

Dhariwal Industries Ltd. Vs. Acit (inv.) and Addl. Cit, Range-1

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Court : Income Tax Appellate Tribunal ITAT Pune

Decided On : Aug-14-2007

Reported in : (2008)111ITD379(Pune.)

Judge : D Srivastava, G Gupta, C Sethi, J Members

Appellant : Dhariwal Industries Ltd.

Respondent : Acit (inv.) and Addl. Cit, Range-1

Judgement :

1. Facts giving rise to the constitution of this Special Bench are that an application was submitted by the assessee for constitution of a Special Bench to resolve the controversy involved in the present bunch of appeals as to whether Gutkha manufactured by the assessee falls under the expression "tobacco preparations" within the meaning of Item No. 2 of the Eleventh Schedule to the I-T Act so as to deprive the assessee of the special relief Under Section 80-I and 80-IA of the I-T Act. In the said application, the assessee pointed out that a Division Bench of this Tribunal at Allahabad has taken the view in Kothari Products Ltd, v, ACIT, 38 ITD 285 that "Zarda Yukta Pan Masala" (pan masala containing tobacco) is not a "tobacco preparation" under Item No. 2 of the Eleventh Schedule and that the deduction Under Section 32AB and 80-1 of the I-T Act could not therefore be denied to the assessee on the ground that the said pan masala was a tobacco preparation within the meaning of Item No.2 in the Eleventh Schedule in the Income-tax Act. In its application seeking the constitution of a Special Bench, the assessee further pointed out that a Division Bench of this Tribunal at Pune has

however taken a contrary view in the assessee's own case for the Assessment Years 1994-95 and 1995-96 and Has held that Gutkha manufactured by the assessee is a tobacco preparation within the meaning of Item No.2 in the Eleventh Schedule and thus not eligible for deduction Under Section 80-I/80-IA. Since two Division Benches of this Tribunal have taken divergent views, the matter was referred by the Division Bench at Pune to the Hon'ble President of this Tribunal for constitution of a special Bench to resolve the controversy. Accepting the reference made by the Division Bench, the Hon'ble President has constituted this Special Bench for disposal of all the aforementioned appeals.

2. Perusal of the Order passed by the Hon'ble Bombay High Court on 24th July 2006 in Dhariwal Industries Ltd. v. ACIT (Income tax Appeal No.118 and 119 of 2005 with appellate side writ petition No. 3837 of 2006) shows that the Id. counsel for the assessee had made a prayer before the Hon'ble High Court that it would be desirable that the appeals arising out of the order passed by a Division Bench of this Tribunal at Pune for AY 1994-95 and 1995-96 which were pending before the Hon'ble High Court should be set aside and the said appeals be restored to this Tribunal with the direction to hear them along with ITA Nos. 203/96, 864/02, 865/02, 960/03 & 961/03 referred to this Special Bench. The Hon'ble High Court has accepted the submission made by the assessee and accordingly set aside the order of the Division Bench of this Tribunal at Pune for AY 1994-95 and 1995-96 with the direction that the aforesaid two appeals be disposed off along with the other appeals referred to the Special Bench. The Hon'ble President has consequently transferred the aforesaid two appeals also to this Bench for hearing and disposal so as to ensure compliance with the directions of the Hon'ble High Court.

3. In all the appeals under consideration, the major issue involved is whether Gutkha manufactured by the assessee is a tobacco preparation within the meaning of Item No, 2 in the Eleventh Schedule to the I-T Act and therefore not entitled to deduction Under Section 80-I/80-IA of the I-T Act. Both the parties have argued the present bunch of appeals with reference to the assessment year 1997-98 and hence we shall take up that appeal first.

1. On the facts and in the circumstances of the case and in law, the Id, CIT(A) has erred in allowing deduction Under Section 801 and 80LA of the I-T Act, to the assessee company, without appreciating the fact that Gutkha is a tobacco preparation and will fall within item-2 of the Eleventh Schedule to the Income Tax Act, 2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) failed to appreciate the fact that Gutkha takes the colour of tobacco preparation in as much as 7% tobacco mixed with Supari in Gutkha/pan masala has the injurious effect to converting it into a tobacco preparation.

5. For better appreciation of the facts of the case and the issues involved in the light of the relevant provisions of law, it may be useful at the outset itself to reproduce the relevant portions of Section 80IA and the Eleventh Schedule to the Income-tax Act as they stood on 1.4.1997. They read as under: '80-IA. Deduction in respect of profits and gains from industrial undertakings, etc., in certain cases. (1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or a hotel or operation of a ship or developing, maintaining and operating any infrastructure facility or scientific and industrial research and development or providing telecommunication services whether basic or cellular (such business being hereinafter referred to as the eligible business), to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to the percentage specified in Sub-section (5) and for such number of assessment years as is specified in Sub-section (6).

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely: (iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India: Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in Sub-clause (b) of Clause (iv) which begins to manufacture or produce an article or thing during the period beginning on the 1st day of April, 1993, and ending on the 31st day of March, 1998, apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule"

had been omitted; (See Section 32A, Section 32AB, Section 80CC(3)(a)(i), Section 80-1(2), Section 80J(4) and Section 88A(3)(a)(i)] List of articles or things

2. Tobacco and tobacco preparations, such as, cigars and cheroots, cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff.

5. Aerated waters in the manufacture of which blended flavouring concentrates in any form are used.

Explanation.- "Blended flavouring concentrates" shall include, and shall be deemed always to have included, synthetic essences in any form.

6. Briefly stated, the facts of the case are that the assessee-company, namely, M/s. Dhariwal Tobacco Products Ltd. (now changed to Dhariwal Industries Ltd.) was engaged in the business of manufacture and sale, inter-alia, of Gutkha during the previous years relevant to the assessment years Under appeal. Its manufacturing activities were located at Ghodnadi, Baroda and Hyderabad. The assessee claimed deduction amounting to Rs.3,18,54,241/- Under Section 80-1 in respect of Ghodnadi unit while it claimed deduction amounting to Rs.3,14,89,948/- and Rs.2,91,60,476/- Under Section 80-IA in respect of Baroda unit and Hyderabad unit respectively. The Assessing Officer examined the case of the assessee. Following the order passed by the Id. Commissioner of Income-tax Under Section 263 on 4.1.96 for AY 1993-94 and his assessment order for AY 1995-96, the Assessing Officer denied deduction claimed by the assessee Under Section 80-1 & 80-IA of the I-T Act. He held that Gutkha manufactured by the assessee was a tobacco preparation within the meaning of Item No. 2 in the List of Articles or Things appearing in the Eleventh Schedule to the Income-tax Act and hence the assessee was not entitled to claim deduction Under Section 80-1 & 80-IA.7. It is evident on perusal of the assessment order that the Assessing Officer has followed the order passed by the Id. CIT Under Section 263 on 4.1.96 for AY 1993-94. The said order passed by the Id. Commissioner Under Section 263 is the subject matter of appeal by the assessee (ITA No. 203/PN/1996) before this Tribunal and is also under consideration in this bunch of appeals. It may therefore be useful to briefly refer to the order passed by the Id. Commissioner Under Section 263. Relevant portion of the said order reads as under: ...On behalf of the

assessee Shri P.C. Farmer, F.C.A. has appeared and argued the case. His contention is that, in Gutkha preparation there is a mixture of tobacco ranging from 6.57% to 7%. For the FY 1990-91 it is 6.980%, for the FY 91-92 it is 7% and for the FY 92-93 it is 6.571%. It has been argued that the predominant ingredient for the preparation of Gutkha is betel nut and not tobacco. The mixture of tobacco is only 7% maximum and therefore it cannot be said to be tobacco preparation. He has cited example that if a certain percentage of alcohol is mixed in a medicine it does not become an alcoholic preparation. He has further stated that if one or two spoon sugar is mixed in tea it does not become sugar preparation and therefore he has argued that it is still a betel nut preparation and not a tobacco preparation as laid down in Eleventh Schedule of the I-T Act, 1961. Apart from that he has stated that there is a different classification in Central Excise Tariff and Pan Masala has been taxed @50% and manufacturing tobacco and tobacco manufacture products substitutes have been taxed separately and therefore even the Central Excise makes the distinction between Gutkha and tobacco preparation. He has further placed reliance on the decision of Income-tax Tribunal decision Vol. 37(1991) page 285 to 292, 37 ITD 285 in the case of Kothari Products Ltd. 2. I have gone through the facts of the case. Eleventh Schedule talks about Tobacco preparation and it gives certain example but the examples are not exhaustive. What is tobacco preparation is to be understood in a common parlance. It has not been defined in the act exhaustibly I am of the opinion that once 7% tobacco is mixed in.

Pan Masala it changes the texture and the use of the Pan Masala and anybody who is not addicted to Zarda or tobacco will not take it.

Therefore, the Gout, has in this wisdom prescribed that in such preparation it should be written that it is injurious to health while in the case of Plain Pan Masala it is nowhere been mentioned.

Suppose food is prepared and arsenic is mixed in a small quantity it no longer remains a food preparation and it becomes poisonous preparation and its effect is that of a poison and not that of a food. Similarly once 7% tobacco is mixed in plain pan masala or' Gutkha it changes the effect of the product and it can no longer be

taken by an ordinary person who is not addicted to tobacco and therefore I am of the opinion that it takes the colour of a tobacco preparation. The example which the assessee has cited is altogether different than the mixing tobacco with Pan Masala or with Gutkha, e.g., if tobacco is mixed in betal leaves it becomes a different preparation and only one who is addicted to tobacco can eat it and not other persons. In view of above, I am of the opinion that once 7% tobacco is mixed in Gutkha or pan masala it changes its effect and it becomes tobacco preparation. I have gone through the decision of the Kothdri product as cited by the assessee and I am of Opinion that above points have not been considered by TTAT while deciding this issue. Apart from that the classification with reference to Central Excise Act is not relevant to Income-tax. Under these circumstances, I am of the opinion that the order of Assessing Officer is erroneous in the eyes of law and prejudicial to the interest of revenue and therefore I direct the Assessing Officer to withdraw the deduction of Rs.8,01,315/- already allowed to the assessee Under Section 80-1 8. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the CIT (A). Ld. CIT(A) accepted the assessee's claim and directed the Assessing Officer to allow deduction Under Section 80-I and 80-IA of the Income-tax. The Id.

CIT(A) has held that Gutkha manufactured by the assessee is not a tobacco preparation within the meaning of Item No. 2 in the "List of Articles or Things" appearing in the Eleventh Schedule to the Income-tax Act, 1961. Ld. CIT(A) has given, in brief, the following reasons for his decision that Gutkha is not a "tobacco preparation" within the meaning of Item No.2 in the Eleventh Schedule: i) The words "tobacco" and "tobacco preparations" in Item No.2 in the Eleventh Schedule are joined by the conjunction "and" which indicates that, a product in order to constitute a "tobacco preparation" under Item No.2 in the Eleventh Schedule, must have close affinity with "tobacco" and therefore such a product must have "tobacco" as its main ingredient. He has also noted that the words "tobacco preparation" in Item No. 2 in the Eleventh Schedule are followed by specific products, such as, cigars and cheroots, cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff. The aforesaid particular products have tobacco as their main ingredient and therefore "tobacco preparations" should be such which have a close resemblance with those specific

products following tobacco products in Item No.2 of the Eleventh Schedule. According to him, the use of the words "such as" in Item No. 2 in the Eleventh Schedule immediately after the words "tobacco preparations" makes it very clear that tobacco preparations should have a close resemblance with the individual products specified therein. He has further noted that though the "tobacco preparations" in Item No. 2 in the Eleventh Schedule do not end with the particular products following thereafter as the definition of "tobacco preparations" is inclusive but the Intention of the legislature is quite clear only those tobacco preparations should fall in the mischief of Eleventh Schedule which have got close resemblance with the particular products listed in Item No. 2.

Gutkha manufactured by the assessee does not, according to the Id.

CIT(A), have close resemblance with the specific products listed in Item No. 2. He has also considered the consumption chart of the raw materials in preparation of Gutkha and noted that consumption of tobacco in the preparation of Gutkha was only 6 to 7% while the percentage of consumption of betel nut was 78 to 80%. He has therefore held that Gutkha can, at the best, be considered as a betel nut preparation and not as a tobacco preparation. According to the Id. CIT(A), tobacco cardamom, perfumes etc. are used in the preparation of Gutkha to enhance its taste. He has thus concluded that tobacco in Gutkha acts only as a taste enhancer.

ii) The Id. CIT(A) has applied the rule of ejusdem generis for coming to the conclusion that the words "tobacco preparations" in Item No. 2 should take colour from the particular words/products following them, iii) Referring to the Maxwell on the Interpretation of Statutes and the judgment of the Hon'ble Supreme Court in CIT v. Taj Mahal Hotel 82 ITR 44 (SC), the Id. CIT(A) has held that while interpreting items in a taxing statute, resort should not be had to the scientific or technical meaning assigned to the items but to the meaning attached to them by those dealing in them in their commercial sense. Having said so, the Id. CIT(A) has held that Gutkha or pan masala containing tobacco is considered different from "tobacco preparations" such as, cigars and cheroots, cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff. According

to him, Gutkha in common parlance is not known as a tobacco product and that a consumer buys Gutkha for the/composite taste of betel nut, kattha, perfumes together with a kick provided by the tobacco. If the consumer is interested in the tobacco, he will prefer chewing tobacco or Zarda, which is much cheaper than Gutkha instead of buying Gutkha. According to the learned CIT(A), Gutkha has its own independent identity as against common tobacco preparations like Zarda or other form of chewing tobacco. He has also taken note of the marketing strategy of the assessee and concluded that Gutkha is marketed as a Gutkha and not as a tobacco product. He has supported his conclusion by referring to the different categories of tariffs specified under the Central Excise Act which gives a different treatment to pan masala containing tobacco as compared to "tobacco preparations" such as cigars, cigarettes, cheroots, Zarda, etc. In this connection, he has also referred to and taken support from the decision of a Division Bench (Allah.) of this Tribunal in Kothari Products Ltd. v. ACIT 37 ITD 285.

iv) The Id. CIT(A) has held that the contents of Gutkha like supari, kattha, tobacco and unknown trade secret perfumes may be hazardous to health and may have been banned by law but Gutkha has not been included in the list of tobacco preparations as given in Item No. 2 in the Eleventh Schedule and therefore manufacture or production of Gutkha is not hit by Item No. 2 of the Eleventh Schedule.

9. Aggrieved by the order of the learned CIT(A), the Department is now in appeal before this Tribunal, In support of the appeal, the Id.

Departmental Representative invited our attention to the legislative history of Section 80-1 of the I-7 Act. He submitted that the predecessor of Section 80-1 was Section 80-E, which was operative in AYs 1966-67 and 1967-68 and dealt with deduction in respect of the profits and gains from specified priority industries in the case of certain companies. He emphasized that the focus of deduction under the said Section 80-I was on the profits and gains derived from specified priority industries and not on non-priority industries. He submitted that Section 80-E was replaced, for and from assessment year 1968-69, by Section 80-1. The focus of Section 80-1 as it existed then, according to him, was again on making the

deduction available in respect of the profits and gains from priority industries in the case of certain companies. He re-emphasized that the focus of Section 80-I, like Section 80-E, was on giving the deduction in respect of profits and gains from priority industries alone. Section 80-I was on the statute book in that form till assessment year 1972-73. He pointed out that the said Section 80-I was omitted for and from AY 1973-74. He submitted that the present Section 80-I was inserted by the Finance (No. 2) Act 1980 w.e.f. 1.4.1981, i.e., for and from AY 1981-82, and Sub-section (2) thereof specifically provided that Section 80-I would apply to an industrial undertaking on the fulfillment of certain conditions enumerated therein. One of the conditions laid down in Clause (iii) of Sub-section (2) of Section 80-I was that the industrial undertaking should be engaged in the manufacture or production of any article or thing, not being any article or thing specified in the Eleventh Schedule. He submitted that the focus of Section 80-E and 80-I till AY 1971-72 was on giving deduction in respect of the profits and gains of specified priority industries. Section 80-IA in its present form does not make any reference to the priority industries because the subject matter of priority industry has been dealt with by including certain items in the List of Articles or Things specified in the Eleventh Schedule, which an industrial undertaking must not manufacture or produce. He submitted that the purpose of the Eleventh Schedule was to specify priority industries by enumerating the articles or things, which must not be manufactured or produced by an industrial undertaking claiming deduction Under Section 80-IA. According to him the concept of priority industry existed not only in Section 80-E and 80-I till AY' 1971-72 but also continues to exist in the present 80-I/80-IA in the form of Eleventh Schedule regarding which a reference has been made in Subsection (2) of Section 80-1. He contended that the benefit of Section 80-I could not be granted to any industrial undertaking if it was found engaged in the manufacture or production of any article or a thing specified in the Eleventh Schedule.

10. Referring to Item No. 2 in the "List of Articles or Things" appearing in the Eleventh Schedule, the Id. Departmental Representative submitted that an industrial undertaking manufacturing or producing "Tobacco and tobacco preparations, such as, cigars and cheroots, cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff was not eligible for deduction

Under Section 80-IA. He further submitted that the present Section 80-I was inserted in the I-T Act w.e.f. AY 1981-82 while the Eleventh Schedule was inserted in 1977 when Gutkha was not in use, It was therefore, according to him, not possible to include Gutkha as a separate item in Item No. 2 of the Eleventh Schedule. He argued that Gutkha was not only a "tobacco preparation" but also "chewing tobacco" within the meaning of item No.2 of the Eleventh Schedule. He pointed out that Gutkha was nothing but pan masala with tobacco, which was prepared before hand and put in pouches in ready to use form and further that tobacco was added to the pan masala to create intoxicating effect. According to him, it was well-known that tobacco caused intoxicating effect and therefore the inclusion of tobacco as a constituent of Gutkha was intended to produce intoxicating effect. He contended that it was not the quantum or percentage of tobacco, which was relevant but its potency in causing intoxicating effect that was relevant in judging whether Gutkha was a tobacco preparation. He submitted that these facts were so widely known that no scientific evidence was needed to prove that the quantity of tobacco added in pan masala or gutkha was sufficient to cause the same intoxicating effect as would be caused by consumption of tobacco and that the consumers understood it very well and therefore preferred Gutkha or pan masala containing tobacco to other pan masalas without tobacco as they preferred to consume tobacco which was the most potent ingredient in Gutkha or pan masala containing tobacco otherwise they would prefer other forms of pan masala without tobacco. According to him, the aforesaid distinction between two preparations, namely, gutkha and pan masala containing tobacco on one hand, and other forms of pan masala not containing tobacco on the other hand established quite well that while gutkha and pan masala containing tobacco were "tobacco preparations", the other forms of pan masala not containing tobacco were not "tobacco preparations". He submitted that it was not the quantum of tobacco added to the pan masala but the retention of the potency of the tobacco in pan masala and gutkha, which was relevant to decide the issue under appeal. In this connection, he pointed out that the quantum of tea added for preparing a cup of tea was quite small and yet it was known as tea or tea preparation and not as water or water preparation notwithstanding the fact that the water constituted a major proportion of tea preparation. He also referred to the example that a glass of

alcohol usually consumed would have significantly smaller quantity of alcohol than soda/water but still it was known as alcoholic preparation and not as soda/water or as soda/water preparation in spite of the fact that the quantum of soda/water was more than the quantum of alcohol. In support of his aforesaid submissions, he relied upon the judgment in *Indian Steel & Wire Products Ltd. v. CIT* 108 ITR 802 (Cal).

11. Referring to the order of the Id. CIT(A), the Id. Departmental Representative submitted that the learned CIT(A) was not justified in holding that Gutkha did not fall under any of the specific words following "tobacco preparations" in Item No. 2 of the Eleventh Schedule and therefore was not in the nature of tobacco preparation. He submitted that the Id. CIT (A) fell in grave error in applying the rule of ejusdem generis in interpreting the meaning of the expression "tobacco preparations". He contended that the words "such as" after "tobacco preparations" in Item No. 2 of the Eleventh Schedule were merely illustrative and not exhaustive and therefore not restrictive of the meaning of "tobacco preparations" and therefore the rule of ejusdem generis was not applicable for interpreting the words "tobacco preparations". His next argument against the applicability of the rule of ejusdem generis was that the said rule was applicable to construe the general words following particular words. He submitted that Item No.2 contained a list of specific words following general words and not general words following particular words. He pointed out that the words "tobacco preparations" were general words while the words following "tobacco preparations" were particular/specific words. His next argument was that the word "tobacco" in "tobacco preparations" was an adjective and would include any preparation in which tobacco was used.

Without prejudice to the aforesaid submission, he further submitted that Gutkha was "chewing tobacco" in item No. 2 of the Eleventh Schedule and therefore was very much covered by the aforesaid specific denomination also.

12. Referring to the specific words following the words "tobacco preparations" in Item No. 2 in Eleventh Schedule, the Id. Departmental Representative submitted that the Eleventh Schedule was appended to the I-T Act in 1977 when Gutkha was not known and it was for this reason that it could not be included in the list of

specific preparations in Item No. 2 as the Legislature could not have foreseen various other forms of tobacco preparations which would come to use after the Eleventh Schedule was appended in 1978. He contended that the law has to keep pace with the latest changes and this is what should guide the interpretation of the term "tobacco preparations". He argued that if a product having tobacco in its composition retained the potency of tobacco, such a product would qualify to be called as a tobacco preparation. He argued that it was qualitative aspect of the product, which was decisive and if the product had undergone metamorphosis as a result of addition of tobacco, the product would be a tobacco preparation. He further contended that it was not the name of the product but the quality of the product: that was important. According to him, pan masala without tobacco is available in the market and so is the pan -masala containing tobacco and gutkha and therefore a consumer does not buy Gutkha or pan masala with tobacco unless he is interested to consume tobacco.

13. Referring to the reliance placed by the Id. CIT(A) on the treatment of pan masala and related products under the Central Excise Act and other legislations, the Id. Departmental Representative submitted that the definition given in one legislation could not be automatically applied to another legislation. He relied upon the judgment of Hon'ble Madras High Court in CIT v. South India Viscose Ltd. 229 ITR 198 (Mad.) for the proposition that "The definition of an expression in one statute cannot be automatically applied to another statute whose object and purpose are entirely different." 14. The Id. Departmental Representative further submitted that the provisions of Section 80-1/80IA should be strictly construed and the deduction admissible there-under should not be extended unless the assessee satisfied the relevant conditions in that behalf. According to him, an assessee producing pan masala with tobacco or Gutkha would be covered by "tobacco preparations" as also by "chewing tobacco" and therefore would not be entitled to claim deduction Under Section 801/80IA.15. Replying to the submissions made by the Id. Departmental Representative, the Id. Sr. counsel for the assessee supported and defended the order of the CIT(A). His line of argument was broadly similar to the reasoning given by the Id. CIT(A) for holding that Gutkha was not a tobacco preparation. He submitted that the provisions of Section 80-1 and 80-IA were incentive provisions enacted to enhance industrial production and therefore

Id. Departmental Representative was not right in his submissions that the deductions available there-under were intended in respect of the profits and gains of the priority industries. He contended that the provisions of Section 80-1 and 80-1A being incentive provisions should be interpreted liberally so as to promote industrial production. He argued that the purpose of Section 80-1 and 80-1A was not to ban or discourage the production of tobacco and tobacco Preparations, Gutkha, etc., as the second proviso to Clause (iii) of Sub-section (2)b Section 80-1 itself extended the deduction to small scale industries manufacturing or producing the articles or things including tobacco and tobacco preparations specified in Item No.2 of the Eleventh Schedule. He submitted in the same breath that the Income-tax Act was not a social welfare scheme and therefore the admissibility of deduction or otherwise needed to be examined with reference to the relevant provisions of law and not with reference to the social objectives.

16. Inviting our attention to Item No. 2 in the Eleventh Schedule to the I-T Act, the Id. counsel submitted that the emphasis in Item No. 2 was on tobacco in both the expressions, namely, "Tobacco" and "Tobacco preparations" and therefore the expression "tobacco preparations" would cover only those preparations in which substantial, main and dominant ingredient was tobacco. He contended that his submission, as aforesaid, was clearly in conformity with the specific products enumerated in item No. 2 in the Eleventh Schedule. Explaining the significance of the words "such as" appearing in Item No. 2 in the Eleventh Schedule, the Id. counsel made two-fold submissions. His first submission was that the words "such as" in Item No. 2 of Eleventh Schedule were words of limitation and therefore the specific words/products following the words "tobacco preparations" would limit the meaning of the words "tobacco preparations" to those specific words. For this proposition, he relied upon the judgment in *Bombay Municipal Corporation v. Daily Taj Pvt. Ltd.* AIR 2001 Bom. 263 in which it has been held that "the words 'that is to say', 'such as' are the words generally understood as words of limitation." He further submitted that the scope of "tobacco preparations" could not therefore be extended beyond the specific products enumerated in Item No. 2 of the Eleventh Schedule. According to him, the listing of products in Item No.2 was quite exhaustive and hence did not permit inclusion of Gutkha in itself. His second submission, in the alternative, in this behalf was that Gutkha was not a tobacco

preparation, as it did not have tobacco as its main, substantial and dominant ingredient.

17. Elaborating his arguments, the learned senior counsel submitted that tobacco was substantial, main and dominant ingredient in all the specific products enumerated in Item No. 2, namely, cigars and cheroots, cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff. In this connection, he took us through the Dictionary meaning of the words "bidi", "cheroot", "cigar", "cigarette", "snuff and "preparation" as given in "The Random House Dictionary" and submitted that all the aforesaid specific products enumerated in Item No. 2 had tobacco as substantial and dominant ingredient. He pointed out that tobacco constituted 6-7% in Gutkha and hence it could not be said that tobacco was substantial, main and dominant ingredient in Gutkha so as to call it a "tobacco preparation".

He contended that an ingredient would constitute a dominant ingredient in any product if it constituted a substantial portion in the overall composition of the preparation either in terms of quantity or value or base. According to him, tobacco constituted about 6 to 7% of Gutkha in terms of quantity and 1% in terms of value and that the base of the Gutkha was also not tobacco. He submitted that the aforesaid facts clearly established that tobacco was neither a dominant nor substantial ingredient in Gutkha and hence Gutkha manufactured by the assessee could not be said to be a tobacco preparation. He contended that a "tobacco preparation" was not something which simply contained tobacco but a preparation, which had tobacco as its main, substantial or dominant ingredient similar to the seven specific products enumerated in Item No.2, He reiterated that mere presence of small quantity of tobacco in Gutkha would not convert: Gutkha into a tobacco preparation.

In this connection, he took us through the Explanation to item No. 5 in the Eleventh Schedule to the I-T Act (supra), which define "Blended flavouring concentrates". According to the said Explanation, "Blended flavouring concentrates" shall include, and shall be deemed always to have included, synthetic essences in any form." On the basis of the aforesaid, the Id: senior

counsel contended that where the intention of the legislature was to cover any product having tobacco as one of its ingredients, the legislature has said it specifically as it has said in the aforesaid Explanation. He contended that, in the absence of similar words as in Explanation to Item No. 5 in the Eleventh Schedule, mere inclusion of small quantity of tobacco as an ingredient In Gutkha would not be sufficient to treat it as falling under "tobacco preparations".

He emphasized that the presence of tobacco should be predominant in the composition of a preparation in order to call it as a tobacco preparation. Applying the aforesaid test, the Id. counsel submitted that Gutkha having tobacco content of 6-7% did not fall in the category of tobacco preparations. According to him, champagne does not become poison because some body has added poison to it.

18. Referring to Item No. 2 in the Eleventh Schedule, the Id. Sr.

counsel submitted that there was no clear word or phrase in the said Schedule that Gutkha or pan masala would be included or treated as a "tobacco preparation" and hence it was not possible to include Gutkha within the list of items enumerated in Item No.2 in the Eleventh Schedule. In this connection, he referred to the judgment in CIT v.Naga Hills Tea Co. Ltd. 89 ITR 236 (SC) and also to the judgment of the Hon'ble Gujarat High Court in CWT v, Shri Sadiqali Samsuddin, 152 ITR 190 (Guj.).

19. The Id. Sr. counsel invited our attention to Sr. No. 1 in Part "A" of the Thirteenth Schedule (inserted by the Finance Act, 2003, w.e.f.

1.4.2004 for the State of Sikkim) and submitted that "tobacco and tobacco products" specifically included "cigarettes, cigars and Gutka, etc." According to him, the legislature was well aware of Gutkha, as Zarda Yukta Pan Masala was being manufactured by M/s Kothari Products Pvt. Ltd. since 1970, when the Eleventh Schedule was inserted in 1970 in the I-T Act and therefore the exclusion of Gutkha from the list under the Eleventh Schedule was deliberate and clear expression of the legislative will that Gutkha was not to be treated as a tobacco preparation. On the basis of the aforesaid, the Id. Sr. counsel contended that where the intention of the legislature was to cover any product having tobacco as

one of its ingredients the legislature has said so in specific terms. According to him, the legislature has neither included pan masala nor Gutkha in Item No. 2 in the Eleventh Schedule nor said that pan masala or any chewing material having tobacco as one of its ingredients would be called tobacco preparation and hence it was not possible to import such a meaning to the expression "tobacco preparations" in Item No. 2 in the Eleventh Schedule.

20. He submitted that tobacco and pan masala have been dealt with differently in the legislations dealing with the levy of Central Excise and Sales Tax and therefore they were perceived even by the Government to be different from each other and that Gutkha was not treated as a tobacco preparation even under those legislations. In this connection, he took us through the orders passed by the Sales Tax Authorities.

Referring to The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, the Id. Sr. counsel submitted that the term "tobacco products" has been defined in Section 2(p) of the said Act as meaning the products specified in the Schedule. Inviting our attention to the Schedule to the said Act, the Id. Sr. counsel submitted that first seven items in the said Schedule, namely, cigarettes; cigars; cheroots; beedis; cigarette tobacco, pipe tobacco and hookah tobacco; chewing tobacco and snuff were exactly the same as in Item No. 2 of the Eleventh Schedule in the I-T Act. It was Sr. No. 8 in the Schedule to the Act of 2003- that "Pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called)" and Sr. No. 9 in the said schedule that "Gutkha" have been included as "tobacco products" as defined in Section 2(p) of the Act of 2003. He submitted that the focus of Sr. No. 8 in the said Schedule was on any chewing material having tobacco as one of its ingredients, which converts any chewing material into a tobacco product. According to him, similar words as in Sr. No. 8 of the Act of 2003 are missing in Item No. 2 in the Eleventh Schedule to the I-T Act. The Id. counsel thereafter took us through the Explanation to item No. 5 in the Eleventh Schedule to the I-T Act to which a reference has already been made earlier in this Order.

21. Supporting his submission that Gutkha was not a tobacco preparation as did not contain tobacco in substantial portion either in terms of quantity or value, the learned senior counsel took us through the provisions of Section 80I(2)(iii) and submitted that the deduction Under Section 80I was available to an industrial undertaking if "it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule." The Id. counsel submitted that the use of the words "not being" in the aforesaid provision clearly showed that the deduction was available to all industrial undertakings unless they manufactured an article or thing not being the one specified in the Eleventh Schedule. He submitted that the words "not being" in the said provision should be liberally construed. For this proposition, he placed reliance on the judgment in *Bajaj Tempo Ltd. v. CIT* 196 ITR 188 in which it has been held that "A Provision in a taxing statute granting incentives for promoting growth and development should be construed \ liberally...." He however submitted that the exclusion clause or the restrictive clause contained in Item No.2 of the Eleventh Schedule should be construed strictly so as to deny the incentive only to those industrial undertakings, which, in terms of strict construction, manufactured or produced those very articles or things, which are specified in the Eleventh Schedule. In other words, the submission of the Id. counsel was that while incentive provisions should be construed liberally, the exclusion clause should be construed strictly. Relying on the aforesaid provisions, the Id.

counsel submitted that all the seven specific products following "tobacco preparations" should be construed strictly and not liberally so as to include a product what is not strictly includible in the said seven products within the meaning of "tobacco preparations". For this proposition, he relied on the decision of Hon'ble Andhra Pradesh High Court in *CIT v. Progressive Engineering Co.* 230 ITR 729 (AP).

22. The Id. counsel for the assessee submitted that identical issue has been considered and decided by a Division Bench of this Tribunal at Allahabad in *Kothari Products Ltd. v. ACIT* 37 ITD 285 in which it has been held that Zarda Yukta Pan Masala (i.e., pan masala containing tobacco) was not a tobacco preparation within the meaning of Item No. 2 of the Eleventh Schedule so as to

disentitle the assessee from claiming deduction Under Section 32AB and 80-1 of the I-T Act. He further submitted that the Reference Application filed by the Department Under Section 256(1) and Section 256(2) against the said order of the Tribunal was dismissed by both the Tribunal as also by the Hon'ble Allahabad High Court on the ground that no question of law arose out of the order passed by the Tribunal. The id. Sr. counsel has also filed a copy of the order passed by the Hon'ble Supreme Court on 12.07.1996 dismissing the Special Leave Applications filed by the Department against the order of Hon'ble Allahabad High Court rejecting the RAs of the Department Under Section 256(2). He contended that the order passed by the Allahabad Bench of this Tribunal has become final and therefore the same should be followed by us as the reasoning given by the Division Bench of this Tribunal in the said case stood endorsed and confirmed both by the Hon'ble Allahabad High Court as also by the Hon'ble Supreme Court.

23. In his rejoinder submissions, the Id. Departmental Representative submitted that Gutkha was a recent phenomenon which was hardly known at the time when Eleventh Schedule was inserted in the Income-tax Act in 1977. According to him, Gutkha would not cease to be a tobacco preparation on the sole ground that Gutkha was not included as a specific product in Item No. 2 of the Eleventh Schedule. He contended that the name of a product was immaterial as it was the quality of the product that would decide the true nature of the product. He reiterated that Gutkha, in qualitative terms, was a tobacco preparation. In this connection, he referred to the judgment in Collector of Central Excise v. Parle Exports Pvt. Ltd. 24. Replying to the submission of the Id. Sr. counsel that the words "such as" in Item No. 2 of the Eleventh Schedule were in the nature of limitation as held in Bombay Municipal Corporation (supra), the Id.

Departmental Representative submitted that the said judgment was given in a particular context and that the observations made by the Hon'ble High Court in the said case would not universally apply and more particularly in interpreting the words "tobacco preparations" used in Item No. 2.

25. Refuting the submission of the Id. Sr. counsel that reasoning given by the Allahabad Bench of this Tribunal in Kothari Products Ltd. stood approved by the

Hon'ble Allahabad High Court and Hon'ble Supreme Court, the Id. Departmental Representative submitted that the superior courts declined to interfere with the order passed by the Tribunal in the said' matter on the sole ground that no question of law was involved in the matter and therefore the orders passed by them should not be taken as endorsement or confirmation of the reasoning given by the Allahabad Bench of this Tribunal on merits. He further submitted that mere dismissal of SLP would not mean declaration of law: Nawab Sir Mir Usma Ali Khan v. CWT 162 ITR 888 (SC). In this connection, he invited our attention to the judgment dated 24th July 2006 of the Hon'ble Bombay High Court in the assessee's own matter (Income tax Appeal No. 118 & 119 of 2005) by which the Hon'ble High Court has set aside the orders, passed by the Division Bench of this Tribunal at Pune for AYs 1994-95 and 1995-96 and restored the appeals relating to the aforesaid assessment years for disposal afresh by this Tribunal. He submitted that the issue therefore needed consideration de novo in the light of the materials available on record.

26. We have heard the parties and considered their submissions including the authorities referred to by them. The simple issue in the present bunch of appeals is whether "Gutkha" manufactured by the assessee falls under the expressions "tobacco preparations" and "chewing tobacco" in Item No.2 of the Eleventh Schedule. The answer to the aforesaid issue turns essentially on facts. In Kothari Products Ltd. (supra), the Allahabad Bench of this Tribunal has held that Zarea Yukta Pan Masala does not fall under the expression "tobacco preparations" while Pune Bench of this Tribunal has held otherwise. The Hon'ble Allahabad High Court has dismissed the Reference Application filed by the Department against the said order of the Allahabad Bench on the ground that no referable question of law was involved. Thus, the Hon'ble High Court considered the aforesaid issue as one involving questions of fact and not of law. Hon'ble Supreme Court has also declined to interfere with the aforesaid order of the Hon'ble High Court. Thus, both the Hon'ble Allahabad High Court and the Hon'ble Supreme Court have held in identical case that the issue whether Gutkha falls under the expression "tobacco preparations" is a question of fact and not a question of law. Keeping this in view, we shall now proceed to first examine in detail the factual aspects surrounding the issue.

27. Tobacco is an agricultural product processed from the fresh leaves of plants in genus *Nicotiana glauca*. Thus "tobacco" connotes the processed narcotic leaves derived from the said plants. Dried tobacco leaves are often smoked in cigars, cigarettes and pipes, and are also chewed in the mouth or sniffed in the nose. Tobacco contains nicotine which is absorbed from the respiratory tract, and through mouth tissue and skin. As little dose of "nicotine" as contained in one half of a cigar or three cigarettes can prove to be lethal; however, only a very small fraction of the nicotine contained in the smoking tobacco products is actually released into the smoke and therefore is 'not lethal. Tobacco users risk many very serious and often fatal illnesses, such as cancer, strokes, heart disease, and lung disease. It's a matter of common knowledge that tobacco use is considered by the health agencies all over the world as the single most important preventable risk to human health and an important cause of premature (early) death worldwide.

28. As stated earlier, use of tobacco can be either in the form of smoking tobacco or in the form of smokeless tobacco. Smokeless tobacco (ST) can either be chewed in the mouth or sniffed in the nose. After tobacco was introduced in India in or around the 17th century, it became an ingredient of the betel quid. Through its association with a socially accepted practice, namely, betel chewing, smokeless use of tobacco as an ingredient in betel preparation found its way and became widespread due to its intoxicating effect and the 'buzz' that it created on its use. Currently almost all habitual users of betel quid use it with tobacco. The most recent variant of betel quid is pan masala, a manufactured item containing areca nut and other ingredients common in betel quid; some brands contain dehydrated and powdered betel leaves also. Four types of pan masalas are available in the domestic market, namely, plain pan masala; sweet pan masala; pan masala containing tobacco and gutka. Pan masalas of all variants are generally sold under the same brand name and so is Gutkha. "Gutkha" is also spelled guttkha, guthka or Gutka.

29. Gutkha is a preparation of crushed betel nut, tobacco, and sweet or savory flavorings. Sold across India in small, individual-size attractive packets that cost between 1 and 4 rupees a piece; it is consumed much like chewing tobacco. The gutkha, a powdery, granular white substance, is placed between the bottom lip

and the gum, or under the tongue. Within moments, the gutkha begins to dissolve and turn deep red in color. It imparts upon its user a "buzz" somewhat more intense than that of tobacco. Highly addictive and a known carcinogen, gutkha is currently the subject of much controversy in the country. Many States have sought to curb its immense popularity by taxing sales of gutkha heavily or by banning it outright. Due to its often sweet taste, easy availability and cheapness, it is popular with poor children, school boys and girls, who can exhibit precancerous lesions at a very early age as a result of its use. Gutkha also has effects on the environment. After it is consumed, it is generally spat onto a wall or the ground or inside the bus/train and other public services including public toilets, causing an unsightly red stain that is quite resistant to the elements. Some building owners have taken to combating this unpleasantness by painting murals of Gods on their walls, with the idea that gutkha-chewers would not spit on a God.

30. There are four major reasons for the popularity of pan masala containing tobacco and gutkha. As stated earlier, pan masala of all variants is generally sold under the same brand name. The single name for all variants of pan masala affords a significant marketing advantage to the manufacturer. Since there are no restrictions on advertising a consumer product that contains no tobacco, pan masala without tobacco is vigorously advertised and promoted. Pan masala of all variants including gutkha carry the same brand name and therefore get considerable benefit from the unrestricted advertisement and promotion of the its non-tobacco counterpart and thereby through surrogate advertising, i.e., duplicating the brand image of one product extensively to promote another product of the same brand. As a result of such high-profile advertising and surrogate advertising, smokeless tobacco use is increasing rapidly in the stratum of society from which it had almost disappeared-among individuals with college education who are in business and in middle and high-level management positions.

Pouches and sachets of smokeless tobacco are becoming more common in public places including schools and colleges as also places of worship.

It is visible even to the naked eyes. Driven by massive advertisement, another factor responsible for the popularity of pan masala is the perish-ability of the betel

leaf, a fresh green leaf from the betel vine, in which various ingredients of the quid are smeared and wrapped.

The tenderness and freshness of the leaf are highly prized, and therefore betel leaf does not last for more than a few days. Betel vine is said to be a delicate plant, requiring much care and attention, and cannot be grown everywhere. The leaf is thus difficult to obtain in places distant from betel-growing areas. Third reason for the popularity of pan masala containing tobacco or gutkha is the difficulty in detecting its use. It is easy to spot and detect the user of betel leaves, cigarettes, snuff, etc. but it is not so easy to spot the user of pan masala containing Gutkha or Gutkha. In other words, it is far easy and convenient to use pan masala containing tobacco or gutkha without the fear of detection by the presents, guardians, teachers, etc, as in the use of other tobacco products. Ease of concealing it, better taste, low price, etc., make pan masala containing tobacco and gutkha extremely popular even with school children and also with those who would have otherwise found it difficult to consume them openly for fear of being detected or identified. Fourth reason is the pleasant taste of gutkha and pan masala containing tobacco, which is achieved by adding various flavouring agents to the tobacco. This is what makes gutkha and pan masala containing tobacco extremely popular even amongst those who would have otherwise found it difficult to use smoking tobacco or other forms of smokeless tobacco for its bad odour or taste.

31. It is well acknowledged that the growth of pan masala industry was very slow in the 1970s when only plain and sweet pan masala were introduced. Those who have seen those days would distinctly recall that the pouches or sachets; containing pan masala with tobacco or gutkha were nowhere visible in any part of the country. However, this industry saw rapid growth from 1980s onwards, after the introduction of pan masala containing tobacco and gutka, especially in small sachets, which increased their transportability and cost of purchase. Synopsis of Debates (Proceedings other than Questions and Answers) held on 1st August 2005 in the Rajya Sabha in this behalf shows, as an example, the reality of the situation as to whether gutkha is perceived to be a tobacco preparation and also as to how this industry has witnessed phenomenal growth over last thirty years or

so. Let us have a glimpse of the relevant portion of the debate. It reads as under: DR. GYAN PRAKASH PILANIA: 'Gutkha' is the most popular brand in various forms of consumption of tobacco. The trade in regard to Gutkha was merely Rs. Six Lakh in the year 1974-75 and now a days, it has risen as high as ten thousand crore of rupees. A number of tobacco shops are opened nearby educational institutions. Continuous use of Gutkha, causes cancer because it contains several harmful things in it. Therefore, I urge upon the Government to ban the production of Gutkha immediately.

(Shri Kripal Parmar, Prof, R.B.S. Varma, Shri Lalitbhai Mehta and Shri Lekhvaj Bachani associated.) 32. It is evident from the aforesaid that the masses in this country perceive "Gutkha" as the most popular brand in the various forms of tobacco use. The purpose of the aforesaid discussion is two-fold: one, to highlight various well-known forms and aspects of tobacco use for proper understanding of the expressions "tobacco", "tobacco preparations" and "chewing tobacco" used in Item No.2 of the Eleventh Schedule; and, two, to highlight as to how the pan masala containing tobacco and gutkha are treated by the cross-sections of the society and also by all those who are actively involved in dealing with pan masala containing tobacco and gutkha, as tobacco preparations. Only those individuals who are addicted to or want to taste the tobacco would use gutkha or pan masala containing tobacco. Those who do not want to consume tobacco do not use gutkha. Gutkha and pan masala containing tobacco are thus consumed for the reason that it has tobacco. Other ingredients are added to tobacco in Gutkha and pan masala containing tobacco to provide better flavour, taste, etc. It is for this reason that consumers prefer gutkha to other forms of tobacco use. By its very nature, tobacco has a very unpleasant taste and hence other ingredients are added to provide taste to the tobacco. Tobacco being unpleasant in taste cannot provide taste to other ingredients in gutkha or pan masala containing tobacco.

33. Let us now turn to the meaning of the expressions "tobacco" and "tobacco preparations" used in Item No. 2 of the Eleventh Schedule.

"Tobacco" connotes the processed narcotic leaves obtained from the plants in genus. Nicotiana. In addition to "tobacco", Item No. 2 in the Eleventh Schedule

also uses another expression, namely, "tobacco preparations". The element of tobacco is common in both "tobacco" and "tobacco preparations". Does it then mean that both the expressions, namely, "tobacco" and "tobacco preparations" carry the same meaning and import? In our view, the answer is in the negative. If the meaning of both of them had been the same, there would then have been no occasion to use both of them in Item No.2. When the legislature enacts a particular phrase statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that the words add something which has not been said before. Leaves of plants in genus *Nicotiana* are first processed before being put to use. There can be two forms in which the said processed leaves can be put to use. First form of use is where the said leaves are used directly after being processed. The phrase "tobacco" in Item No.2 would therefore cover a product in which processed tobacco leaves are used directly in substantial quantity, like, cigarette, cheroot, hookah, etc. Then, what are "tobacco preparations"? Should "tobacco preparations" be also interpreted in the same sense in which "tobacco" is understood? The answer again is in the negative for the reasons already stated earlier.

In our view, "tobacco preparations" would cover all those preparations and products which are prepared using tobacco if the properties of tobacco are retained in the preparation without undergoing any metamorphosis as a result of addition of other ingredients. In such a case, the preparation would qualify to be called a "tobacco preparation". Notwithstanding the fact that gutkha contains tobacco to the extent of 6-7%, the tobacco in Gutkha retains all the qualities of tobacco including the pharmacology of nicotine and the physiological and psychological of nicotine and to the same extent as in other forms of tobacco use. It has also to be kept in view that the quantity and rate of absorption of nicotine present in chewing tobacco is much higher, faster and far more effective than in the use of smoking tobacco as the chewing tobacco is absorbed directly and immediately in the body in full quantity through extremely sensitive mouth tissues.

34. As stated earlier, tobacco has a very unpleasant taste and therefore it is orally consumed better when it is mixed with other ingredients. That is why the

Legislature has taken care to include "tobacco preparations" together with "tobacco" in Item No.2. Tobacco, in the form of processed leaves, is never the only constituent in spit or chewing tobacco. It is neither possible nor practicable to orally consume tobacco, i.e., processed leaves for several reasons. First is the lethal effect of the nicotine. A very small quantity of nicotine can prove to be lethal if it is orally consumed. Besides, it is not possible for anyone to orally consume purest form of tobacco, i.e., processed leaves or nicotine, without mixing it with other agents. As stated earlier, tobacco contains nicotine, which is absorbed from the respiratory tract, and through mouth tissue and skin. However a small fraction of the tobacco containing nicotine is needed, when it is orally consumed for the reason that the nicotine so consumed is directly released in the body while larger quantity of tobacco is needed in smoking tobacco. It is for this reason that the quantity of tobacco cannot be as substantial in chewing tobacco as it is in smoking tobacco. Second is that only a small quantity of tobacco is necessary for use as a neuro-stimulant and for getting the kick and the buzz. The quantity of tobacco which is included in gutkha is sufficient to reflect its potency and produce its effect on its consumer. The small quantity of tobacco in gutkha carries as much nicotine as it is in smoking tobacco or other tobacco preparations. Third is that tobacco per se has a very unpleasant taste. It is therefore simply not possible to orally consume tobacco in the form of processed leaves. A person orally consuming the tobacco in the form of processed leaves will, in all likelihood, immediately vomit it out. If he somehow happens to absorb it, he will, in all likelihood, suffer from serious intoxication and other health complications. That is why several ingredients are added so as to make the "chewing tobacco" taste pleasant, palatable and attractive for human consumption. All these are matters of common knowledge. Gutkha or pan masala containing tobacco will not become tobacco-less preparations on the sole ground that the content; of tobacco is 6-7% ignoring the fact that the said composition of tobacco in gutkha or pan masala containing tobacco carries the same pharmacology of nicotine and physiological or psychological effects of nicotine as other tobacco products, like cigarettes: cheroots, etc.

35. Learned senior counsel vehemently contended that a preparation would not be a tobacco preparation unless tobacco was its main or dominant ingredient

According to him, an ingredient would be a dominant ingredient in any preparation if it constituted a substantial portion in the overall composition of the preparation either in terms of quantity or value or base. We have given serious thought to the submissions made by the learned senior counsel. In our view, an ingredient in a preparation would be a dominant one if its properties dominate or prevail over other ingredients present in the preparation regardless of the fact that smaller quantity of such an ingredient is used in the preparation than the quantities of other ingredients. The success of pan masala industry lies in the fact that the pan masala containing tobacco and gutkha produced by it are extremely palatable, tasty and carry the same strength or potency of tobacco as in other forms of tobacco use and it is for this reason that it is so popular even amongst the school children and also amongst those who would not have used smoking tobacco or other forms of smokeless tobacco due to its unpleasant taste or odour, Gutkha having tobacco content of 5 to 7% carries the same pharmacology of nicotine and causes the same physiological and psychological effect as any other tobacco preparation or product individually specified in Item No. 2. Other ingredients are added to make the spit or chewable tobacco, i.e., Gutkha taste pleasant and palatable and this is what is exactly done in the manufacturing of gutkha and pan masala containing tobacco. As stated earlier, the pharmacology of nicotine, the physiological and psychological effects of nicotine are intact in the tobacco added to other ingredients in the Gutkha and pan masala containing tobacco in the same way and in the same strength as they are in other forms of tobacco use. Thus the tobacco content present in Gutkha has dominant effect over all other ingredients in Gutkha. Other ingredients in Gutkha simply make it tasty and easy to chew the tobacco present in Gutkha without affecting the quality or potency of the tobacco. It is neither the size nor the length nor the quantum of the ingredient in a preparation which can decide by itself as to what is the dominant or main ingredient in a preparation but the strength or potency of an ingredient which would decide as to what is the dominant ingredient in a preparation. In this view of the matter, it is not possible to accept that gutkha and pan masala containing tobacco should not be treated as tobacco preparation only because of the fact that tobacco constituted a small portion, i.e., 6 to 7% of their overall composition. It is like the fact that a glass of coke is treated as coke notwithstanding the presence of

substantial quantity of water in it and a very small quantity of coke in it. Likewise, a cup of tea is called tea preparation notwithstanding the fact that processed tea leaves are in smaller quantity than the quantity of other ingredients, like water, in it. Beer is called alcoholic preparation even though the content of alcohol in beer is just 5 to 6%. In homoeopathic preparations, the quantity of liquid medicine is nominal while the sugar pills constitute the bulk of the homeopathic preparation but nobody calls a homoeopathic medical preparation a sugar preparation. Same principles apply to various drug preparations. The tests suggested by the learned senior counsel fall flat in all the aforesaid examples. The overall nature of a preparation cannot therefore be judged by applying the test of substantial quantity or the test of substantial value of an ingredient; in the overall composition of the product nor is it necessary that it should, form the main base of the product. In our view, the dominant ingredient in a preparation is one which retains by virtue of its potency its basic characteristic without undergoing any metamorphosis. It is the quality of the product which decides the nature of the product. If a preparation is consumed for its tobacco content and the tobacco content does not undergo any morphosis after addition of other ingredients, the preparation would be a tobacco preparation. Thus qualitative aspect of a preparation and the popular perception of all those who deal with the preparation will ultimately decide the true nature of preparation. If both the aforesaid tests are applied to Gutkha, then there can be no manner of doubt that Gutkha and pan masala containing tobacco are tobacco preparations notwithstanding the fact that they may have 5-7% of tobacco in them. We hold accordingly.

36. Besides, the expression "tobacco preparations" has to be understood in contradistinction to a "tobacco-less preparation". As a "tobacco-less preparation" cannot become a "tobacco preparation", a "tobacco preparation", by the same logic, cannot become "tobacco-less preparation". It cannot be said that "Gutkha" is a tobacco-less preparation".

37. Learned senior counsel has vehemently contended that the seven items enumerated in Item No.2, namely, cigars and cheroots, cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff were quite exhaustive and therefore would restrict the scope of "tobacco preparations" to

those seven products alone. The learned senior counsel contended that there was therefore no scope to treat Gutkha and pan masala containing tobacco as "tobacco preparations". We have carefully considered the submissions made by the learned Counsel.

The rule of construction *noscitur a sociis* means that the meaning of a word is to be judged by; the company it keeps. As stated by the Privy Council in *Angus Robertson v. George Day* (1879) 5 AC 63, p. 69 (PC), it is a legitimate rule of construction to construe words in an Act of Parliament with reference to the words found in immediate connection with them, A careful perusal of the aforesaid seven items in Item No. 2 of the Eleventh Schedule would show that all the seven items fall in the category of (i) smoking tobacco, or (ii) smokeless tobacco, i.e., chewing tobacco or snuff. Therefore, the expression "tobacco preparations" in Item No. 2 needs to be construed in a manner that includes all the aforesaid three forms of tobacco use namely smoking tobacco and smokeless tobacco comprising of chewing tobacco, and snuff.

Those seven items make it absolutely clear that all the aforesaid three forms of tobacco use have been included within the phrases "tobacco" and "tobacco preparations". The purpose of enumerating seven items in Item No. 2 is to include all forms of tobacco use and cover them either in "tobacco" or in "tobacco preparations" and not to restrict the phrase "tobacco preparations" to those seven items alone. That is why general phrases like "tobacco" and "tobacco preparations" are followed by specific words in Item No. 2. It is not; in our view, the purpose of enumeration of all the aforesaid items that the words "tobacco preparations" should receive interpretation so as to restrict the Expressions "tobacco" and "tobacco preparations" to those seven items alone If that had been the intention of the legislature, then there Was no need to use the words "tobacco" and "tobacco preparations" in Item No. 2. The legislature, in that case, would have specified those seven items alone without using the expressions "tobacco" and "tobacco preparations" preceding them. This further strengthens the view that the purpose of enumeration of all the seven items in Item No.2 is to illustrate, by way of example, the various forms of tobacco use and to cover all of them under the expressions "tobacco" and "tobacco preparations". What is intended by the

inclusion of seven items in Item No. 2 is that all the aforesaid forms of tobacco use must be included under the expressions "tobacco" and "tobacco preparations" and that none of them must be excluded from their purview. Therefore, listing of the seven items in Item No.2 is not intended to convert the smokeless use of tobacco like "Gutkha" from being a "tobacco preparation" into a "tobacco-less preparation". Without prejudice to the aforesaid, if the aforesaid seven items were still to be treated as exhaustive or limiting/restricting the meaning of the words "tobacco preparations", then the limitation/restriction placed by them would be that the expression "tobacco preparations" would extend to cover the use of tobacco either as smoking tobacco or smokeless tobacco and to no other form of tobacco use. In that case also, the smokeless use of tobacco will cover Gutkha manufactured by the assessee and thus fall under the expression "tobacco preparations".

38. The learned senior counsel, however, contends that the words "such as" in Item No. 2 are always words of limitation. We are unable to agree with him. At page 3129 in the second volume of "The New Shorter Oxford English Dictionary" (1993 Edition), the meaning of the words "such as" is given as "for example". In *Royal Hatcheries v. State of Andhra Pradesh*, it has been held at page 668 of the said report that "the words 'such as' indicate that what are mentioned thereafter are only illustrative and not exhaustive". At page 670 of the said Report, it is stated: "So far as words 'such as' are concerned there is no dispute that they are meant to be illustrative and not exhaustive." At page 671 of the said Report, the terms "viz." and "etc." have been interpreted thus: "The opinion of Viscount Finlay shows that the expression 'viz.' stands for 'videlicet', which means 'to wit' or that is to say". These words are generally understood as words of limitation; Regarding the meaning of the word "etc.", it was observed that the word "etc." is absolutely different from "et alia" and that it means 'all the rest'." It cannot therefore be said as a universal and inflexible rule that the words "such as" would always import limitation. In the contextual setting of Item No. 2 of the Eleventh Schedule, the expression "such as" indicates that 'what' are mentioned thereafter are only illustrative of the various forms of tobacco use and "tobacco preparations". We therefore hold that all the seven items specified in Item No.2 of the Eleventh Schedule are illustrations of various forms of "tobacco preparations" and their use.

39. Without prejudice to the aforesaid observations, Let us accept for a while the submission of the learned senior counsel and assume that the expression "such as" in Item No. 2 is in the nature of limitation.

In the event of that assumption, the natural question would be whether Gutkha manufactured by the assessee falls under any of the items specified in Item No.2 of the Eleventh Schedule. One of the items mentioned therein is "chewing tobacco". The question now is whether Gutkha and pan masala containing tobacco fall under "chewing tobacco" or not. If they fall under "chewing tobacco", they would be specifically also covered by Item No.2 of the Eleventh Schedule. The obvious question therefore is what is "chewing tobacco"? It is something, which one neither smokes nor swallows. All one has to do is to slosh it around in his mouth and spit out the brown juices every few seconds. It may be pretty disgusting but after all this is what is called "chewing tobacco" or spit tobacco -a form of smokeless tobacco.

It is well known that Gutkha and pan masala containing tobacco are chewed and would therefore also fall under the expression "chewing tobacco" which is one of the items denominated in Item No. 2 of the Eleventh Schedule. It is not the case of the assessee that "Gutkha" is chewed sans tobacco in it. Tobacco in Gutkha is also chewed. As stated earlier, other ingredients are added to tobacco in Gutkha to make the use of tobacco pleasant. We have also noted earlier in this Order that chewing tobacco, e.g., Gutkha carries with it the same pharmacology of nicotine and same physiological and psychological effects of nicotine as smoking tobacco or other forms of tobacco use. Gutkha is thus nothing but a different form of tobacco use through mouth. Gutkha belongs to the genus "chewing tobacco" as also "tobacco preparations".

Thus Gutkha and pan masala containing tobacco will be covered not only by the expression, namely, "tobacco preparations" but also by: the specific denomination, namely, "chewing tobacco" in Item No. 2 of the Eleventh Schedule. In this view of the matter, the submission of the learned senior counsel that Gutkha is not a tobacco preparation because it is not specifically covered by any of the items denominated in Item No. 2 of the Eleventh Schedule does not help the assessee even if the words "such as" in Item No.2 were treated as words of limitation.

40. The Id. counsel has contended that "Gutkha" is not one of the items enumerated in Item No. 2 of the Eleventh Schedule. He submits that Zarda Yukta Pan Masala was being manufactured by Kothari Products Ltd., since 1970 and therefore Parliament was well aware of the existence of the use of Gutkha. The learned Departmental Representative, on the other hand, contends that when the Eleventh Schedule was inserted in 1977, the use of Gutkha was not widely known and hence this was the reason why it could not be included in Item No. 2 in the Eleventh Schedule. We have given serious thought to the rival submissions made by both the parties. Without prejudice to our finding earlier in this Order that Gutkha is a form of chewing tobacco falling under the expression "chewing tobacco" in Item No.2, we shall now proceed to examine as to whether the mere absence of the word "Gutkha" in Item No 2., would take it away from the sweep of Item No.2 of the Eleventh Schedule. The Eleventh Schedule was inserted in the I-T Act by the Finance (No.2) Act 1977 w.e.f. 1.4.1978. It is a fact that the use of Gutkha and pan masala with tobacco was not widely known at that point of time notwithstanding its production in smaller quantities by M/s Kothari Products since 1970 as stated by the learned senior counsel for the assessee. The Id. counsel has also referred to the Thirteenth Schedule inserted by the Finance Act 2003 w.e.f. 1.4.2004 wherein Gutkha has been specifically included in the phrase "Tobacco and Tobacco products (including cigarettes; cigars, Gutkha etc.)". It is seen that the said Sr. No. 1 forms part of Part "A" of the Thirteenth Schedule, which is applicable for the State of Sikkim. The aforesaid Schedule was inserted by the Finance Act 2003 by which time the use of Gutkha had become widely prevalent and it is for this reason that Gutkha has been specifically included in the Thirteenth Schedule. This fact itself suggests that Gutkha Was not widely used in 1977 when Eleventh Schedule was inserted in the I-T Act and therefore pan masala containing tobacco or Gutkha could not be included in Item No. 2. It does not however alter the fact that the legislature was well aware, when the Eleventh Schedule was inserted in the I-T Act, about the various forms of tobacco use and therefore included all the forms of tobacco use prevalent at that time, namely, smoking tobacco and smokeless tobacco specifically including "chewing tobacco" in Item No.2 in the Eleventh Schedule. Widespread use of Gutkha is a recent phenomenon. It nevertheless falls within the ambit of "tobacco preparations" as

also within the ambit of "chewing tobacco" in Item No.2 of the Eleventh Schedule. Let us pause here for a while. If a manufacturer of "cigarette" retaining the properties of "tobacco" had named it as "Rose", would the cigarettes so manufactured have ceased to be "tobacco preparations" and become a "rose" not falling under Item No.2 of the Eleventh Schedule? The answer is emphatic "No". It is for this reason that the Courts all over the world have time and again declined to be bound by labels and have always tried to look through the substance in order to determine the true nature of a preparation or product. Besides, latest developments, which go well with the phraseology of the statute, cannot be ignored. It is fairly well settled that the language of a statute can be extended to new things which were not known and? could not have been contemplated when the Act was passed, when the Act deals with a genus and the thing which afterwards comes into existence was a species, of that genus. As stated at page 102 in the "Maxwell on the Interpretation of Statutes" (Twelfth Edition by P. St. Langan), the provision of Magna Carta, which exempted lords from the liability of having their carts taken for carriage, was held to extend to degrees of nobility not known when it was made, such as dukes, marquises and viscounts. As stated earlier in this Order, Gutkha was not much in use at the time when Schedule 11 was inserted in the Income-tax Act. Gutkha is one of the species of "chewing tobacco" as also "tobacco preparations". In this view of the matter, the mere fact that Gutkha or pan masala containing tobacco is specifically not included in the Eleventh Schedule inserted in 1977 w.e.f. 1.4.1978 will not make any difference and thus will not advance the cause of the assessee. The view that we have taken in the matter is supported by the principle laid down in *SIL Import, USA v. Exim Aides Silk Exporters*, in which the Hon'ble Supreme Court, in the context of the service of notice Under Section 138 of the Negotiable Instruments Act, has held as tender: Francis Bennion in "Statutory Interpretation" has stressed the need to interpret a statute by giving allowance for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words and other matters.

For the need to update legislations, the Courts have the duty to use interpretative process to the fullest extent permissible by the enactment. The following passage at page 167 of the above book has been quoted with approval by a three judge

Bench of this Court in State v. S.J. Choudhary It is presumed that Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

41. As already stated above, Gutkha and pan masala containing tobacco fall under the expression "chewing tobacco". The mere fact that they have not been individually specified in Item No. 2 of the Eleventh Schedule does not mean by itself that they would fall outside the scope of "chewing tobacco" or "tobacco preparations" only because of the fact that they came to be widely used after the Eleventh Schedule was inserted in the I-T Act.

42. The Id. counsel has strongly relied upon the provisions of the Acts dealing with Central Excise and Sales Tax in support of his submission that pan masala, Gutkha, tobacco preparations have been treated by them differently. In our view, reference to the aforesaid Acts is neither necessary nor warranted. It has been held in CIT v. Ventakeshwara Hatcheries 237 ITR 174 (SC) that "the meaning assigned to a particular word in a particular statute cannot be imported to a word used in a different statute". Besides, the Acts relating to Central Excise and Sales Tax deal with the structure of duty and taxes in respect of various goods, articles and things classified by them. Classification for the purpose of duty or taxes is hardly relevant for deciding the scope of "tobacco preparations" and "chewing tobacco" used in Item No.2 of the Eleventh Schedule.

43. The Id. counsel for the assessee has strongly relied upon the decision of a Division Bench of this Tribunal at Allahabad in Kothari Products Ltd. (supra) and submitted that the reasoning given by the Tribunal in the said case stood endorsed or approved by the High Court and the Supreme Court as the superior courts have declined to entertain the Reference Applications filed by the Revenue against the said order of the Tribunal. In our view, the submissions made by the Id. counsel for the assessee do not carry much weight. It is true that the Allahabad

Bench of this Tribunal has taken one view but it is equally true that the Pune Bench of this Tribunal has taken a contrary view, A Special Bench is Constituted Under Section 255 to resolve such controversies including controversies on facts. The mere fact that the Hon'ble Allahabad High Court has declined to admit Reference Application against the order of the Allahabad Bench of this Tribunal in Kothari Products Ltd. (supra) on the ground that no referable question of law arose means in legal terms that the Hon'ble High Court has considered and held that the issue whether Gutkha falls "tobacco preparations" in Item No. 2 of the Eleventh Schedule is a question of fact and not of law. The Hon'ble Supreme Court has declined to interfere with the said order of the Hon'ble High Court. Their decisions are affirmation that the issue whether Gutkha falls under the expression "tobacco preparations" is a question of fact and not a question of law. In view of the divergence of Views between Division Benches of this Tribunal at Allahabad and Pune on this important question of fact, the assessee sought and the Hon'ble President of this Tribunal accepted that the issue required to be referred; to this Special Bench for adjudication. But the issue whether Gutkha falls under the expression "tobacco preparations" remains a question of fact as held by the Hon'ble Allahabad High Court and Hon'ble Supreme Court in Kothari Products Ltd. (supra) involving identical issue. It is for this reason that we have examined in detail the facts surrounding the issue and it is after such examination that we record a finding of fact that Gutkha manufactured by the assessee falls under the expressions "tobacco preparations" as well as "chewing tobacco" within the meaning of Item No. 2 of the Eleventh Schedule.

44. Both the parties have argued as to how the provisions of Section 80-1/80-IA and more particularly the words used in Item No. 2 of the Eleventh Schedule should be construed. The Id. Departmental Representative submitted that they should be construed strictly while the Id. senior counsel contended that the incentive 'provisions should be construed liberally but the exclusion or restrictive clauses and words should be construed strictly. In bur view, the task of interpretation hardly arises in the present case. The meaning of the words "tobacco preparations" and "chewing tobacco" are fairly well known and clear. We have simply endorsed what is popularly believed to be the true nature of Gutkha and pan masala containing tobacco as "tobacco preparations" and "chewing

tobacco". It may be relevant to mention that the name of the assessee-company itself was "Dhariwal Tobacco Products Private Ltd.". This shows as to how the assessee itself treated its own products. We are conscious that the assessee has since changed its name. But that does not alter; the, perception of the assessee itself about the nature of the products manufactured by it.

(i) The expressions "tobacco" and "tobacco preparations" in Item No.2 of the Eleventh Schedule in the Income-tax Act do not mean one and the same thing. While the expression "tobacco" means processed narcotic leaves and hence "tobacco" would mean a product in which the said leaves are substantially used in terms of quantity, value or base, the expression "tobacco preparations" means a preparation using tobacco if the; pharmacology of nicotine and physiological and psychological effects of nicotine are dominant and the properties of nicotine, a substance derived from tobacco, do not undergo any metamorphosis as a result of addition of other: ingredients in the preparation. Tested on this principle, "Gutkha" falls under the expression "tobacco preparations". We therefore hold accordingly.

(ii) The test suggested by the learned senior counsel requiring that substantial quantity of "tobacco", either in terms of weight/quantity or value or base in the preparation, must be present in a product/preparation is relevant for judging whether a product falls under the expression "tobacco" or not. The test whether an ingredient is a dominant one in a preparation is relevant for judging whether a preparation falls under the expression "tobacco preparations" or not. The dominate nature of an ingredient in a preparation must be judged in the light of the fact whether the properties of that ingredient are retained and dominate the preparation without undergoing any metamorphosis as a result of the addition of other ingredients in the preparation. Tested on this principle also, Gutkha falls under the expression "tobacco preparations" for the reasons explained earlier in this Order.

(iii) The words "such as" used in Item No.2 are merely illustrative and not exhaustive. They are indicative of what are mentioned thereafter. In the Contextual setting of Item No.2 of the Eleventh Schedule, the words "such as" are mere indication of various forms of tobacco use, namely, (i) smoking tobacco; and (ii)

smokeless tobacco comprising of various forms of "chewing tobacco" and "snuff.

Without prejudice to the aforesaid, the words "chewing tobacco" in Item No.2 would also cover "Gutkha" within its sweep and ordinary meaning.

(iv) The fact that Gutkha is not one of the items individually enumerated in Item No.2 of the Eleventh Schedule does not mean that it does not fall under the expressions "tobacco preparations" and "chewing tobacco" used therein. Courts have time and again declined to be bound by labels and have always tried to look through it and breach to the substance. In substance, Gutkha is well covered by, the aforesaid expressions and hence absence of its individual denomination in Item No. 2 of the Eleventh Schedule is not material.

This is more so as Gutkha was not widely used at the time when the Eleventh Schedule was inserted in the I-T Act.

(v) In popular sense also, Gutkha is used for its tobacco content the taste of which is further enhanced by other ingredients present in Gutkha. Those who are not interested in tobacco would never use Gutkha for the reason that other variants of pan masalaj without tobacco are; available in the market and therefore persons interested in using the other ingredients of Gutkha would use them for the sake of taste of other ingredients and not Gutkha. Besides, the name of the assessee, namely Dhariwal Tobacco Products Private Ltd., indicates that the assessee treats itself as a manufacturer of tobacco products and its Gutkha as a tobacco product. Subsequent alteration in the name would not dilute the nature of the products produced by the assessee. Thus, it is evident that all concerned understand Gutkha as falling under "tobacco preparations" as well as under "chewing tobacco" in Item No.2. In Royal Hatcheries Pvt. Ltd. v. State of AP (supra), the Hon'ble Supreme Court has held that the particular words used by the legislature in the denomination of articles are to be understood according to the common commercial understanding of the terms used. Tested on this principle also, "Gutkha" is perceived, according to the common commercial understanding, as "tobacco preparation" and "chewing tobacco".

(vi) Classification of goods under legislations dealing with levy of taxes and duties on them is relevant only for the purpose of those legislations. They are not relevant for the purpose of interpreting the expressions "tobacco", "tobacco preparations" and "chewing tobacco". The meaning of the aforesaid expressions used in Item No. 2 has to be seen in their contextual setting in Item No. 2 of the Eleventh Schedule.

(vii) The judgment of the Hon'ble Allahabad High Court declining to admit the Reference Application filed by the Department against the order of a Division Bench of this Tribunal at Allahabad in Kothari Products Ltd. (supra) and the Hon'ble Supreme Court declining to interfere with the aforesaid judgment of the High Court is an authority for the proposition that the issue whether Gutkha falls under the expression "tobacco preparations" within the meaning of Item No.2 of the Eleventh Schedule is a pure question of fact. Our finding on the facts is that Gutkha manufactured by the assessee falls under the expressions "tobacco preparations" as well as "chewing tobacco" within the meaning of Item No.2 of the Eleventh Schedule.

46. Keeping all the facts of the case and the applicable law in view, we hold that Gutkha and pan masala containing tobacco are "tobacco preparation" and "chewing tobacco" within the meaning of Item No. 2 of the Eleventh Schedule to the I-T Act. Since the assessee is manufacturing or producing Gutkha, which is one of the items covered by the Eleventh Schedule, the assessee is not entitled to claim deduction Under Section 80I/80IA. In this view of the matter, the order of the CIT(A) is vacated. The appeal filed by the Department is allowed.

1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in allowing deduction Under Section 80I and 80A of the I-T Act, to the assessee company, without appreciating the fact that Gutkha is a tobacco preparation and will fall within item-2 of the Eleventh Schedule to the Income Tax Act.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) failed to appreciate the fact that Gutkha takes the colour of tobacco preparation in as much as 7% tobacco mixed with Supari in Gutkha/pan masala has the injurious

effect to converting it into a tobacco preparation." 48. The issue raised by the Department in the aforesaid appeal is identical with the one raised by it in its appeal for AY 1997-98 which we have already considered and decided in favour of the Department.

Following the same, appeal filed by the Department for AY 1998-99 is allowed.

1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in allowing deduction Under Section 80I and 80A of the I-T Act, to the assessee company, without appreciating the fact that Gutkha is a tobacco preparation and will fall within item-2 of the Eleventh Schedule to the Income Tax Act.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) failed to appreciate the fact that Gutkha takes the colour of tobacco preparation in as much as 7% tobacco mixed with Supari in Gutkha/pan masala has the injurious effect of converting it into a tobacco preparation.

50. The issue raised by the Department in the aforesaid appeal is identical with the one raised by it in their appeal for AY 1997-98 which we have already considered and decided in favour of the Department. Following the same, appeals filed by the Department for AY 1999-2000 & 2000-01 are allowed.

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred legally and factually in holding that "Since the issue is already decided against the appellant by Hon. ITAT, Puna bench, Pune, the ground of appeal raised by the appellant has to be rejected as the appellant would not be entitled to any allowance of deduction Under Section 80IA of the income-tax Act, 1961 as held by the Assessing Officer and upheld by the Hon'ble ITAT, Pune Bench.

The CIT(A) has thus erred in not even applying his judgment to the fact of the case, The deductions claimed Under Section 80I and Under Section 80IA as claimed by the assessee company should be allowed, 52. The issue raised by the assessee in the aforesaid appeal is identical with the one raised by the Department in its appeal for AY 1997-98 which we have already considered and

decided in favour of the Department and against the assessee. Following the same, appeal filed by the assessee for AY 2001-02 is dismissed.

53. The, grounds raised by the Department in both the aforesaid appeals are identical and read as under: 1. On the facts and in the circumstances of the case and in law, the Id, CIT(A) has erred in allowing the deduction Under Section 80-I of the I-T Act without appreciating the fact that Gutkhas is a tobacco preparation and will fall within Item 2 of the Eleventh Schedule to the I-T Act.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) failed to appreciate the fact that Gutkha takes the colour of tobacco preparation in as much as 7% tobacco mixed with supari in Gutkha/Pan masala has the injurious affect of converting it into a tobacco preparation.

54. The aforesaid appeals filed by the Department were earlier disposed off by a Division Bench of this Tribunal at Pune by its Order dated 20th July 2004. The said order was challenged before the Hon'ble Bombay High Court. By its Order dated 24th July 2006, the Hon'ble High Court has set aside the aforesaid order of this Tribunal and restored the appeals for a fresh disposal together with other appeals bearing ITA Nos. 203/PN/1996; 864/PN/2002; 865/PN/2002; 960/PN/2003; and 961/PN/2003 to ensure uniformity in decision without expressing any opinion on the merits of the case. In respectful compliance with the order of the Hon'ble Bombay High Court, we have heard these appeals together with other appeals. The aforesaid issues have already been considered by us in earlier paragraphs and decided against the assessee. Following the aforesaid order, the appeals filed by the Department for both the aforesaid assessment years are allowed.

1. The CIT(A) has erred legally and factually in concluding that the order of the Assessing Officer is erroneous in the eyes of the law and prejudicial to the interest of revenue and has therefore erred in directing the Assessing Officer to withdraw the deduction Under Section 80-I of the I-T Act of Rs.8,01,315/- already granted to the assessee company. The order passed Under Section 263 by CIT, Pune may therefore be quashed.

2. The CIT Pune has erred legally and factually in holding that even though main ingredient of Gutkha is betel nuts, and only a small percentage of tobacco is added in Gutkha, the Gutkha is a "tobacco preparation", and has further erred in holding that it is an item covered by List of Articles item No. 2 of Schedule XI to Income Tax Act 1961 and in directing the Assessing Officer to withdraw deduction Under Section 80I of the I-T Act, 1961. He ought not to have withdrawn the deduction Under Section 80-1 of I-T Act, which was rightly allowed.

3. Without prejudice to above grounds of appeal, the CIT has completely erred in not even considering the fact that in Plain Pan Masala, even a small percentage of tobacco is not added and has further erred in holding and directing the Assessing Officer to withdraw the total deduction Under Section 80I of the I-T Act 1961.

He ought to have allowed 80I deduction or, other] varieties of Pan masala.

4. The CIT, Pune has erred in not following the ratio of the ITAT decision in the case of Kothari Products Ltd. (37 ITD 285) when the facts and circumstances of the case squarely apply to the appellant's case and when it is learnt that the Reference Application in the Kothari Products Ltd. case is rejected and the ITAT decision has become final.

He ought to have followed the ratio of the ITAT decision in the case of ' Kothari Products Ltd. 56. The aforesaid appeal has been filed by the assessee against the order passed by the Id. CIT(A) Under Section 263 of the I-T Act 1961 on 4.1.96 on the ground that the assessment order passed by the Assessing Officer was erroneous in the eyes of law and prejudicial to the interest of the revenue. After having held so, the Id. Commissioner further directed the Assessing Officer to withdraw the deduction amounting to Rs.8,01,315/- allowed by the Assessing Officer: to the assessee Under Section 80-1 of the I-T Act, 57. Facts: of the case, in brief, are that the assessment Under Section 143(3} was completed by the Assessing Officer on 30.12.1994 assessing the total income of the assessee at Rs.18,69,740/- after allowing deduction amounting to Rs,8,01, 315/- Under Section 80-I to the assessee. Bare perusal of the assessment order shows that there is no discussion of any kind in the assessment order regarding the aforesaid claim

made by the assessee. The Id. Commissioner called for the records, examined them and issued a show-cause notice dated 5.12.95 calling upon the assessee to explain as to why he should not take suitable action Under Section 263 of the I-T Act and issue appropriate directions to the Assessing Officer in the matter. After considering the explanation given by the assessee, the Id. Commissioner passed the order under appeal. Relevant portion of his order has already been extracted and reproduced earlier in this order.

58. Aggrieved by the aforesaid order passed by the Id. Commissioner, the assessee is now in appeal before this Tribunal. The Id. Sr. counsel took us through the entire order passed by the Id. Commissioner and submitted that it was nowhere mentioned by the Commissioner in his order as to how the assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. According to him, it was not the case of the Id. Commissioner that the Assessing Officer had; not examined the matter; while passing the order. He submitted that the Assessing Officer took a possible view in conformity with the decision of the Allahabad Bench of this Tribunal in Kothari Products Ltd. (supra) which was binding on him at that time in the absence of any contrary view, and therefore the Assessing Officer could not be said to have committed any error in allowing the claim of the assessee Under Section 80-I. According to him, the Assessing Officer was bound to allow the claim in terms of the decision of the Tribunal in the aforesaid case: Union of India v. Kamlakshi Finance Corporation Ltd. 1991 (55) E.L.T. 433 (SC) The Id. counsel has placed reliance on the following decisions: 1) CIT v. Jagadhri Electric Supply And Industrial Co. 40 ITR 490(P& H) 59. Per-contra, the Id. Departmental Representative supported the order passed, by the Id. Commissioner Under Section 263. He submitted that the order passed by the Assessing Officer was cryptic and without application of Judicial mind, According to him, it was passed without any examination of the relevant issue either in terms of facts or in terms of law. He contended that the decision given by the Allahabad Bench of this Tribunal was distinguishable and not binding on the Assessing Officer. He further submitted that each assessment year was a separate unit of assessment and therefore the issue in each; assessment year needed to be decided on its own facts and in accordance with the prevailing law 60. We have considered the rival submissions.

We have perused the assessment order. Para 2 of the assessment order reads as under: 2. The assessee derives income from manufacturing activities of various kinds of pan masala. It has undertaken activities of trading also. The assessee runs the business at different centers i.e.

Indore, Bombay and Pune. A consolidated account is kept at head office at Pune. Books of account kept are cash book, ledger, petty cash books, sales and purchases register, debit note, credit note register and production register. The books of account are closed and adjusted. Copies of trading account, P & L A/c. balance sheet and relevant extracts are filed. The books are audited and necessary reports in Form No. 3CA and 3CD are filed. The assessee has filed necessary compliances as called for from time to time.

3. During this year, total sales are made to the tune of Rs.609,94,887/against which GP worked out at Rs. 1,77,18,636/- which gives 29%. During last year, sales took place at Rs.2,38,38,790/-and GP was shown at Rs.28,10,253/- which gives 11.79%, the sales and purchases are entirely billed and verifiable.

The assessee has kept quantity details for each kind of varieties manufactured. The expenses claimed are supported by bills and all payments are made by cheques. The expenses claimed under the head advertisement for Rs,42,34,314/- has been fully scrutinized. The assessee has kept separate register and bills in this connection.

The extract of account has been brought on record. All the payments are effected through cheques/banks. The other expenses claimed are verifiable.

61. It is quite evident on bare perusal of the assessment order that the Assessing Officer has misdirected himself in assuming that the assessee derived its income from manufacturing activities of various kinds of pan masala. He lost sight of the fact that the assessee was also the manufacturer of Gutkha, which contained tobacco, Serial No. 10 of ITNS-65 (i.e., form of assessment order) requires the Assessing Officer to indicate the nature of business, of the assessee. In the said column, the Assessing Officer has indicated the nature of assessee's business as "Manufacturing of various kinds of pan masala".

Thus, the Assessing Officer proceeded, to complete the assessment and allow the deduction Under Section 80I on the assumption that the assessee was deriving its income from the manufacturing of various kinds of pan masala. The fact that the assessee was manufacturer of Gutkha seems to have escaped his attention. It is on this assumption that he allowed deduction @ 30% of the profits derived from the manufacturing activities of various kinds of pan masala. Thus the Assessing Officer has completely lost sight of the fact that the assessee is a manufacturer of Gutkha also. He has granted deduction Under Section 80-I of the I-T Act without taking note of the most crucial aspect of the case, Le., that the assessee is manufacturing Gutkha also and thereby allowed deduction @ 30% on the whole of the profit assuming it to be the profit derived from the manufacturing activities of pan masala only. The assumptions made by the Assessing Officer regarding the nature of the business of the assessee and profits arising from them are completely incorrect and therefore erroneous and prejudicial to the interests of the Revenue. They also reflect his total non-- application of mind to the relevant aspects of the case. It is a case where the Assessing Officer has mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. It is because of such non-consideration of the relevant issues on the part of the Assessing Officer that the deduction claimed by the assessee Under Section 80I stood automatically allowed without any scrutiny and on erroneous presumption that the profit on which the deduction was being claimed was from the manufacturing of various kinds of pan masala. The assessment order placed before us is clearly erroneous and prejudicial to the interest of the Revenue, as it has been passed without proper examination or enquiry or verification or objective consideration of the relevant issues. The Assessing Officer has completely omitted the relevant issue, namely, whether gutkha manufactured by the assessee falls Under "tobacco preparation" and "chewing tobacco" so as to deprive the assessee from claiming deduction Under Section 80I. It is not a case where the Assessing Officer has taken a possible view as he could have taken a possible view only if he had examined the relevant issues. It is thus a case of total non-application of mind on the part of the Assessing Officer while passing the assessment order.

62. We are well aware that Section 263 cannot be invoked to correct each and every type of error or mistake committed by the Assessing Officer, In Malabar

Industrial Co. Ltd., 243 ITR 63, the Hon'ble Supreme Court has held as under: There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only 'when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall the orders passed without applying the principles of natural justice or without application of mind.

63. Turning to the facts of the present case, it is seen that the Assessing Officer has passed a highly cryptic order without any conscious consideration of the issue as to the admissibility of the claim made by the assessee Under Section 80-I of the I-T Act in the light of the conditions prescribed in the statute. Perusal of the assessment order does not show any conscious or judicial application of mind by the AO in the matter. In our view, the assessment order revised by the learned Commissioner suffers from (i) incorrect assumption of facts by the Assessing Officer with regard to the nature of business and consequently granting deduction Under Section 80I on the basis of such incorrect assumptions; (ii) non-application of mind to the vital aspects of the case; and (iii) being a stereotyped order in which the Assessing Officer has merely accepted what the assessee wanted him to accept without any application of mind. The aforesaid observations made in Malabar Industrial Co. (supra) squarely apply to the facts of the case. Respectfully following them, we hold on the facts of the case that the assessment order passed by the Assessing Officer has rightly been held by the learned Commissioner to be erroneous and prejudicial to the interest of the revenue.

64. In taking the aforesaid view, we are also supported by the decision in Arvee International v. Additional Commissioner of Income-tax 290 ITR (AT) 8 (Mumbai) in which the aforesaid principles laid down in Malabar Industrial Co. (supra) have been reiterated. We are in agreement with the principles laid down in that decision.

64. Next issue that arises for consideration is whether the finding recorded by the learned Commissioner that Gutkha is a "tobacco preparation" is correct. We have taken a view and held in this Order that Gutkha manufactured by the assessee falls under the expression "tobacco preparation" and also under the expression

chewing tobacco" within the meaning of Item No.2 of the Eleventh Schedule in the Income-tax Act. We are therefore in agreement with the view taken by the learned Commissioner in this behalf in his Order Under Section 263.

65. In view of the foregoing, the appeal filed by the assessee is dismissed. Pronounced today, i.e., the 14th August 2007 in the open Court.

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