2(7)(d) of the Finance Act, 1966.

There were expressions 'construction' and 'manufacture' in the provision to be construed. The High Court has pointed out that the Legislature 'does not want to include in the definition a company which is engaged mainly or otherwise in the

construction of anything other than ships'. So, construction companies could not take shelter under the expression 'construction' found therein. The High Court then noticed the line of argument that a part of the construction activity includes manufacture, like making of windows, doors, etc. This line of approach was erroneous for two reasons : first, that making of doors and windows themselves are 'construction' and not 'manufacture' and two, even if they are manufacture, it introduces a dichotomy in an integrated activity which their Lordships viewed with disfavour. It is on the second aspect that the Orissa High Court found for the assessee-that is, some of the activity was for manufacture. We cannot accept this line of reasoning in the Bombay High Court cases for obvious reasons.

17. We have indicated above in para 8 that 'manufacture' cannot include 'construction' activity, at least in the income-tax statutes. We have quoted supra the Bombay High Court decision to support this view. We will now show further authorities to show that, whatever might be the position in other statutes, in the Income-tax Act, construction is not considered part of manufacture. We would quote from Maxwell, 12th Edition, the passage dealing with 'An Act is to be regarded as a whole' : Passing from the external aspects of the statute to its contents, it is an elementary rule that construction is to be made of all the parts together and not of one part only by itself. It has been said that one of the safest guides to the construction of sweeping general words which are hard to apply in their full literal sense is to examine other words of like import in the same instrument and to see what limitations must be imposed on them ; and if it is found that a number of such expressions have to be subjected to limitations and qualifications and that such limitations and qualifications are of the same nature, that circumstance forms a strong argument for subjecting the expression in dispute to a like limitation and qualification. (p. 58) 18. In applying this test, we must ask ourselves what is the limitation that is imposed on the word 'manufacture' in this Act The limitation is apparent when we see other sections which have used the word 'construction'. Therefore, reading the Act as a whole, whenever we interpret the word 'manufacture' we must exclude therefrom construction. Otherwise those sections which use the word 'construction' must be held to construe redundant words. We cannot say they are 'surplusage' if we exclude construction from manufacture.

19. So far we have been dealing with the expression 'manufacture'. We will now turn to the expression 'article' and consider whether a building is an article. We have seen that the Orissa High Court has held that a dam is an article. It supports the assessee's case. But this alone is not going to help in deciding the issue. The assessee must also be a manufacturer.

20. With regard to the Tribunal decisions relied on, they are now of no consequence after the two Bombay High Court decisions. So, we do not propose to go into the reasonings found therein. We may mention that the Tribunal decisions were on the expression 'industrial company' found in the Finance Act, which is not very relevant now.

21. In view of the foregoing discussion, we should hold that the assessee is not entitled to deduction under Section 80J. So, the assessee's appeal regarding the first year of eligibility does not really arise. But, we will decide that issue also, assuming we are wrong in our above findings. The assessee's case is that the first year is 1979-80 and the Commissioner (Appeals) has held it to be 1976-77.

The issue is, when has the assessee begun manufacture or" produce articles as required under Section 80J(4) We have no difficulty in approving the Commissioner's findings. The assessee's activities had started in the year relevant to the assessment year 1976-77 when they reclaimed the land on which the building is to be constructed. That is the starting point of the activity which eventually produced the 'article' i.e., the building. But, the assessee's case rests on a reference to Explanation 2 to Section 80J(1). This Explanation introduced retrospectively by the Finance Act, 1980 does not support the assessee's case. This Explanation refers to computation of capital employed only, which, earlier, formed part of Rule 19A. Even otherwise, when the assessee has started business activity by the reclamation, there has to be a computation for the assessment year 1976-77. We see no merit in the assessee's contention.

22. In the result, the department's appeal is allowed and the assessee's appeal dismissed.