

# SUPREME COURT OF INDIA

Commissioner of Income Tax - 1

Vs.

Hindustan Corporation Ltd.

C.A.No.9295 of 2017

(A.K.Sikri and Ashok Bhushan,JJ.,)

03.08.2017

## JUDGMENT

**A.K.Sikri,J.,**

1. The question of law that arises of consideration in all these appeals, which are filed by the Commissioner of Income Tax, Mumbai, is identical. The respondents-assesseees in these appeals are engaged in the process of bottling Liquefied Petroleum Gas (LPG) Cylinders meant for domestic use. They are claiming benefit of Sections 80HH, 80-I and 80-IA of the Income Tax Act, 1961 (hereinafter referred to as the 'Act' ). Admissibility of benefit under the aforesaid provision depends upon the question as to whether bottling of LPG is an activity which amounts to 'production' or 'manufacturing' for the purposes of the aforesaid provisions of the Act.

2. The Assessing Officers (AOs) had disallowed the deduction claimed by the assesseees holding that they did not engage in the production or manufacture activity because of the reason that LPG was produced and manufactured in refineries and thereafter there was no change in the chemical composition or other properties of the Gas in the activity of filling the cylinder. This view was affirmed by Commissioner of Income Tax (Appeals). The Income Tax Appellate Tribunal (ITAT), however, upset the aforesaid view of the AOs after finding that LPG produced in the refineries cannot be directly supplied to households without bottling of the LPG into the Cylinders and insofar as LPG bottling is concerned, it is a complex activity which can only be carried out by experts. In this light, it was noted that the process involved LPG suction, vapour distribution, de-classification, compression of LPG vapour, external and internal cleaning, hydro pressure testing refilling, sealing, quality control etc. and hence the activity would be a 'manufacturing activity' . In this hue, the Tribunal also referred to the Gas Cylinders Rules, 2004 and in particular Rule 2(xxxii) thereof which defines 'manufacture of gas' to mean filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder. On that basis, it was concluded by the Tribunal that the activity of filling of cylinder with compressed gas amounts to 'production' or 'manufacture' for the

purposes of Sections 80HH, 80-I and 80-IA of the Act as well. The High Court has concurred with the view of the ITAT. This is how the Department is before this Court and insists that the process of bottling LPG cylinder in domestic use does not amount to manufacture.

3. Before discussing the aforesaid central issue which has arisen for consideration, it may be noted that Section 80-I of the Act provides for certain amount of deductions in respect of profits and gains derived from an industrial undertaking or a ship or the business of a hotel or the business of repairs to ocean-going vessels or other powered craft to which the said section applies. Section 80-IA gives similar benefits to those industrial undertakings or enterprises which are engaged in infrastructure development. Section 80HH, on the other hand, entitles deduction in respect of profits and gains from a newly established undertaking or a hotel business in backward areas.

4. As mentioned above, all the assesseees are in the business of bottling LPG cylinder and according to them they are industrial undertakings and the aforesaid process amounts to production or manufacture. Since, manufacture or production of articles is sine qua non for treating these assesseees as industrial undertakings and for the applicability of the aforesaid provisions, it is essential to establish that the assesseees are industrial undertakings. It is in this context the question mooted above has arisen for consideration.

5. Learned counsel appearing for the Revenue opened his arguments by referring to the order of the AO in Civil Appeal No. 9295 of 2017. He pointed out that before passing the Assessment Order, the AO had issued a questionnaire to the assessee to explain:

- (a) the process of LPG manufacturing;
- (b) activities carried out in the Bottling Plants; and
- (c) detailed submission on the issue of eligibility and allowability of such case.

6. Insofar as process of LPG manufacturing is concerned, the AO noted that the assessee had narrated the same in the following form:

“LPG (Liquefied Petroleum Gas), which is used as a fuel for domestic purposes as well as in commercial and industrial establishments is obtained by refining of crude in the crude distillation units and Catalytic Crackers of the refinery. It generally consists of butane, propane and butane and propane mixtures. In the refinery, the plant is fed with natural gas and crude oil. The feed gas and the gas undergoes a chilling up to a temperature of 22 degree centigrade and 37 degree centigrade. In the first stage, when it is chilled to 22 degree centigrade, the liquefied hydrocarbon formed is separated out and the vapour is further chilled to 37 degree centigrade. The liquefied hydrocarbons from both stages are then fractionated in two stages. The heavier fractionation is obtained from the bottom of first fractionators, the top product from the second column is LPG, which is sent for bottling.”

7. Response of the assessee to the question pertaining to activities carried out in the bottling plants was as under:

“The LPG is generally used for commercial/industrial applications as well as for domestic applications. “While LPG is marketed to industrial customers by filling the same into the LPG tanks/tankwagens directly from the refineries, the LPG for domestic applications has to be necessarily filled into the LPG Cylinders. Unless LPG is filled into the cylinders, the same cannot be used as a domestic fuel, since LPG which is a gaseous substance in ambient temperature has to be compressed into liquefied stage, the flow of which shall be controlled by the valve fitted on to the cylinder. Accordingly, in order to facilitate the convenience of handling as well as to make it usable as domestic fuel, bulk LPG from the refineries are transported to the LPG bottling plants situated in different places, (more proximate to the customers place) and then filled into the cylinder by a very sophisticated process. The activity carried out in the various LPG Bottling Plants are as below:

Receipt of bulk LPG through tankers/tank wagons, its unloading and storage into spheres/bullets.

Receipt of LPG Cylinders from manufacturers, distributors and repairers.

Receipt of valves, regulators and consumable spare for operation/running of the plants.

Refilling/bottling of LPG in cylinders by compressing the same into liquid.

Storage of LPG packed cylinders.

Despatch of packed cylinders to LPG.

Distributors for - illegible.

Maintenance/upkeeping of plant equipment to ensure smooth operation of plant.  
Imparting necessary training to employees, contract workmen and transporters crew to ensure safe operation/handling of LPG/LPG cylinders in plant and enroot.”

8. After taking note of reply to the aforesaid two questions, the AO proceeded to decide as to whether the assessee was an industrial undertaking and whether it is manufacturing or producing article. He noted the decision of the Gujarat High Court in the case of *State of Gujarat v. Kosan Gas Company*<sup>1</sup>, wherein identical facts are involved, viz. the assessee therein after purchasing LPG from M/s. HPCL was refilling the same into small cylinders and the High Court held that the said process did not amount to manufacture. The AO, thereafter, dealt with the contention of the assessee predicated on Section 10A of the Act wherein explanation (iii) mentions that manufacture includes assembling as well and,

therefore, assessee's case was covered by the definition of 'manufacture' under Section 10A of the Act. This contention was, however, rejected by the AO by pointing out that the definition of 'manufacture' as given in the explanation (iii) to Section 10A of the Act is for limited purposes in the context of newly established industrial undertakings in free trade zone and the very explanation starts with the phrase 'for the purposes of this section'. The AO further noticed that the word 'manufacture' is not defined in the Act. He, therefore, proceeded to turn to the legal and general definitions available elsewhere and referred to corpus juris secundum and also certain cases of this Court dealing with the issue. On that basis, the AO concluded that 'manufacture' can be said to be a process or activity which brings into existence a new identifiable and distinctive goods and the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity but is recognised in the trade as a new and distinct commodity. The AO also referred to the legal dicta laying down the principle that the test is not whether what is produced as a result of the process carried out in the plant becomes more saleable from an otherwise less saleable article. Simply because a process carried out on a particular article adds to its value or improves its marketability on account of processes like shining, polishing, removal of impurities etc., meant by itself be sufficient to hold that the product so finished is commercially different from the one on which such a process had been carried out. The value addition, therefore, does not amount to production or manufacture. On that basis, the AO concluded that since no new product had come into existence after going through the process undertaken by the assessee and it remained the same product, namely, LPG, the process of filling up of the gas into cylinder was not a manufacturing process.

9. Heavily relying upon the aforesaid reasoning of the AO, the learned counsel for the Revenue submitted that this view is consistently taken in catena of judicial pronouncements and, therefore, should be accepted. He also referred to the following judgments in support of his contention: *Servo-Med Industries Private Limited v. Commissioner of Central Excise, Mumbai*<sup>2</sup> and *Commissioner of Income Tax, Kerala v. Tara Agencies*<sup>3</sup>.

10. The aforesaid submissions were refuted by Mr. Tarun Gulati, learned counsel appearing for the assessee M/s. Hindustan Petroleum Corporation Limited. He explained the LPG bottling process by pointing out that the traditional source of LPG is oil refineries where crude oil is processed. LPG vapour is one of the lighter fractions produced by oil refining and petrochemical processes. Since LPG typically consists of a mixture of propane, propylene, butane and butylene (containing 3 or 4 carbon atoms per molecule), these hydrocarbons are easily liquefied by moderate compression at ambient temperature. Unlike natural gas which can be piped to the consumer, LPG has to be transported in the liquid phase at ambient temperature and, therefore, required to be handled in specially designed pressure vessels. Once the LPG vapour is subjected to moderate pressure to achieve liquefaction, the resultant liquid must be contained within a pressurized system or a pressure vessel until it is required as gas by the consumer. In the vapour phase, LPG exists as a heavier gas and on liquefaction, its volume reduces considerably<sup>4</sup>

11. Learned counsel submitted that Sections 80HH, 80-I and 80-IA of the Act use the expression ‘manufacture’ or ‘production’, therefore, whenever industrial undertaking is either manufacturing or producing an article, it will be entitled to the benefit of the aforesaid provisions, subject to satisfying other conditions laid down in those Sections. His argument was that the activities undertaken by the assessee in their bottling plant results in the production of a new commercial product which is made suitable for domestic use, which would otherwise not be possible without undergoing such processes. Gas produced by refineries is not usable as such by the consumer for domestic use. It requires several complex processes to bottle the gas in cylinders to make it usable by domestic consumers. After LPG is bottled in cylinders the product obtains a different name, character and use which is different from its original components. A domestic consumer identifies bottled LPG as a product different from the LPG produced in the refinery or from the empty cylinder. Even otherwise, the word ‘production’ is wider than the word ‘manufacture’ and any activity which makes a product marketable and usable to the consumer would be covered by the word ‘production’. Learned counsel referred to the judgment of this Court in *Income Tax Officer v. Arihant Tiles and Marbles P. Ltd.*<sup>5</sup> wherein this Court has held that the word ‘production’ is wider in ambit and has a wider connotation than the word ‘manufacture’. He also sought to draw sustenance from the judgment of this Court in *Vadilal Chemicals Ltd. v. State of A.P. & Ors.*<sup>6</sup> wherein this Court held that bottling of ammonia amounts to manufacture. He also took support from the definition of ‘manufacture of gas’ occurring in Rule 2 (xxv) of the erstwhile Gas Cylinders Rules, 1981 issued under the Explosives Act, 1881 which defines the aforesaid expression to mean filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder. He further pointed out that even Gas Cylinders Rules, 2004 which superseded the aforesaid Rules of 1981 contain identical definition of ‘manufacture of gas’ in Rule 2 (xxxii). His submission was that this definition itself provides legislative intent as well as that of the Central Government treating the process as manufacture of gas. Mr. Gulati also argued that for the purposes of Section 80-IB of the Act, which provides a deduction for industrial undertaking established in the North Eastern region, the Central Government has notified vide Notification No. 627(E) dated August 4, 1999, eligible industries and the following entry is relevant for the purposes of the instant appeals:

“13. Gas based intermediate products industry manufacturing or producing -

- (i) Gas exploration and production;
- (ii) Gas distribution and bottling;
- (iii) Power generation;
- (iv) Plastics;
- (v) Yarn raw materials;

- (vi) Fertilizers;
- (vii) Methanol;
- (viii) Formaldehyde and FR Resin Melamine and MF Resin;
- (ix) Methylamine, hexamethylenetetramine, ammonium bicarbonate;
- (x) Nitrous acid and ammonium nitrate;
- (xi) Carbon black;
- (xii) Polymer chips.

(Emphasis Supplied)”

It was contended that from the above, it is clear that an undertaking engaged in bottling of gas is considered to be involved in manufacture or production for the purpose of deductions under the Act and this view has been taken by the Central Government itself.

12. Learned counsel argued that the findings of the Tribunal, as upheld by the High Court, were not assailed by the Department and, therefore, there was no question of law involved. He also referred to the few judgments of different High Courts which have taken the view that LPG bottling would amount to manufacture and pointed out that in those cases, no appeal was preferred by the Department. Learned counsel also endeavoured to distinguish the judgment of the Gujarat High Court in *Kosan Gas Company's* case as well as the judgments of this Court which have been relied upon by the learned counsel for the Revenue and submitted that those judgments have no applicability. He, thus, pleaded that the appeals of the appellant/Revenue deserve to be dismissed.

13. Mr. Parijat Sinha, who appeared for some other assessee, argued almost on the same lines.

14. We have given adequate consideration to the respective submissions of both the parties, which they deserve. As is clear from the facts and arguments noted above, the question of law which is involved (already mentioned) is: Whether bottling of LPG, as undertaken by the assessee, is a process which amounts to ‘production’ or ‘manufacture’ for the purposes of Sections 80HH, 80-I and 80-IA of the Act?; and if so, whether the respondents/assessee are entitled to claim the benefit of deduction under the aforesaid provisions while computing their taxable income?

15. At the outset, it needs to be emphasised that the aforesaid provisions of the Act use both the expressions, namely, ‘manufacture’ as well as ‘production’. It also becomes clear

after reading these provisions that an assessee whose process amounts to either ‘manufacture’ or ‘production’ (i.e. one of these two and not both) would become entitled to the benefits enshrined therein. It is held by this Court in *Arihant Tiles and Marbles P. Ltd.* case that the word ‘production’ is wider than the word ‘manufacture’. The two expressions, thus, have different connotation. Significantly, *Arihant Tiles* judgment decides that cutting of marble blocks into marble slabs does not amount to manufacture. At the same time, it clarifies that it would be relevant for the purpose of the Central Excise Act. When it comes to interpreting Section 80-IA of the Act (which was involved in the said case), the Court was categorical in pointing out that the aforesaid interpretation of ‘manufacture’ in the context of Central Excise Act would not apply while interpreting Section 80-IA of the Act as this provision not only covers those assessees which are involved in the process of manufacture but also those who are undertaking ‘production’ of the goods. Taking note of the judgment in *Commissioner of Income Tax, Goa v. Sesa Goa Ltd*<sup>7</sup>. which was rendered in the context of Section 32A of the Act and which provision also applies in respect of ‘production’, the Court reiterated the ratio in *Sesa Goa Ltd.* to hold that the word ‘production’ was wider than the word ‘manufacture’. On that basis, finding arrived at by the Court was that though cutting of marble blocks into marble slabs did not amount to ‘manufacture’, if there are various stages through which marble blocks are subjected to before they become polished slabs and tiles, such activity would certainly be treated as ‘production’ for the purpose of Section 80-IA of the Act. In this context, relevant discussion contained in *Arihant Tiles* case needs to be reproduced, which is as under:

“16. In the present case, we have extracted in detail the process undertaken by each of the respondents before us. In the present case, we are not concerned only with cutting of marble blocks into slabs. In the present case we are also concerned with the activity of polishing and ultimate conversion of blocks into polished slabs and tiles. What we find from the process indicated hereinabove is that there are various stages through which the blocks have to go through before they become polished slabs and tiles. In the circumstances, we are of the view that on the facts of the cases in hand, there is certainly an activity which will come in the category of “manufacture” or “production” under Section 80-IA of the Income Tax Act.

17. As stated hereinabove, the judgment of this Court in *Aman Marble Industries (P) Ltd.* [(2005) 1 SCC 279 : (2003) 157 ELT 393] was not required to construe the word “production” in addition to the word “manufacture”. One has to examine the scheme of the Act also while deciding the question as to whether the activity constitutes manufacture or production. Therefore, looking to the nature of the activity stepwise, we are of the view that the subject activity certainly constitutes “manufacture or production” in terms of Section 80-IA.

18. In this connection, our view is also fortified by the following judgments of this Court which have been fairly pointed out to us by learned counsel appearing for the Department.

19. In *CI7 v. Sesa Goa Ltd.* [(2004) 13 SCC 548 : (2004) 271 ITR 331], the meaning of the word “production” came up for consideration. The question which came before this Court was whether ITAT was justified in holding that the assessee was entitled to deduction under Section 32-A of the Income Tax Act, 1961, in respect of machinery used in mining activity ignoring the fact that the assessee was engaged in extraction and processing of iron ore, not amounting to manufacture or production of any article or thing.

20. The High Court in *Sesa Goa case* [(2004) 13 SCC 548 : (2004) 271 ITR 331], while dismissing the appeal preferred by the Revenue, held that extraction and processing of iron ore did not amount to “manufacture”. However, it came to the conclusion that extraction of iron ore and the various processes would involve “production” within the meaning of Section 32-A(2)(b)(///) of the Income Tax Act, 1961 and consequently, the assessee was entitled to the benefit of investment allowance under Section 32-A of the Income Tax Act. In that matter, it was argued on behalf of the Revenue that extraction and processing of iron ore did not produce any new product whereas it was argued on behalf of the assessee that it did produce a distinct new product.

21. The view expressed by the High Court that the activity in question constituted “production” has been affirmed by this Court in *Sesa Goa case* [(2004) 13 SCC 548 : (2004) 271 ITR 331] saying that the High Court's opinion was unimpeachable. It was held by this Court that the word “production” is wider in ambit and it has a wider connotation than the word “manufacture”. It was held that while every manufacture can constitute production, every production did not amount to manufacture.

22. In our view, applying the tests laid down by this Court in *Sesa Goa case* [(2004) 13 SCC 548 : (2004) 271 ITR 331] and applying it to the activities undertaken by the respondents herein, reproduced hereinabove, it is clear that the said activities would come within the meaning of the word “production”

16. Keeping the aforesaid distinction in mind, let us take note of the process of LPG bottling that is undertaken by the assessees herein and about which there is no dispute. It has come on record that specific activities at assessees’ plant include receiving bulk LPG vapour from the oil refinery, unloading the LPG vapour, compression of the LPG vapour, loading of the LPG in liquefied form into bullets, followed by cylinder filling operations. The stages of these activities are as under:

“(a) Bulk LPG is received in the bottling plant through road tankers/rail wagons;

- (b) The LPG is unloaded into spheres/bullets through LPG compressors which use variable levels of pressure for suction, unloading and vapour recovery;
- (c) Refilling/bottling of LPG in cylinders by compressing the same into liquid form; and
- (d) Capping, fixing of seals and safety valves prior to storage and loading of filled cylinders.

17. Thus, after the bottling activities at the assessee's plants, LPG is stored in cylinders in liquefied form under pressure. When the cylinder valve is opened and the gas is withdrawn from the cylinder, the pressure falls and the liquid boils to return to gaseous state. This is how LPG is made suitable for domestic use by customers who will not be able to use LPG in its vapour form as produced in the oil refinery. It, therefore, becomes apparent that the LPG obtained from the refinery undergoes a complex technical process in the assessee's plants and is clearly distinguishable from the LPG bottled in cylinders and cleared from these plants for domestic use by customers. It may be relevant to point out that keeping in view the aforesaid process, the ITAT arrived at the specific findings in support of its decision, which are as under:

- “(a) There is no dispute that the LPG produced in the refinery cannot be directly supplied to the consumer for domestic use because of various reasons of handling, storage and safety.
- (b) LPG bottling is a highly technical and complex activity which requires precise functions of machines operated by technically expert personnel.
- (c) Bottling of LPG is an essential process for rendering the product marketable and usable for the end customer.
- (d) The word ‘production’ has a wider connotation in comparison to ‘manufacture’, and any activity which brings a commercially new product into existence constitutes production. The process of bottling of LPG renders it capable of being marketed as a domestic kitchen fuel and, thereby, makes it a viable commercial product.

18. In the considered opinion of this Court, the aforesaid activity would definitely fall within the expression ‘production’. We agree with the submission of the learned counsels for the assessee that the definition of ‘manufacture of gas’ in Rule 2 (xxxii) of the Gas Cylinders Rules, 2004 also supports the case of the assessee inasmuch as gas distribution and bottling is treated as manufacturing or producing gas. We are also inclined to accept the submission of the learned counsel for the assessee that various High Courts have, from time to time, decided that bottling of gas into cylinder amounts to production and, therefore, claim

of deduction under Sections 80HH, 80-I and 80-IA would be admissible. Another important aspect which was highlighted by learned counsels for the assesseees was that identical issue whether bottling of gas into cylinder amounts to production for claim of deduction under the Act has been considered by various High Courts and decided in the affirmative but those decisions were not challenged by the Department. The cases specifically referred were M/s. Puttur Petro Products Pvt. Ltd. v. The Assistant Commissioner of Income Tax, Mangalore and Central U.P. Gas Ltd. v. Deputy Commissioner of Income Tax, Kanpur .

19. From the submissions made by learned counsel for the Revenue, who banked on the reasoning given by the AO, it can be gathered that the entire thrust of the AO was that the process involved in filling up the gas into cylinders does not amount to ‘manufacture’ inasmuch as the said process does not bring into existence a new identifiable and distinctive goods. In the first instance, no distinction was drawn between manufacture and production and the matter was not looked into from the angle as to whether the aforesaid process would amount to production or not. Other reason which prevailed with the AO and which was also the argument of the learned counsel for the Revenue was that, on identical facts, the Gujarat High Court had held that refilling the LPG after purchasing from M/s. HPCL into small cylinders would not amount to manufacture. That was a case which was decided in the context of the Gujarat Sales Tax Act, 1969. The Court held that transfer of LPG from bulk containers into cylinders did not amount to process of manufacture. It is pertinent to point out that Section 2(16) of the Gujarat Sales Tax Act, 1969 defines ‘manufacture’ and, therefore, the entire case was examined keeping in view the said definition of ‘manufacture’ and the issue was as to whether the process amounted to manufacture or not. As pointed out above, the question as to whether it amounts to ‘production’ as well did not arise for consideration. The AO committed manifest error in relying upon the said decision inasmuch as the provisions with which we are concerned in the instant case use the words ‘manufacture or production’ and are not limited to ‘manufacture’ alone.

20. Judgment in the cases of Servo-Med Industries Private Limited and Tara Agencies, which were cited by the learned counsel for the Revenue, may not apply to the present case. They dealt with the provision of the Central Excise Act and, therefore, test of ‘manufacture’ propounded on that case would not be applicable when dealing with the cases under the provisions of Sections 80HH, 80-I and 80-IA of the Act which use both the expressions ‘manufacture’ and ‘production’ . It has already been clarified in Vadilal Chemicals Ltd. judgment. Insofar as judgment in Tara Agencies is concerned, the factual scenario therein was totally different where three different stages in relation to tea were examined by this Court. The Court held that the procedure of blending of different qualities of tea would amount to ‘processing of tea’ and it did not amount to ‘manufacture or production of tea’ . Here, the case set up by the assesseees is not that bottling of LPG is ‘processing’ as distinguished from ‘manufacture’ or ‘production’ . We may, at this juncture, refer to the judgment of this Court in *Commissioner of Income Tax, Madras v. Vinbros and Company*<sup>10</sup> where bottling and blending of alcohol is held to be ‘manufacture or production’ for the purpose of Section 80-IB of the Act.

21. We, thus, find that the view of the ITAT as affirmed by the High Court is correct and, therefore, there is no merit in these appeals which are accordingly dismissed.

Judgment Referred.

<sup>1</sup>(1992) 87 STC 0236

<sup>2</sup>(2015) 14 SCC 0047

<sup>3</sup>(2007) 6 SCC 0429

<sup>4</sup>See “A Background to Liquefied Petroleum Gases, Their Sources and Safe Handling, and Safe Use as Fuels”, *Advanced Petrochemicals*, Dr. G.N. Sarkar.

<sup>5</sup>(2010) 320 ITR 0079 (SC)

<sup>6</sup>(2005) 6 SCC 0292

<sup>7</sup>(2004) 271 ITR 0331 (SC)

<sup>8</sup>(2014) 361 ITR 0290

<sup>9</sup>ITA224 of 2014

<sup>10</sup>(2015) 14 SCC 483