BEFORE IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D' NEW DELHI

SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 2144/Del/1989
Assessment Year: 1984-85

ITA No. 544/Del/1989
Assessment Year: 1985-86

ITA No. 3186/Del/1990
Assessment Year: 1986-87

ITA No. 2192/Del/1991
Assessment Year: 1987-88

ITA No. 525/Del/1995
Assessment Year: 1991-92

Indian Railway Const. Co. Ltd.
Palika Bhawan, Sector XIII,
R.K. Puram, New Delhi.
(Appellant)

vs.

IAC (A) R-XIII
New Delhi.
(Respondent)

Assessee by : Shri Ved Jain, Adv.
Shri Pranjal Srivastava, Adv.
Department by: Ms. Sulekha Verma, CIT(DR)

Date of Hearing : 09.06.2016
Date of pronouncement : 01.07.2016

O R D E R

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

These appeals have been filed by the assesee against the order of the CIT(A)-I, Delhi passed in respective appeals for assessment years 1984-85 to 1987-88 and 1991-92.

2. It is pertinent to note that these appeals have been set aside by the Hon'ble High Court of Delhi order dated 27.4.2009 passed in ITA No. 222 of 2006 and other appeals(For short High Court order) to the Tribunal for limited purpose i.e. for re-examination of the sole issue emerging from paras 31 to 34 of the order that "" As to whether such a claim which is made on the manufacture of articles which have been used for the construction would be admissible or not u/s 80HH and 80I of the Act."

3. We have heard arguments of both the sides and carefully perused the relevant materials placed on record interalia order of Hon'ble High Court dated 27.4.2009 (supra) and other relevant orders and judgment as relied by both the parties.

4. The Ld. Counsel for the assessee contended that as per para 2 of High Court order besides construction work of railway line the assessee company being a public sector company incorporated under companies Act and under administrative control of Ministry of Railways also engaged in the manufacturing of large no. of items and this fact has also been noted by the Tribunal at page 2 of last para for assessment year 1983-84 dated 20.8.1991 (hereinafter the Tribunal order). The Ld. Counsel vehemently pointed out that as per the Hon'ble High Court order (supra), it has been decided that the assesee is not eligible for deduction in respect of the income earned from construction activities but the assessee is eligible for deduction u/s 80HH & 80I of the Act on the income accrued during the relevant period from the manufacturing activities and for this limited purposes calculation of exemption the limited issue should be restored to the file of the AO for want of necessary details in this regard.

5. The Ld. CIT(DR) vehemently contended that there is no requirement of setting aside the issue to the file of the AO as the assessee is not carrying any manufacturing activity and even if some

small manufacturing activity is being carried out, the assessee did not maintain separate accounts for construction and manufacturing activity hence, there is no requirement for sending the case to the file of the AO for this purpose. The Ld. CIT(DR) also drawn our attention towards Hon'ble High Court Order (supra) paras 31 to 34 and order u/s 263 of the Act dated 7.2.1989 for asstt. year 1984-85 page 2 para 4 and contended that assesee company is a railway construction company there might be a minor activity of manufacturing of articles but the purpose of this activity is to complete main construction project hence the same is not eligible for deduction u/s 80HH and 80I of the Act. The Ld. CIT(DR) also drawn our attention to para 3 of the order of the Commissioner passed u/s 263 of the Act dated 7.2.1989 for asstt. year 1984-85 and contended the assessee failed to establish that the assessee is an industrial undertaking eligible for deduction u/s 80HH and 80I of the Act. Hence, there is no requirement for sending this issue to the file of the AO for computation of deduction. The Ld. CIT(DR) also pointed out that as per order of the Tribunal dated 28.4.2006 which was challenged by the same before the Hon'ble High Court, in para 6 the Tribunal has also observed that manufacturing activity of the assesee was not very significant compared to the total turnover of the assesee

which again goes against the claim of deduction placed by the assessee. The Ld. CIT(DR) also contended that the conclusion recorded by the Tribunal in para 9 to 11 of the Tribunal order dated 28.4.2006 (Supra) has been discussed by Hon'ble High Court order (supra) hence claim the assessee is not sustainable. The Ld. CIT(DR) also contended that as per profile of assessee company available on website the company is in the construction activity and not in the manufacturing activity and this deduction claimed by the assessee cannot be allowed. The Ld. CIT(DR) also placed reliance on the decision of Hon'ble High Court of Delhi in the case of CIT vs. Minocha Brothers Pvt. Ltd. (1986) 160 ITR 134(Del) which has been subsequently upheld by Hon'ble Supreme Court, contended that construction is not a manufacturing activity and when the assessee is purely engaged in the construction activity then it is not eligible for deduction u/s 80HH and 80I of the Act. The Ld. CIT(DR) contended that the observation of Hon'ble High Court in para 32 are based on factually incorrect arguments as such argument was not properly contravened by the Ld. Standing Counsel of the department appearing before Hon'ble High Court.

6. Placing rejoinder the above contentions of revenue , the Ld. Counsel for the assessee pointed out that the Ld. CIT(DR) wants to say that the case of the revenue was not placed properly by the Ld. Standing Counsel before Hon'ble High Court which is not permissible as per ethics of court arguments as the ability of High Court officer can not be challenged on doubted by the lower court officer appearing before the Tribunal on behalf of the Department. The Ld. Counsel also pointed out that the assessee claimed entire 100% income as deduction u/s 80HH & 80I of the Act but the claim regarding construction activity has been denied by the Hon'ble High Court, however, the claim of deduction in respect of manufacturing activities has been held as acceptable by the Hon'ble High Court then it is not open to the revenue to challenge this conclusion of Hon'ble High Court before Tribunal. The Ld. Counsel also pointed out the ratio of the Hon'ble High Court order in the case of CIT vs. Minocha Brothers (Supra) and Hon'ble Supreme Court in the case of N.C. Budhiraja (supra) has been followed in the Hon'ble High court order (supra) in assessee's case thus claim of deduction u/s 80HH & 80I of the Act has been allowed on the income accrued from construction activity.

7. On careful consideration of above submissions, from the order of Hon'ble High Court order (supra) paras 31 to 34 we observe that the issue has been set aside to the Tribunal for re-examination of the claim of the assessee for deduction u/s 80HH & 80I of the Act keeping in view the parameters laid down by the Hon'ble Supreme Court in the case of N.C. Budhiraja (Supra). The relevant para 28 to 34 are being respectfully reproduced below for the sake of completeness in this order :

"28. The Supreme Court, in appeal preferred by the Revenue against the judgment of the High Court, reversed the decision of the High Court. The Supreme Court noted that Section 80HH occurs 'in Chapter VI-A, which provides for "deductions to be made in computing total income". Sub-section (1) of Section 80HH provides that "where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel, 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 twenty per cent thereof'. Sub-section (2) say that section 80HH applies to any industrial undertaking which fulfils at the four conditions prescribed therein.

29. Thereafter, sub-section (2) of Section 80-HH was set out by the Apex Court, which lays down the conditions for the applicability of this provision in respect of industrial undertakings. The Supreme Court proceeded on the basis that the assessee was an industrial undertaking and delineated following question which arose for consideration :-

> *"In short. the limited question is whether the construction of a dam to store water (reservoir) can be characterized as amounting to manufacturing or producing an article or*

articles,' as the case may be."

The Court therefore, explained the meaning of the words 'manufacture', 'production' and 'articles' and held as under :-

"The word "production" or "produce" when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods. The next word to be considered is "articles", occurring in the said clause. What does it mean? The word is not defined in the Act or the Rules. It must, therefore, be understood in its normal connotation - the sense in which it is understood in the commercial world. It is equally well to keep in mind the context since a word takes its colour from the context. The word "articles" is preceded by the words "it has begun or begins to manufacture or produce". Can we say that the word "articles" in the said c1ause comprehends and takes within its ambit a dam, a bridge, a building, a road, a canal and so on? We find it difficult to say so. Would any person who has constructed a dam say that he has manufactured an article or that he has produced an article? Obviously not. If a dam is an article, so would be a bridge, a road, an underground canal and a multi-storeyed building. To say that all of them fall within the meaning of the word "articles" is to overstrain the language beyond its normal and ordinary meaning. It is equally difficult to say that the process of constructing a dam is a process of manufacture or a process of production. It is true that a dam is composed of several articles; it is composed of stones, concrete, cement, steel and other manufactured articles likes gates, sluices, etc. But to say that the end product, the dam, is an article is to be unfaithful, to the normal connotation of the word. A dam is constructed: it is not manufactured or produced. The expression. "manufacture" and "produce" are normally associated with movables - articles and goods, big and small - but they are never employed to denote the construction

activity of the nature involved in the construction of a dam or for that matter a bridge, a road or a building.

(emphasis supplied)

30. It is dear from the above that:

(i) while interpreting the words 'manufacture' or 'production, the Court drew distinction between manufacture/produce on the one hand and 'construction' on the other hand;

(ii) things like dam or, for that matter, bridge, roads, canals, buildings, are constructed and not manufactured;

(iii) the expression 'manufacture' or 'produce' are normally associated with movables, i.e. articles and goods, but not with construction activity;

(iv) the construction activity may be composed of articles, but that by itself will not become production of articles. For this purpose, it is the 'end product' which is the test and not various components/articles which go into the construction of the said end product.

31. Applying the aforesaid test. when we examine the case of the assessee in the context of end product, it is difficult to come to the conclusion that the activity of laying railway line can amount to 'manufacture' or 'produce'. It would definitely be a construction activity.

32. We may, however, note the argument of learned counsel Appearing for the assessee, who sought to draw a fine distinction by making a submission that the assessee was not claiming benefit of Section 80-HH and 80-1 on the strength of such manufacturing activity. On the contrary, the assessee was seeking benefit under the aforesaid provisions on the strength of manufacturing activity carried on by the assessee, namely, manufacture of numerous items, parts, components, etc. which go into the working and operational railway tracks. In this behalf, he had relied upon the following observation of the Supreme Court in N.C. Budhiraja (supra) :-

"It may be that the respondent is himself manufacturing some of the articles like gates, windows and doors which go into the construction of a dam but that makes little

difference to the principle. The petitioner is not claiming the deduction provided by section 8OHH on the value of the said manufactured articles but on the total value of the dam as such. In such a situation. it is immaterial whether the manufactured articles which go into the construction of a dam are manufactured by him or purchased by him from another person. We need not express any opinion on the question what would be the position if the respondent had claimed the benefit of section 80HH on the value of the articles manufactured or produced by him which articles have gone into/consumed in the construction of the dam."

33. *The learned counsel is right to the extent that in N.C. Budhiraja the Supreme Court categorically mentioned that the assessee had claimed benefit of Section 80-HH and 80-1 on the total value of the construction of dam as such and not on the value of manufactured articles which go into the construction of a dam. At the same it is also clear that the Court" did not express any opinion as to whether such a claim which is made on the manufacture of articles which go into the construction of a dam would be admissible or not. Obviously, it was left open.*

34. *Be that as it may, the issue in question has not been examined by the ITAT from this angle at all. Simply relying upon its order in respect of the assessment year 1983-84 (which was based on the High Court judgment in N.C. Budhiraja and overruled by the Supreme Court), the Tribunal allowed the appeal of the assessee herein. We are of the opinion that the matter needs to be re-examined by the ITAT keeping in view the aforesaid parameters laid down by the Supreme Court in N.C. Budhiraja. For want of adequate material before us, it is not possible to give the answer by ourselves. In that view of the matter, question No. 1 requires no answer."*

8. In view of above observations and conclusion of Hon'ble High Court Order (supra) in our humble understanding, the Hon'ble High Court categorically held that the activity of lying railway line cannot amount to activity of "manufacture" or "produce" and the same is construction activity and an income earned by the assessee therefrom is not eligible for deduction u/s 80HH and 80I of the Act. However, the Hon'ble High Court in the light of observations of the Hon'ble Supreme Court in the case of N.C. Budhiraja (supra) as reproduced in para 37 of the Hon'ble High Court order (supra) and in subsequent para 33 observed that the Hon'ble Supreme Court categorically mentioned that the assessee had claimed benefit of section 80HH and 80I of the Act on the total value of the construction of dam as such and not on the value of manufactured articles which go or used in construction of dam. Their Lordship speaking for Hon'ble Jurisdictional High Court in the same para 33 further observed that the Hon'ble Supreme Court in the decision of N.C. Budhiraja (supra) did not express any opinion as to whether such a claim which is made on the manufacture of articles which go or used for construction, would be admissible or not and the same was left open. Subsequently, in para 34 of the Act the Hon'ble High Court set aside the issue to the Tribunal for re-examination of the issue in view of the

parameters laid down by the Hon'ble Apex Court in the case of N.C. Budhiraja (supra).

9. On the basis of foregoing discussion in our humble understanding the sole question for our adjudication is as follows :

> *"whether the assesee is eligible for the deduction u/s 80HH and 80I of the Act in regard to the profits accrued to it from manufacturing activity, if any, carried out by it during the relevant financial periods ?"*

10. From last para at page 2-3 of the Tribunal order dated 20.8.1997 for asstt. year 1983-84 the activities of the assessee companies has been noted as follows :-

> *"The assessee submitted its detailed reply to the said notice vide its communication to the CIT dated 24th of March, 1988. In paragraph of this communication it has been submitted that the company manufactures or produces various articles such as, ballast, concrete sleepers, specialized mechanical track laying/relaying equipments, railway panels, steel roof panels, columns, gentry, girders, wind girdles, frames, dressings, erection towers, tackles etc. track laying equipment, cantilever assemblies, termination assemblies, droppers, multi-track different sizes, structuring steel for different types of bridges, reel wagons, flat top coaches for pentagraph checking, special beat attachment for pedestal insulators signals and signals operating systems relays racks, relays, signaling track circuiting power packs, ground gears, etc. etc."*

11. Further from the Hon'ble High Court order (supra) para 2 we observe that the assesee is engaged in the manufacturing of large number of items. This para 2 reads as follows :

> *"2. The assessee, namely, Indian Railway Construction Company Ltd. is a public sector company incorporated under the Companies Act and is under the administrative control of the Ministry of Railways. It is engaged in the manufacturing of large number of items such as ballast, concrete sleepers, specialised mechanical track laying/relaying equipments, railway panels, steel roof panels, columns, gentry, girders, wind girdles, frames, dressings? erection towers, tackles, etc., track laying equipment, cantilever assemblies, termination assemblies, droppers, multi-track portal structures, structure and earth steel bonds, earth mats, jumpers of different sizes, drop arms, super masts for feeders, multiple cross-channels of different sizes, double .track cantilevers, aluminum bus bars, reel wagons, flat top coaches for pentagraph checking, special beat attachment for pedestal insulators, signals and signal operating systems, relay racks, relays, signalling truck circuiting power packs, ground gears etc., all of which are used in the fabrication and installation of railway tracks."*

12. From the above it is vivid that besides construction activity and lying of railway line the assessee during the relevant financial periods was engaged in manufacturing activity as an industrial undertaking. These facts have not been controverted by the AO or by the CIT(A) and obviously onus lies on the assessee to show that besides construction and lying of railways line it was also engaged into manufacturing activity

which is performed in an industrial undertaking, for establishing claim of deduction u/s 80HH and 80I of the Act.

13. If we analyse the facts and circumstances of the present case then we are of opinion that in view of the facts noted by the Tribunal in the order dated 20.8.19991 (supra) and in para 2 of Hon'ble High Court order remanding the issue to Tribunal (supra) it is amply clear that the Tribunal as well as Hon'ble High Court noted and observed that besides construction activity the assessee is also engaged in manufacturing of large number of various items which are used in the installation and fabrication of railway tracks.

14. We decline to accept vehement contention of Ld. CIT(DR) that since the entire claim of the assessee of deduction u/s 80HH & 80I of the Act has been dismissed by the High Court then there is no point to decide eligibility of same on the manufacturing activities. Because in our humble understanding of the ratio of Hon'ble High Court order (supra) if the Hon'ble High Court was inclined to dismiss entire claim of the assessee then there was no need to send the case to the Tribunal for re-examination of the issue of allowability of claim of the assessee in

regard to income earned from manufacturing activities as noted by their Lordship in para 31 to 34 (as reproduced above) keeping in view the parameters laid down by Hon'ble Supreme Court in the case of N.C. Budhiraja (supra). Per contra, we are in agreement with the contention of Ld. Counsel for the assesse that the Hon'ble High Court held that the assessee is not entitled for deduction in respect of income accrued to it from construction activities such as lying of railway line / tracks. However, subsequently the Hon'ble High Court observed that since the issue of allowability of deduction u/s 80HH of the Act was left open by the Hon'ble Supreme Court in the case of N.C. Budhiraja (supra) as noted by Hon'ble High Court in para 32 (as reproduced above in this order), hence the Hon'ble High Court explicitly held that the claim of deduction u/s 80HH & 80I of the Act is allowable for the income accrued from manufacturing activities and the case of the assessee was not examined by the Tribunal from this angle at all.

15. On the basis of foregoing discussion we observe that the assessee is also engaged in the manufacturing of large number of items used which are used in fabrication and installation of railway lines/tracks. The Ld. CIT(DR) pointed out that this fact was not disclosed or placed before

AO and CIT but we decline to accept this contention of the as from para 3 at page 2 of the order of CIT dated 7.2.1989 passed u/s 263 of the Act, we note that vide written submission dated 27.9.1988 the assessee submitted this fact that the assessee company is suppose to manufacture various articles like cement concrete sleepers, track lying equipment, rail penal etc. which shows that the fact of manufacturing activity was informed to lower authorities and this fact was subsequently noticed in the Tribunal order for asstt. year 1983-84 (supra) and Hobn'ble High Court order (supra) thus it would be not fair to the assessee to say as contended by Ld. CIT(DR) that the Ld. Standing counsel tried to make out a new case by placing factually incorrect arguments, as noted by Hon'ble High Court in para 32 (supra) that the assessee was seeking benefit of deduction u/s 80HH & 80I of the Act. On the strength of the fact that the assessee also carried manufacturing activity during the relevant period.

16. Further keeping in view the dicta laid down by Hon'ble Supreme Court in the case of N.C. Budhiraja (supra) we respectfully note that their Lordship speaking for the Hon'ble Apex Court clearly held that the assessee is not entitled for deduction u/s 80HH and 80I of the Act for

income earned from construction activities but their Lordship refrain themselves from expressing any opinion on the question that what would be the position if the responded had claimed the benefit of section 80HH on the value of the articles manufactured or produced by it which articles have gone or used or consumed in the construction. When we proceed to analyse and re-examine the issue in view of the directions to Tribunal by Hon'ble High Court order (supra) then we note that this issue has to be re-examined and considered in the context of provisions of section 80HH of the Act. The clause (i) of sub section 2 and subsection (i) section 80HH of the Act mandates as follows :-

[21]**80HH.** (1) Where the gross total income of an assessee includes any profits and gains derived[22] from an industrial undertaking[22], or the business of a hotel, 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 twenty per cent thereof.

xx xx xx

4) The deduction specified in sub-section (1) shall be allowed in computing the total income in respect of each of the ten assessment years beginning with the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or the business of the hotel starts functioning :

Provided that,—

xx xx xx

17. In view of above provision we note that the deduction u/s 80HH of the Act in respect of profit and gains from newly established industrial undertaking in backward areas would be given subject to fulfillment of certain conditions as provided in sub section (2) of the said provision.

In the case in hand it is not the case of the AO that the assessee is not entitled for deduction because it is not fulfilling conditions mentioned in subsection (2) but the case of the AO is that the assessee is primarily engaged in the business of construction and lying of railways track / line and hence it is not entitled for deduction of u/s 80 HH & 80I of the Act. The CIT has in order u/s 263 of the Act for asstt. year 1984-85 (supra), in para 4 dismissing said claim of the assessee in regard to manufacturing activities, observed as follows :-

> *4. " At the outset, I would like to point out that the department has never doubted the status of the company as not being an Industrial Undertaking. Therefore, the arguments of the assessee company in this context are redundant. Regarding the manufacturing activity as listed in the reply, the claim of the assessee company is still inadmissible because the end product after the execution of the project is a Railway track or a bridge. As already explained, they do not constitute an article or a thing being immovable in character. There might be a minor activity of manufacture of articles but the purpose of this activity is to complement the main project i.e laying of Railway track. In view of this, the arguments of the assessee company are devoid of any substance and, therefore, the same are rejected. It would not be out of place to mention that while framing the assessment for the assessment year 1985-86, the claim of the assessee for deductions u/s 80-HH and 80-I was not allowed to the assesee company by the Assessing Officer on similar grounds. This order has been confirmed by the CIT(A)."*

18. In view of above observation it is vivid that the factum of said manufacturing activities are being undertaken by the assessee was well

known to authorities below but they denied deduction not only on the income from construction activity but also dismissed prayer of deduction on manufacturing activities. We are not agree with the contention the Ld. CIT(A) and subsequently raised by Ld. CIT(DR) that there might be a minor activity of manufacture of articles buy the purpose of the activity is to complete the main project of laying railways track / line as when the provisions of the Act mandates that the assessee is eligible for deduction pertains to income accrued from manufacturing activities then in our considered view, the manufacturing activity was an integral part of entire activity and namely for the reason that such an activity was not very significant compared to total turnover of the assessee it could not be said the assessee not engaged in manufacturing activity. In the provision of 80HH of the Act, as noted above, it is mandated that where the total gross income of an assessee includes any profits and gains derived from an industrial undertaking then this section of deduction applies. In the present case also the gross total income of the assessee includes income from manufacturing activity of an industrial undertaking irrespective of the fact that the activities is being carried out either at small scales or large scale and such activity was significant or not

compared to total turnover of the assessee including income of the business which is not eligible for such deduction.

19. In view of above we hold that the assessee is eligible for deduction u/s 80HH of the Act on the income from manufacturing activity. We may point out that the Ld. Counsel for the assessee fairly accepted that the assessee has not maintained separate book of accounts for construction and manufacturing activities hence these details have not been placed on record. He further submitted that if opportunity is allowed then the calculation in regard to income from manufacturing activities may be placed before the competent authority to discharge onus cast upon the assessee to substantiate its claim of deduction. The Ld. CIT(DR) has objected to above submissions of assessee by contending that when there is not separate accounts then and details and amount of income from small and insignificant manufacturing are not on record then it would be futile exercise to grant an opportunity to assessee to submit the same at this belated stage hence, claim of the assessee should be dismissed.

20. On careful consideration above it was the duty and onus on the shoulder of the assessee to show that he was also engaged in

manufacturing activities and the gross total income declared by it also include income from manufacturing activity and on the basis of foregoing discussion we have held that the assessee is entitled for deduction u/s 80HH and 80I of the Act on the part of income earned from manufacturing activities. However, for want of adequate material on the record of the Tribunal, it is not possible for us to calculate quantum of deduction and thus we find it appropriate to send the issue for limited purposes i.e. for calculation of deduction u/s 80HH on the income earned from manufacturing activities during the relevant periods under consideration for all five assessment years. Hence, we direct the AO to calculate the quantum of deduction for all the five assessment years under consideration.

21. In the result, all the appeals of the assessee are allowed with the directions to the AO as mentioned hereinabove.

Order pronounced in the open court on 1st July, 2016.

Sd/-	Sd/-
(L.P. SAHU)	(CHANDRA MOHAN GARG)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated 1st July, 2016
'veena'
Copy of order forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By Order

Asstt Registrar, ITAT