

ITAT/29/2021
IA No. GA/2/2021

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME
TAX, CENTRAL-1, KOLKATA

-Versus-

M/S. SHALIMAR PELLET FEEDS LTD.

Appearance:
Mr. Smita Das De, Adv.
...for the appellant.

Mr. Abhratosh Majumdar, Sr. Adv.
Ms. Swapna Das, Adv.
Mr. Siddhartha Das, Adv.
...for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 4th April, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 9th April, 2019 passed by the Income Tax Appellate Tribunal, Kolkata "D" Bench (the 'Tribunal' in short) in ITA Nos.2201, 2222, 2197, 2198 and 2199/Kol/2018 for the assessment years 2008-09, 2009-10, 2010-11, 2011-12 and 2013-14.

The appeal has been filed by the revenue raising the following substantial questions of law for consideration:

- i) Whether the Income Tax Appellate Tribunal erred in law in holding that the assessee has manufacturing activity in the production of the pellets and feeds although the process of productions or the procedure for producing the article does not come to neither the ambit of Section 2(29BA) of the Income Tax Act, 1961 and therefore perverse ?
- ii) Whether the order of the Income Tax Appellate Tribunal is at all sustainable inasmuch as the issue of question whether the activity is manufacturing or not pending hearing in High Court ?
- iii) Whether the Income Tax Appellate Tribunal misread and misinterpreted Section 80IB(5) and 80E(IE) of the Income Tax Act, 1961 and came to an erroneous decision that the assessee is entitled to additional depreciations claimed on plant and machinery relating to manufacturing since the activities does not come under the purview of the term "manufacture" under section 2(29BA) of the Income Tax Act, 1961 as such the order is liable to be set aside ?
- iv) Whether the Income Tax Appellate Tribunal erred in law in setting aside the order of Assessing Officer who made an addition of Rs.3,24,49,403/- in the Assessment Year 2009-10 based on the facts or difference in sales as per tax audit report/payment made to persons specified under Section 40A(2) (b) of the Income Tax Act, 1961 to M/s. Shalimar Hatcheries Ltd. as submitted by the assessee itself ?
- v) Whether the Income Tax Appellate Tribunal erred in allowing 30% depreciation amounting to

Rs.14,68,279/- in the Assessment Year 2009-10 as claimed by the assessee since the same is entitled to 15% on lorries, which was not used for the business of hire ?"

We have heard Ms. Smita Das De, learned standing counsel for the revenue and Mr. Abhratosh Majumdar, learned senior counsel assisted by Ms. Swapna Das and Mr. Siddhartha Das, learned Advocates appearing for the respondent.

It is not in dispute that the substantial questions of law, as suggested above, were decided in the assessee's own case. However, we find that the assessee's own case in ITAT/199/2018 dated 7th December, 2021 and ITAT/200/2018 dated 22nd February, 2022, the substantial questions of law nos.1 to 3, as suggested by the revenue, were slightly worded in a different manner in ITAT/200/2018 in which it was substantial question of law No.2. By the judgment dated 22nd February, 2022 the appeal was allowed and the question of law was answered in favour of the respondent/assessee. The operative portion of the judgment reads as follows:

"This is with regard to the claim for deduction under Section 80IB(5) of the Act which was denied by the assessing officer, granted by the Commissioner of Income Tax (Appeals) (CIT(A)) which was affirmed by the Tribunal. The assessee claimed deduction under Section 80IB of the Act on the ground that the activity done by them in their factory is a manufacturing activity by manufacturing poultry feed and, therefore, they are entitled for deduction. The assessing officer was of the view that there was no manufacturing done by the assessee but what was done

by the assessee is mixing various product, each one of them had an individual identity and cannot be construed to be an input for manufacturing of poultry feed. Therefore, the claim for deduction was denied. Before the CIT(A), the assessee had explained the entire manufacturing process which has been recorded by the CIT(A) in paragraph 2.7 of the order dated 11th February, 2016. From the said finding recorded by the CIT(A), we find that the process adopted by the assessee cannot be said to be a mere act of mixing of various individual products to turn out to be a poultry feed. The process involves steam cooking which is done after the materials are mixed and the assessee has a one tonne per hour boiler which generates steam at 10 kgs/cm² pressure and they also have insulated pipeline which carries the steam to the pellet section. The pressure reducing valve (PRV) is fitted before the pellet section which is reducing the pressure from 10 kgs to 1.5 kg/cm² which will ensure that the steam entering the conditioning section is released slowly into the material for good conditioning. Thereafter, there are two other conditioning processes in which the poultry feed comes into contact with steam which is stated to ensure that the starch contained in the feed is gelatinised which is better for the growth of the chicken and at that level the feed attains a temperature of 85°C thereby all the bacteria like E Coli, salmonella and other microbes get destroyed. After conditioning, the product goes in the pelleting section, then to the cooling section, then to the crumbling section, then to the sieving section and after passing the quality control test, it is ready for bagging. The assessee had also furnished details as to what are the raw materials required to make the poultry feed. This has been noted by the CIT(A) in paragraph 2.7.3 onwards of the order.

The list of micro ingredients, list of vitamins and the list of minerals have also been mentioned. Noting all these facts and also taking into consideration the order passed

by the tribunal in the case of DCIT-Cir-2/Kol Vs. Amricon Agrovest (ITA No.827/Kol/2012 dated 13.8.2013 where the assessee produced poultry feed and the tribunal after examining the entire process granted relief to the assessee. The CIT(A) also referred to the decision in the case of Komarala Feeds Vs. DCIT (1999) 18 CCH 087(ITAT Bangalore). In the said decision the tribunal held that while the raw materials individually can be eaten by both human beings as well as animals, the end product can be eaten only by animals. Thus, noting the factual position, the CIT(A) held that from the details filed by the assessee, it is clear that the end product of such poultry feed cannot be reversed back to its original raw materials/ingredients. The revenue challenged the order before the tribunal. The tribunal also examined the factual position and took note of various other decisions as also that the Central Government has notified the poultry feed industry under Section 80IB(4) and other observations, the appeal filed by the revenue was dismissed.

The learned counsel for the appellant/revenue submits that the process undertaken by the assessee is only mixing and, therefore, the assessing officer was right in denying the relief. In support of her contentions, the learned counsel referred to the decision of this Court in the case of PCIT, Kolkata Vs. V.N. Enterprises Limited in ITAT No.129/2016 dated 30.9.2021. This decision is pressed into service to buttress her submission that when there is ambiguity in an exemption provision, the benefit has to go to the revenue.

Further, the learned senior standing counsel referred to the decision in the case of Commissioner of Income Tax Vs. Tara Agencies [2007] 292 ITR 444 (SC). It is submitted that the decision in Tara Agencies was not placed before this Court when judgment was rendered in the case of Principal Commissioner of Income-Tax Vs. Sona Vets Pvt. Ltd. [2020] 424 ITR 387 (Cal) which held in favour of the assessee.

Firstly, the revenue has not been able to dislodge the factual findings recorded by the CIT(A) after examining the process undertaken by the assessee. On going through the materials placed before the CIT(A) which have been recorded in the order, we have no hesitation to hold that the process undertaken by the assessee in producing the poultry feed amounts to manufacture. The simple test which can be applied is to examine as to whether the individual ingredients which are mixed together to form the poultry feed can be recovered and brought back to its original position. After the process is completed, if such reversal is not possible then it goes without saying that the final product has a distinct and separate character and identity. The learned senior standing counsel submits that the process involves only mixing of all the ingredients which ingredients are capable of being consumed as such even by human beings. In our view, this may not be the right test because though the individual ingredients are capable of being consumed by human beings, the end product, namely, the poultry feed obviously cannot be consumed by human beings. Therefore, the individual ingredients lose their identity and get merged with the final product which is a separate product having its own identity and characteristics. Therefore, we are of the view that the CIT(A) and the tribunal were right in holding that the process undertaken by the assessee amounts to manufacture. So far as the decision in the case of V.N. Enterprises Limited is concerned, the question which was framed in the said appeal was whether the assessee therein will be entitled to exemption under Section 10B of the Act for business of blending of tea. The learned senior counsel for the respondent/assessee submits that in the said case a review application has been filed by the assessee raising several issues. Be that as it may, the said decision arose out of interpretation and the applicability of Section 10B on the particular process adopted by the assessee therein

in the light of the amendment by substitution done in Section 10B in the year 2001. Therefore, the Hon'ble Division Bench while considering the said provisions came to the conclusion that there was some ambiguity and, consequently, held that in case of ambiguity in any exemption provision, the benefit has to go to the revenue. To be noted that Section 10B as it stood prior to 2001 had an expanded definition of the term "manufacture" which included "process". Therefore, in our considered view, the decision in V.N. Enterprises Limited may not render assistance to the case of the revenue. The decision in Sona Vets has considered the case of an assessee who was also engaged in producing poultry feed. The Court has devoted several paragraphs of its judgement to examine as to what was the process undertaken by the assessee therein and concluded that the process undoubtedly amounts to manufacture. It may be true that the Court had referred to the judgement which was cited in paragraph 11 of the order. The argument of the learned senior standing counsel is that the decision of the Hon'ble Supreme Court in Tara Agencies was not placed before the Division Bench while rendering the decision in Sona Vets Pvt. Ltd. In our considered view, that may not make the judgement in Sona Vets Pvt. Ltd. to be inapplicable to cases where similar activities were carried on. In fact, in the case of Tara Agencies the process was blending of tea and obviously the process which was mentioned therein was different and distinguishable as that of the process of making poultry feed. Therefore, we would be well-justified in following the decision in Sona Vets Pvt. Ltd. which had considered the same product as that of the product produced by the assessee. Therefore, we hold that the tribunal was right in confirming the order of the CIT(A) and granting relief under Section 80IB of the Act. In the result, the substantial questions of law framed on this issue are decided against the revenue."

Following the above decision, the substantial question nos.1, 2 and 3 are answered against the revenue.

So far as the question nos.4 and 5 are concerned, identical question was also raised before us in ITAT/199/2018 and the findings rendered by the tribunal was set aside and the matter was remanded to the Commissioner of Income Tax (Appeals). Following the said decision in ITAT/199/2018 dated 7th February, 2021, the finding rendered by the Tribunal on the said issue is set aside and the matter is remanded to the CIT(A) to consider the case of the assessee afresh in terms of the observations contained in our judgment dated 7th December, 2021.

The appeal, ITAT/29/2021 stands disposed of accordingly.

Consequently, the connected application for stay (IA No.GA/2/2021) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)