(2002) 09 DEL CK 0171

Delhi High Court

Case No: Income Tax Reference No''s. 86-88, 315-318 of 1985 and 28, 245 of 1988

Commissioner of Income Tax		APPELLANT
	Vs	
Hydle Constructions (P.) Ltd.		RESPONDENT

Date of Decision: Sept. 26, 2002

Acts Referred:

- Finance Act, 1978 - Section 2, 2(7)(c)
- Income Tax Act, 1961 - Section 256, 256(1), 32A, 32A(2), 32A(2)(a)

Citation: (2002) 125 TAXMAN 836

Hon'ble Judges: S.B. Sinha, C.J; A.K. Sikri, J

Bench: Division Bench

Advocate: R.D. Jolly and Ajay Jha, for the Appellant; B.B. Ahuja, Anurag Chawla and Rajiv Ranjan Dwivedi, for the Respondent

Judgement

S.B. Sinha, C.J.

The following questions at the instance of the assessee and/or the Revenue in respect of the assessment year specified hereinbelow have been referred to by the Income Tax Appellate Tribunal, Delhi Bench ''A'', New Delhi (in short, ''the Tribunal'') u/s 256(1) of the income tax Act, 1961 (in short, ''the said Act'') for opinion of this Court:--

ITR No. 86-88/1984. For the assessment year 1976-77:

(i) "Whether on the facts and in the circumstances of the case, the assessee-company was eligible for deduction u/s 80J of the income tax Act, 1961 and assessee''s undertaking could be held to be manufacturing or producing articles within the meaning of section 80J?

ITR 315-318/1985. Assessment years 1979-80 and 1980-81

Assessee:

Whether on the facts and in the circumstances of the case, the assessee- company was eligible for deduction under sections 80J and 80HH of the Act and the assessee''s undertaking could be held to be manufacturing or producing articles within the meaning of sections 80J and 80HH for the assessment years in question?

Department:

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in directing the income tax Officer to consider the assessee''s claim for investment allowance for the assessment years in question, for being allowed provided all other conditions laid down in that section were satisfied?

ORIENT CORPORATION, BOMBAY Vs. COMMISSIONER OF Income Tax, BOMBAY CITY.,

(i) Whether, on the facts and in the circumstances of the case, the assessee-company was eligible for deduction under sections 80J and 80HH of the income tax Act, 1961 and the assessee''s undertaking could be held to be manufacturing or producing articles within the meaning of sections 80J and 80HH for the assessment years in question?

(ii) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in directing the income tax Officer to consider the assessee''s claim for investment allowance for the assessment years in question, for being allowed provided all other conditions laid down in that section were satisfied?

ITR 245/88. Assessment year 1982-83

(i) Whether on the facts and in the circumstances of the case, the assessee-company was eligible for deduction under sections 80J and 80HH of the income tax Act, 1961 and the assessee''s undertaking could be held to be a manufacturing or producing articles within the meaning of sections 80J and 80HH?

Common question for the assessment years 1977-78 and 1978-79:

(ii) Whether on the facts and in the circumstances of the case, the assessee-company was eligible for deductions under sections 80J and 80HH of the income tax Act, 1961 and assessee''s undertaking could be held to be manufacturing or producing articles within the meaning of sections 80J and 80HH?

The assessee is a company registered under the Indian Companies Act. The following main objects of the company are stated in its Memorandum of Association:--

1. To carry on the business of contractors for construction of roads, buildings, houses, flats, factories, office, dams, canals, tanks, reservoirs, cyphons, bridges, hydel projects, power houses, tunnels, culverts, drains, channels, sewages, gardens and pleasure gardens and all sorts of contracts for procurement and supply for

local, municipal, State, Central authorities, Government Departments, railways, universities or for any other person, firms or companies.

2. To undertake the construction of every description and to erect, re-build, enlarge, alter, pull down, improve, re-model existing works and to convert and appropriate land for roads, streets, squares, gardens, playgrounds and other conveniences.

3. To buy, purchase or otherwise acquire or construct multi-storey flats, houses, buildings, factories and other properties leasehold or free-hold either on rent, lease or for any other consideration and to sell, let, mortgage, assign pledge, lease out or otherwise dispose of on instalment basis or under hire-purchase agreements or any other manner and generally to deal with the properties of the company that may be necessary or convenient for any of the objects of the company.

4. To act as consultants, advisers, architects, civil engineers, designers, town planners, valuers, surveyors and supervisors for all sorts of building activities and allied jobs and works, which may be usefully or conveniently combined by research, development, improvement with the business of the company.

2. The assessee undertakes contract inter alia for construction of tunnels, power houses and dams. It claimed deduction u/s 80J of the said Act. It also raised a claim that it should be treated as an ''Industrial Company'' and, thus, should be held to be entitled to a lower rate of tax. The said claims of the assessee, however, were not acceded to by the Assessing Officer. The said claims relate to the assessment years 1976-77 to 1978-79. However, during the subsequent years, the assessee had also claimed relief u/s 80HH of the said Act. The said claim of the assessee although initially was not accepted by the Assessing Officer, the same was done by the Commissioner of income tax. The assessee further claimed relief u/s 32A of the said Act.

3. At this juncture, we may notice that as regards the assessee''s claims for being treated as an ''Industrial Company'', the learned Tribunal directed the concerned Authorities to ascertain the basis of the claim as to whether the assessee is an ''Industrial Company'' or not. The learned Tribunal in its order dated 20-10-1983 arrived at the following findings:--

(i) The assessee-company having as its main business carrying out of Civil construction works like tunnels, Power Houses etc., can be treated as an Industrial Company if on facts it is found that the company is engaged in manufacture or processing of goods.

(ii) In order to find out whether the company was mainly engaged in the activity of manufacture or processing of goods, the income tax authorities have been directed to ascertain the relevant facts and come to a conclusion on consideration of all the materials and also having regard to the Explanation to the definition of ''Industrial Company'' as given in the Finance Act.

(iii) The assessee-company which is engaged in constructing tunnels, dams, Power Houses etc. is not eligible for deduction u/s 80J or 80HH of the income tax Act as the construction undertaking cannot be held to be manufacturing or producing articles within the meaning of section 80J or 80HH.

(iv) In case, the relief u/s 80J is to be worked out the provisions of section 80J as in force in the relevant assessment years should be taken into consideration having regard to the retrospective amendment of that section as well as any decision, which may be pronounced by the Supreme Court on this question.

(v) While the assessee-company is not entitled to investment allowance u/s 32A for the assessment year 1977-78, the claim of the assessee has to be considered or the assessment year 1978-79 and the same has to be allowed provided all other conditions laid down in that section are satisfied.

4. Before proceeding to deal with the questions involved in these reference, we may notice some of the relevant provisions of the said Act, which read thus:--

80HH. Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas. --(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business or 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.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:--

(i) it has begun or begins to manufacture or produce articles after the 31st day of December, 1970, but before the 1st day of April, 1990, in any backward area;

(ii) it is not formed by the splitting up, or the reconstruction, or a business already in existence in any backward area:

Provided that this condition shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose in any backward area;

(iv) it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.

Explanation. --******

(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 hotels starts functioning:

Provided that,--

(i) in the case of an industrial undertaking which has begun to manufacture or produce articles, and

(ii) in the case of the business of a hotel which had started functioning,

After the 31st day of December, 1970, but before the 1st day of April, 1973, this sub-section shall have effect as if the reference to ten assessment years were a reference to ten assessment years as reduced by the number of assessment years which expired before the 1st day of April, 1974.

******

80J. Deduction in respect of profits and gains from newly established industrial undertaking or ships or hotel business in certain cases. --(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship 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 reduced by the deduction, if any admissible to the assessee u/s 80HH or section 80HHA of so much of the amount thereof as does not exceed the amount calculated at the rate of six per cent per annum on the capital employed in the industrial undertaking or a ship or business of the hotel, as the case may be, computed in the prescribed manner in respect of the previous year relevant to the assessment year (the amount calculated as aforesaid being hereafter, in this section, referred to as the relevant amount of capital employed during the previous year):

Provided that in relation to the profits and gains derived by an assessee being a company, from an industrial undertaking which begins to manufacture or produce articles or to operate its cold storage plant or plants after the 31st day of March, 1976, or from a ship which is first brought into use after that date, or from the business of a hotel which starts functioning after that date, the provisions of this sub-section shall have effect as if for the words "six per cent", the words "seven and a half per cent" had been substituted.

(2) The deduction specified in sub-section (1) shall be allowed in computing the total income in respect of the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or to operate its cold storage plant or plants or the ship is first brought into use or the business of

the hotel starts functioning (such assessment year being hereafter, in this section, referred to as the initial assessment year) and each of the four assessment years immediately succeeding the initial assessment year:

32A. Investment allowance.--******

(2) an industrial undertaking shall be deemed to be a small-scale industrial undertaking, if the aggregate value of the machinery and plant (other than tools, jigs, dies and moulds) installed, as on the last day of the previous year, for the purposes of the business of the undertaking does not exceed,--

(i) in a case where the previous year ends before the 1st day of August, 1980, ten lakh rupees;

(ii) in a case where the previous year ends after the 31st day of July, 1980, but before the 18th day of March, 1985, twenty lakh rupees; and

(iii) in a case where the previous year ends after the 17th day of March, 1985, thirty-five lakh rupees,

and for this purpose the value of any machinery or plant shall be,--

(a) in the case of any machinery or plant owned by the assessee, the actual cost thereof to the assessee; and

(b) in the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant.

(2A) The deduction under sub-section (1) shall not be denied in respect of any machinery or plant installed and used mainly for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule, by reason only that such machinery or plant is also used for the purposes of business of construction, manufacture or production of any article or thing specified in the said list.

5. Mr. Ahuja, the learned senior counsel appearing on behalf of the assessee, would submit that the learned Tribunal committed an error insofar as it failed to take into consideration that the assessee is neither entitled to get the benefit of the intermediate product, which it manufactures, particularly when such intermediate products are used in the end product, namely, construction of tunnel, power house and/or dam nor entitled to the benefit of investment allowance.

According to the learned counsel, it is one thing to say that benefit under the aforementioned provisions are being claimed by a company for an end product, which would not be an activity of an Industrial Company, but it is another thing to say that such benefits are being claimed by a company not for its end product, but for its intermediate products.

One it is held, the learned counsel would contend, that the assessee-company is so entitled as it is an ''Industrial Company'', it would also be entitled to the investment allowance.

The learned counsel would submit that the learned Tribunal committed a manifest error in relying upon a decision of the Gujarat High Court in Cellulose Products of India Ltd. Vs. Commissioner of Income Tax, Gujarat, wherein it was held that ''article'' should only mean the end product and not the intermediate product.

Sections 80HH, 80J and 32A, the learned counsel would contend, claiming benefit in relation to the intermediate product will have a role to play. In support of the said contention, strong reliance has been placed on Commissioner of Income Tax Vs. Bhagat Construction Co., Commissioner of Income Tax Vs. K.S. Venkataraman and Co. Pvt. Ltd., Commissioner of Income Tax Vs. K.S. Venkataraman and Co., CIT v. Coromandel Engg. Co. Ltd. [2002] 123 Taxman 828 (Mad.). He would submit that construction companies, thus, are also entitled to the benefit of the aforementioned provisions in relation to the intermediate product.

As regard construction of section 32A of the said Act, the learned counsel would submit that the same being a beneficent provision it should be construed liberally.

Manufacturing activity, contends the learned counsel, would not depend on the end products, but there are instances where even a slight change in the identity of the original product has been held to come within the purview of the manufacturing activity. End product, the learned counsel would contend, is a test, which should not be applied to in a case of this nature.

6. Mr. Jolly, the learned counsel appearing on behalf of the Revenue, however, would submit that the jurisdiction of this Court u/s 256 of the said Act is very limited. The learned counsel would take us through the order passed by the Assessing Officer and would submit that no such claim was raised by the assessee before the Assessing Officer. According to the learned counsel, assessee ought to have claimed benefit of the aforementioned provisions in respect of his intermediate products before the Assessing Officer and, thus, this Court having regard to finding of fact would not enter there into.

Mr. Jolly would submit that the claim of the assessee was in relation to the entire construction activities and now, therefore, it cannot be heard to say that it is entitled to the benefit thereof in relation to its intermediate product.

The learned counsel would contend that the facts found by the learned Tribunal are binding on this Court and it is only required to answer the reference on the basis thereof. Strong reliance in this connection has been placed on India Cements Ltd. Vs. Commissioner of Income Tax, Madras,

Having regard to the claim made by the assessee herein, the learned counsel would contend that the question is clearly covered by the decision of the Apex Court in

Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, and Commissioner of Income Tax, Delhi-I Vs. Minocha Brothers P. Ltd.,

Mr. Jolly has also relied upon the decisions in Bhagat Construction Co. (P) Ltd. Vs. Commissioner of Income Tax, Lucky Minmat Pvt. Ltd. v. C.I.T., (2000) 245 ITR 830 (SC); Commissioner of Income Tax Vs. Asian Techs Ltd., and Commissioner of Income Tax Vs. Vaish Brother''s and Co.,

The learned counsel would contend that for the purpose of construction of the statutory provisions, the purpose of the said Act must be taken into consideration viz-a-viz the claim of the assessee.

7. Mr. Ahuja, in reply, would submit that the questions of law may not arise out of the findings of the Assessing Officer, but the findings of fact by the Tribunal. The learned counsel reminded us that the said claim was made in the proceedings and in fact were allowed by the CIT(A).

8. The learned Tribunal considered a question as to whether on the facts of the case the assessee was engaged in a manufacture or processing of goods and whether it can be held that it is so ''mainly engaged''. It had not been disputed before the learned Tribunal that manufacture of steel structure, concrete slab and other activities of either manufacture or processing of goods are invariably undertaken by the construction company. The Tribunal, therefore, held that the assessee-company is engaged in the manufacture or processing of goods. It, however, raised a question that whether such engagement can be considered to be a predominant one. It proceeded to consider the matter from the balance sheet of the assessee with a view to ascertain its activities. According to the learned Tribunal, although the Tribunal rejected the contention of the assessee that its activities come under the other Heads of the definition as well, but observed:--

The only part of the definition under which the activity of the company have to be considered are the ''manufacture or processing of goods''. For this purpose, we would send back the case to the Assessing Officer to determine the extent of activity by looking to the nature of activities is each year separately. If predominant activity is of such nature that will come under manufacture or processing of goods the benefit should be given to the company. In the alternative if various types of activities are found to be there, explanation to the definition should applied and the extent of income from such manufacturing and processing of goods should be worked out, if necessary, on cost accountancy basis. This will determine whether the company is mainly engaged in the activity of manufacture and processing of goods. The first ground is disposed of accordingly.

9. As regards application of section 80J of the said Act, which was involved in the appeals preferred by the Revenue as also by the assessee, the CIT(A) in his judgment relying on or on the basis of the decision of the Apex Court in Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal,

held that the assessee-company satisfies conditions regarding manufacture or producing of articles. The Tribunal held:--

40. We have carefully considered the rival arguments on this point. We are of the view that the lower authorities erred in making this as corrollary of the first point regarding industrial company. Every industrial company need not have an industrial undertaking, which is eligible for benefit u/s 80J or 80HH. Every provision has to be applied on the basis of the condition laid down in that case and the requirements given in that section. There are various points of difference between ''industrial company'' as defined in the Finance Act and an ''industrial undertaking'' to which benefit u/s 80J is available. Besides the fact that the industrial undertaking can be owned by any person other than a company, the other differences are very material. It is not necessary to detain ourselves for deciding whether a construction company is an industrial undertaking. The word industrial undertaking is not defined in the section itself and one has to take the general meaning as used at the other places and if necessary in other laws. The construction work has the possibility for becoming industrial undertaking depending on the nature of the work done and the extent to which the undertaking uses men and machines. A construction company of the magnitude of the assessee can be said to be an industrial undertaking but question does not end there. Section 80J does not apply to all the industrial undertakings. It only applies to an industrial undertaking, which fulfils all the conditions laid down in section 80J(4). The conditions as given in section 80J(4) are as under:--
(i) It is not formed by the splitting up or the reconstruction of a business already in existence;

(ii) It is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) It manufactures, or produces articles, or operates one or more cold storage plant or plants, in any part of India, and has begun or begin to manufacture or produce articles or to operate such plant or plants, at any time within the period of (thirty three) years next following the 1st day of April, 1948, or such further period as the Central Government may by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

(iv) In a case where the industrial undertaking manufactures or produces articles, the undertaking employs; ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without aid of power.

We do not proceed to consider various proviso and explanation. The condition which is important for our purpose are condition numbers (iii) and (iv). These conditions are that the industrial undertaking manufactures or produces articles and has begun to manufacture or produce articles within the specified period.

Clause (iv) also lays down certain other conditions with reference to manufacture or production of articles. Deduction u/s 80J also starts after undertaking starts manufacturing or producing articles. Thus, the whole emphasis in section 80J on the manufacture or production of articles by the industrial undertaking. The words "processing of goods" which is an intermediate activity before final manufacture is missing from the conditions in section 80J whereas it is found in the definition of industrial company and at several other places. In the definition of an industrial company the main emphasis was the company being mainly engaged in a specific activity whereas in section 80J the emphasis is not on the activity itself but ultimate production of articles or their manufacture.

It held that the end product of the assessee cannot be an article within the meaning of the said provision. Following the decision of the Gujarat High Court in Cellulose Products of India Ltd.''s case (supra), it observed:--

Giving the above meaning it would be seen that in the case of the assessee the end product is a tunnel or a Power House or a dam. In our opinion, a tunnel or a Power House or a dam cannot be considered to be "articles" as the reference in the section appears to be an independent commodity. From that angle we find that the assessee-company was not manufacturing or producing articles. If all the intermediate product were eligible for deduction u/s 80J the question would arise as to when such undertaking starts being eligible for the relief u/s 80J. A company may start making out slabs in one year and the other small structural components in another year and may ultimately construct the dam in the third year. If the ultimate product is to be considered the under- taking could not be eligible in the first two years and in the third year when the ultimate product comes into existence, it is found that it is not an article, as it is an immovable property. We are not inclined to take the view that the making of tunnel or dam can also be considered as a manufacture of articles. While we do so, we respectfully depart from the decision of the Orissa High Court in the case of N.C. Budharaja. Sec. 80J has to be considered as a whole and when we look to its requirements, we find that an undertaking like the assessee cannot get the benefit u/s 80J as it stands. In the course of making of dams or tunnels the assessee may acquire various raw materials and may process them to construct the dam. In that process it is likely that some components are manufactured by undertaking itself. That will be an intermediate product. However, it cannot result in the conclusion that the undertaking is manufacturing articles for which it has come into existence. If such intermediate article was to be taken into consideration, there will be no end to the confusion of computation or grant of relief. In fact, section 80J does not contemplate such a meaning. It has, therefore, to be held that the assessee-company in its undertaking for the construction of tunnels or dams is not manufacturing or producing articles so as to enable it to get deduction u/s 80J of the income tax Act. The same position will apply to the claim of the assessee u/s 80HH of the income tax Act. The language there is also similar to the language used in section 80J.

10. As regards claim of the assessee in terms of section 32A of the said Act, it noticed that whereas investment allowance was allowable if machinery installed is used for the purpose of construction, manufacture or production of any one or more articles or things specified in the list in the Eleventh Schedule and the law was changed in the assessment year 1978-79. It held:--

44. In the assessment year 1978-79, however, the law was changed. For this year, it was provided that an assessee would be entitled to investment allowance if machinery was used in an industrial undertaking for the business of construction, manufacture or production of any articles or things not being an article or thing specified in the list in the Eleventh Schedule. In other words, except for such machinery, which are producing articles or things in the Eleventh Schedule, other machinery which are used for the purpose of business of construction, manufacture or production of any other thing would get investment allowance. Thus, it would appear that the business of the assessee insofar as it is a business of construction, manufacture or production of any articles or things would be eligible for investment allowance. The income tax Officer will, therefore, bear this in mind the above requirement of law while satisfying himself the assessee''s eligibility by fulfilling the other conditions given in section 32A. Subject to the above clarification the direction of the CIT(Appeals) in so far as it relates to the assessment year 1978-79 will stand while his direction in the assessment year 1977-78 will be vacated.

11. In Cellulose Products of India Ltd.''s case (supra), it was held:--

41. It is obvious on a plain reading of section 84 that the articles which are referred to in clause (iii) of sub-section (2) are the end-product or the final product for the manufacture of which the undertaking has been set up and since the same words, namely, ''manufacture or product articles'', are with a slight variation occurring in section 84(7)(i), the same meaning of word ''articles'' should be given to the word in that clause also in view of the well-known principle of interpretation that when the same words are used in the same section of the same statute, as far as possible the same meaning should be given to the same word in both the places. The words in section 84(7)(i) are ''begins to manufacture or produce articles''. If the qualifying clause (iii) in sub-section (2)''manufactures or produces articles in any part of India'' means only manufactures or produces articles which are the final product of the undertaking or the end-product of the undertaking, then there is no reason to assign any other meaning to the word "articles" when section 84(7)(i) speaks of the undertaking beginning to manufacture or produce articles. This is as it appears to us on a plain reading of the section. Therefore, it is necessary for us to examine the materials on record to ascertain as to why this industrial undertaking set up that was the article which this particular undertaking was intended to manufacture or produce.

12. Section 80HH of the said Act provides for deduction in respect of profits and gains from newly established industrial undertakings in backward areas subject to

fulfilment of the conditions specified therein. The Authorities had not come to the conclusion that the assessee does not fulfil the said conditions, as in view of its decision the said question did not arise for consideration. The learned Tribunal, as noticed hereinbefore, proceeded on the basis that the end-product of the assessee would not be an article.

Article would inter alia mean a particular object or substance, a material, thing or a class of things, material or tangible object - Black''s Law Dictionary, 7th Edn., page 111.

Nobody manufactures a dam or a tunnel. A dam or tunnel is constructed, but the question, which arose from consideration, was although a tunnel or a dam would not be an article, which is capable of being manufactured, but whether the intermediate products may be considered to come within the purview of manufacturing activity/industrial undertaking within the meaning thereof. The question, which has not been gone into by the learned Tribunal, was if at all the gross total income of assessee includes any profits and gains derived from an industrial undertaking, by reason of manufacture of intermediate product and not necessarily end-product, the benefit under the aforementioned provisions can be derived by the assessee-company.

13. Section 80J of the said Act provides for deduction in respect of profits and gains from newly established undertakings or ships or hotel business in certain cases.

Sub-section (4) of the said section declares that the same would apply to any industrial undertaking, which fulfils the conditions laid down therein; clause (iii) whereof refers to manufacture or production of articles.

14. Section 32A of the said Act refers to an investment allowance inter alia in respect of a plant specified in sub-section (2) thereof, which is owned by the assessee and is wholly used for the purpose of business carried on by him. Whereas clause (a) of sub-section (2) lays down a qualification to the effect that the assessee engaged in the business of operation of ships or aircraft; no such qualification has been laid down in clause (b) thereof. Sub-clause (iii) of clause (b) of section 32A refers to any other industrial undertaking for the purpose of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule. The said provision refers to construction and not to a construction company. It categorically refers to manufacture or production.

15. Having regard to the aforementioned proposition of law, we may notice decision of the Apex Court in N.C. Budharaja & Co.''s case (supra). Therein the question, which arose for consideration of the Apex Court, was as to whether the construction of dam to store water can be characterized and would amount to manufacturing or producing of article or articles, as the case may be. It was held:--

The expressions "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. The decisions of the Bombay High Court in Commissioner of Income Tax Bombay City-I Vs. N.U.C. Private Ltd., and in Commissioner of Income Tax (Central), Bombay V Vs. Shah Construction Co. Ltd., relied upon by Sri Murthy, are no doubt not decisions rendered u/s 80HH or u/s 84 - they arose under the relevant Finance Acts, the question being whether the assessees were industrial companies - but they do contain observations which tend to support the stand of the Revenue.

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 80HH 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.

The said decision, thus, does not deal with a question as to whether the manufacture of an intermediate product would entitle to the benefit under the said provisions. On the other hand, it is apparent from the said decision that the assessee therein did not claim any deduction on the value of the manufactured articles.

16. In the aforementioned backdrop, we may now consider the decisions of the Apex Court as also the High Courts cited by Mr. Jolly.

17. In Minocha Bros. (P.) Ltd."s case (supra), the question arose whether the assessee was an industrial company. Having regard to the definition of "industrial company", it was held that the company must be mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ship or in the manufacture or processing goods or in mining. A legal fiction was created in terms whereof a company would be deemed to be mainly engaged in any of the specified activities only the income attributable to any one or more of the aforesaid activities included in its total income of the previous year (as computed before making any deduction under Chapter VI-A of the said Act) is not less than 50 per cent of the total income. The said question has also not been gone into by the Authorities in the instant case.

Therein, a Division Bench of this Court was dealing with a contention as to whether manufacture of doors, windows, etc. used for the purpose construction of a building

would entitle the assessee for the benefit of lower rate of tax. It was held that the real activity of the assessee is to construct a building, which is not processing or manufacturing of goods. The Court accepted that such a provision should receive an interpretation favourable to the assessee, but observed that a transitory or evanescent product like an R.C.C. block or a door is only a step towards making the whole building. Yet again in the instant case, the question as to whether the assessee herein had been manufacturing the said products regularly or not had not been answered.

18. In Builders Associations of India Vs. Union of India and others, the decision of the Apex Court in N.C. Budharaja & Co.''s case (supra) was merely followed and no other law has been laid down therein.

19. In Bhagat Construction Co. (P.) Ltd.''s case (supra), the fact of the matter was as follows:--

... The assessee is a private limited company. For the assessment year 1985-86, the assessee derived income from construction of the Bokaro Steel Plant. It was also doing contract work for the DDA. The nature of the work executed by the assessee was as under:

(1) Earth work

(2) Masonry work

(3) Concrete work

(4) Wood work

(5) Flooring work

(6) Finishing work

(7) Miscellaneous items.

Following the decision of Minocha Bros. (P.) Ltd.''s case (supra), it was held:--

In our opinion the main business of the assessee shall have to be determined. Whether it was a construction business and any step involved in that construction business was only ancillary to the construction activity of the assessee or production of any goods was itself the main business activity of the assessee? An assessee may be engaged in the activity of building work as a contractor and in the process of completing that work some manufacture may be done at interim stage. The product of such manufacturing activity would not result in the production of goods but the product of such activity would be consumed by the assessee in its building work. In that case the assessee would be not a producer but a consumer; for at the end of its business activity, it would be producing not any goods or article but only constructing a building.

20. However, the decision of the Minocha Bros. (P.) Ltd.''s case (supra) has been upheld by the Apex Court on a different ground.

21. In Asian Techs Ltd.''s case (supra), a Division Bench of Kerala High Court held:--

Learned counsel for the assessee submitted that the question as to benefit of section 80HH on value of articles manufactured or produced by him which have gone into in the construction of the dam was left open. On a reading of the decision of the Apex Court, it is clear that the activities carried on by the assessee appear to be the same as that of the party in the case before the Apex Court. Where the articles manufactured go into the construction of the dam, it was observed that such situation makes little difference to the principles of the case. There is no scope for finding out whether the part of the activity generated an income for the purpose of section 80HH. The business activities were conducted as a whole and it is almost impossible as accepted by learned counsel for the assessee to decipher one of the activities for the purpose of finding out whether any profit is relatable thereto. (p. 356)

Yet again the question raised in these references had not been gone into.

22. In Lucky Minmat (P.) Ltd.''s case (supra), it was observed:--

We have been shown the statements of case in the present matter as also in the matter of Commissioner of Income Tax Vs. Best Chem and Limestone Industries Pvt. Ltd., and are satisfied that the Tribunal has found as aforestated. There was, therefore clearly a distinction on the facts. The conversion into lime and lime dust or concrete by stone crushers could legitimately be considered to be a manufacturing process while the mere mining of limestone and marble and cutting the same before it was sold in the market could not be so considered.

23. In Vaish Bros. & Co.''s case (supra), a Division Bench of Allahabad High Court, however, observed that mere preparation of mortar by mixing cement with sand and laying of bricks one after the other or the manufacturing of doors and windows out of timber could not be said to be processing of goods. The said question is not of much relevance in the instant case.

24. In Commissioner of Income Tax Vs. Vishal Builders P. Ltd., this Bench merely held that a builder of commercial flats was not an Industrial Company and was, therefore, not entitled to be taxed at the lower rates. The questions, which arose for consideration, in these matters again did not fall for consideration therein.

25. We may in the aforementioned backdrop notice several other decisions, which had been relied by Mr. Ahuja.

26. In K.S. Venkataraman & Co. (P.) Ltd.''s case (supra), a Division Bench of the Madras High Court considered the effect of the decision in Minocha Bros. (P.) Ltd.''s case (supra) as also in N.C. Budharaja & Co.''s case (supra) and held:--

... Having gone through the order of the Commissioner, we are not satisfied that his finding was rendered after considering the evidence which was required to be considered for recording such finding. The Commissioner has not given any reason for his holding that the works like casting cement or reinforced cement slabs and other works involving use of cement constituted manufacturing activity. The Revenue also had not addressed itself to this aspect but had only been pursuing the contention that any construction company was ineligible for being regarded as an industrial company. The Judicial Member who considered the order of the Commissioner was of the view that the finding recorded by the Commissioner was not adequately supported by materials on record.

The assessee though engaged in the business of construction besides being engaged in the manufacture of certain articles is eligible for being regarded as an industrial company if it is able to establish that 51 per cent or more of its income in the relevant previous year was on account of its manufacturing activity.

27. Yet again in K.S. Venkataraman & Co. (P.) Ltd.''s case (supra), the same Bench observed:--

... There can be no manner of doubt that if an item can be regarded as an item of manufacture made as a result of the process of the manufacture, the undertaking which manufactures that article is eligible to be regarded as an industrial undertaking insofar as the activity of manufacturing is concerned. A composite undertaking which is an industrial undertaking in one part and non-industrial undertaking in another part does not by that reason cease to capable of being regarded as an industrial undertaking to the limited extent of its claim for the benefits under the Act, in relation to the activity which can properly be regarded as a manufacturing activity carried on by such an undertaking.

Section 32A of the Act, which confers the benefit of investment allowance is a provision, which is obviously meant to encourage industries to install new plant and machinery where such plant and machinery is utilized for the manufacture or process of articles and goods. The ownership of the industry is not the material factor. It is the bringing into existence of a manufactured article with the aid of plant and machinery that is material. Such manufacturing activity is required to be carried out by an industrial undertaking. The two things are interconnected. An undertaking wherein that activity of manufacturing takes place is an industry, if it meets the well known tests for determining the existence of an industry. The activity should be an organized activity and there should be co-operation between the labourer and the employer. It must be systematic. The industrial undertaking must be engaged in bringing into existence articles or things by a process of manufacture, and if these tests are met, an industrial undertaking can be recognized as being in existence. The fact that the owner of that undertaking is also engaged in other activity, which cannot be regarded as an industrial activity, would not disentitle the undertaking or the owner thereof from claiming the benefits provided u/s 32A(2) of the Act, if all the

other conditions as set out in that section are met by the assessee.

As the matter has not been examined with reference to the question as to whether the plant or machinery installed for which the investment allowance had been claimed were used in the manufacture of other goods or articles, we consider it just and proper to remand the matter to the Assessing Officer for fresh consideration and examination of the assessee''s claim. The Assessing Officer shall give due opportunity to the assessee and after scrutinizing the materials produced, if he is satisfied that the machinery or plant is in fact used in the manufacture of articles or things and that the assessee is an industrial undertaking he shall grant the benefit to the assessee in accordance with the statutory provisions.

28. In Coromandel Engg. Co. Ltd.''s case (supra), a Division Bench of Madras High Court distinguished the decision of N.C. Budharaja & Co.''s case (supra) and held that as there were certain observations, which were similar to other cases, it would be better that the matter goes back and decided on merits by the Tribunal after giving a fresh hearing to the assessee.

29. We may notice that in CIT v. Orissa Cement Ltd. [2002] 123 Taxman 620 (Delhi) while interpreting the provisions of section 80-I of the said Act upon referring to a decision of the Apex Court in Tata Iron and Steel Co. Ltd. Vs. The State of Bihar, held:--

15. However, in this case, as noticed hereinabove, the AAC as also the Tribunal had arrived at a finding of fact, which had not been disputed by the revenue, that the production of limestone is done at a stage for the purpose of manufacture of cement. As noticed hereinbefore, it was further held that from the audited statement, it was possible to compute the profits on the basis of the transfer of limestone to the final stages at the market price. The decision of the Division Bench of this Court in CIT v. Dalmia Cement (Bharat) Ltd. [IT Reference No. 87 of 1981, dated 13-9-2000] is, therefore, distinguishable on facts. Keeping in view the decision of the Apex Court in the case of Tata Iron and Steel Co. Ltd. Vs. The State of Bihar, and the decision of the other High Courts following the same, we are of the opinion that the Division Bench of this Court in Dalmia Cement (Bharat) Ltd.''s case (supra) cannot be considered to have constituted a precedent. We may notice that in the case of The Regional Manager and Another Vs. Pawan Kumar Dubey, the Apex Court has clearly held that:

''... It is the rule deducible from the application of law to the facts and circumstances of a case, which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to the similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts''. (p. 1769)

30. The essence as to whether the companies, which undertake such composite business of manufacturing and constructions are entitled to the benefits of the

aforementioned provisions in the light of the decisions relied upon by Mr. Ahuja, being essentially question of fact had not been considered by the learned Tribunal. It, as noticed hereinbefore, mainly proceeded on the basis of the end-product doctrine.

31. We may further notice that a Division Bench of Bombay High Court in Commissioner of Income Tax, Bombay City-II Vs. Pressure Pilling Co. (India) P. Ltd., held:--

The essence of a manufacturing process is the conversion of raw material into entirely a new commodity or a new thing. The place or the side where the manufacturing process or the process of production of something is carried out is not relevant for determining whether the product produced or manufactured is an article. The mere fact that an article is manufactured or brought into being at the site itself would not be material for determining whether the thing produced or manufactured is an article. It is not necessary that an article should be manufactured in a factory alone.

It is also not necessary that all articles must necessarily have the quality or the possibility of being sold and purchased across the counter or that they must necessarily be transportable in order to be classified as an article.

******

... that by subjecting the concrete mixture which consisted of several articles to certain process with iron bars, something new was brought into being. By the piling process something new, which ultimately formed part of the construction came into being. But at the time when it was brought into being, it had complete independent existence and it was described as a pile, which was more or less akin to a pillar. The fact that when the superstructure was constructed, the foundation which was in the form of piles, got attached to the superstructure and became a part of the entire building, would not be material because the point of time with reference to which the applicability of section 84 would have to be considered, was when the article was brought into being as a product of the piling process. Though ultimately the piles become part of the building that did not detract from the fact that before the superstructure was constructed, a pile was an independent product as such. Since the end-product of the piling process was something which had an independent existence and an independent entity and was described as a pile, it was an article for the purpose of section 84(2)(iii), since it was brought into being by a special process of production. Therefore, the assessee was engaged in the ''manufacture or production'' of articles within the meaning of section 84(2)(iii) and was entitled to relief under the section. (p. 334)

32. In the instant case, the assessee does not claim benefit in respect of the entire profit earned by it, but is only asking for the relief to the extent to which it would have otherwise been entitled to, had it been held to be an ''Industrial Company'' for

the purpose of manufacture of the intermediate products, which it is required to manufacture for the purpose of utilization thereof in construction of dam and tunnel, etc. It was, in our considered opinion, obligatory on the part of the Department to go into the said question. Such questions were specifically raised by the assessee before the Commissioner (Appeals) as also before the Tribunal, but the same has not been considered in their proper perspective.

33. We may also notice that in Textile Machinery Corpn. Ltd.''s case (supra), the Apex Court while dealing with the provisions of section 15C of the Indian Income Tax Act, 1922 relied upon the decision of the Apex Court in Tata Iron & Steel Co. Ltd.''s case (supra) and held that even though the manufacturing products of the new industrial undertakings were merely used in the assessee''s other business of manufacturing of boilers, machinery plants, wagons, etc., the element of profit was there and the extent of the same could be ascertained as the assessee was maintaining separate books of account. It was further held:

It is clear that the principal business of the assessee is heavy engineering in the course of which it manufactures boilers, wagons, etc. If an industrial undertaking produce certain machines or parts which are, by themselves, identifiable units being marketable commodities and the undertaking can exist even after the cessation of the principal business of the assessee, it cannot be anything but a new and separate industrial undertaking to qualify for appropriate exemption u/s 15C. The principal business of the assessee can be carried on even if the said two additional undertakings cease to function. Again, the converse is also true. The fact that the articles produced by the two undertakings are used by the boiler division of the assessee will not weigh against holding that these are new and separate undertakings. On the other hand, the fact that a portion of the articles produced in these two new industrial undertakings had been sold in the open market to others is a circumstances in favour of the assessee that the new industrial units can function on their own. Use of the articles by the assessee is not decisive to deny the benefit of section 15C.

Section 15C partially exempts from tax a new industrial unit which is separate physically from the old one, the capital of which and the profits thereon are ascertainable. There is no difficulty to hold that section 15C is applicable to an absolutely new undertaking for the first time started by an assessee. The cases which give rise to controversy are those where the old business is being carried on by the assessee and a new activity is launched by him by establishing new plants and machinery by investing substantial funds. The new activity may produce the same commodities of the old business or it may produce some other distinct marketable products, even commodities which may feed the old business. These products may be consumed by the assessee in his old business or may be sold in the open market. One thing is certain that the new undertaking must be an integrated unit by itself wherein articles are produced and at least a minimum of ten persons

with the aid of power and a minimum of twenty persons without the aid of power have been employed. Such a new industrially recognizable unit of an assessee cannot be said to be reconstruction of his old business since there is no transfer of any assets of the old business to the new undertaking, which takes place when there is reconstruction of the old business. For the purpose of section 15C the industrial units set up must be new in the sense that new plants and machinery are erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of section 15C the new undertaking must be formed by reconstruction of the old business. Now, in the instant case, there is no formation of any industrial undertaking out of the existing business since that can take place only when the assets of the old business are transferred substantially to the new undertaking. There is no such transfer of assets in the two cases with which we are concerned. (p. 205)

The Apex Court observed:

... As in the instant case, once the new industrial undertakings are separate and independent production units in the sense that the commodities produced or the results achieved are commercially tangible products and the undertakings can be carried on separately without complete absorption and losing their identity in the old business, they are not to be treated as being formed by reconstruction of the old business. (p. 206)

34. In Commissioner of Income Tax Vs. Hind Lamps Ltd., a Division Bench of the Allahabad High Court, of which B.P. Jeevan Reddy, J. (as his Lordship then was) was a member, observed:--

The object of section 80J is to encourage new industrial undertakings by providing that a certain part of the income should be exempted from tax. This exemption is made available for a certain number of years from the commencement of the working of the new industrial undertaking. The section states that, where any profit and gain is derived from any industrial undertaking, the portion of it to the extent of 6 per cent of the capital employed in the undertaking shall be exempted from tax. The words ''profits and gains derived from an industrial undertaking'' only mean profits and gains computed in accordance with the provisions of the Act.

The provisions of sub-section (1) of section 80J make it clear that the profits and gains of a new industrial undertaking from which deduction of the relevant percentage of capital employed during a particular assessment year is allowable under that provision, are the profits and gains includible in the computation of the total income chargeable to tax. There are no two modes of computation of the profits or gains of the new industrial undertaking contemplated by sub-section (1) of section 80J, one for determine the total income chargeable tax and the other for applying the provision contained in that sub-section, refer Commissioner of Income Tax, Patiala Vs. Patiala Flour Mills Co. P. Ltd.,

The dispute in the present case has narrowed down and is confined only to whether, on the basis of the profit and loss account submitted by the assessee, the profit and loss of the new unit can reasonably be worked out or not for the purpose of computation of the benefit u/s 80J of the Act.

In view of a series of decisions, now there is no dispute that the provisions of section 80J of the Act do not envisage that separate accounts should be submitted in respect of the new unit and it was also not necessary that separate accounts should be maintained, see International Instruments P. Ltd. Vs. Commissioner of Income Tax, Karnataka, and Mahindra Sintered Products Ltd. Vs. Commissioner of Income Tax, However, in the present case, separate accounts in the ledger had been kept by the assessee in respect of the new unit on the basis of which, according to him, profits have been determined. (p. 555)

The same principle was reiterated by the Patna High Court in CIT v. Hindusthan Malleables and Forgings Ltd. [1991] 191 ITR 701. Therein relying upon the decision of the Supreme Court in Textile Machinery Corpn. Ltd.''s case (supra), it was held:--

... It has been held by the Supreme Court at page 206 of the report that, in order to be entitled to the benefit of deduction in question, the following facts have to be established by the assessee, namely, (i) investment of substantial fresh capital in the industrial undertaking set up, (ii) employment of requisite labour therein, (iii) manufacture or production of article in the said undertaking, (iv) earning of profits clearly attributable to the said new undertaking, and (v) above all, a separate and distinct identity of the industrial unit set up.

As stated earlier, in the present case, the Tribunal has recorded findings of facts in respect of each of the pre-requisites as laid down by the Supreme Court in the above-referred case and, as such, the assessee is clearly entitled to the benefits of section 80J of the Act. (p. 73)

35. Yet again in Commissioner of Income Tax Vs. Beehive Engineering Co. and Allied Industries (P.) Ltd., Syed Shah Mohammed Quadri, J. (as his Lordship then was) speaking for a Division Bench of the Andhra Pradesh High Court upon referring to the interpretation of term ''Industrial Company'', as given in clause (c) of sub-section (7) of section 2 of the Finance Act, 1978, held:

From the above extract, two things are clear, viz., (i) that for a company to be an ''industrial company'' within the meaning of the abovesaid provision, it is enough if the company is carrying on manufacturing of goods, and (ii) that the application of the Explanation would arise only in a case where the company is not mainly an industrial company; in such a case if the income of that company from manufacture of goods exceeds 51 per cent it would be treated as industrial company. In the instant case, having regard to the findings of fact recorded by the Tribunal, the assessee-company squarely falls within the meaning of ''industrial company'', whether or not the income from the activities mentioned above exceeds 51 per cent.

Indeed, as a matter of fact, the Revenue itself treated the assessee-company as an ''industrial company'' for the years 1973-74 to 1977-78.

We may, however, make note of the fact that though Commissioner of Income Tax Vs. N.C. Budharaja and Company,) was reversed by the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, yet it would not have any bearing on the facts of this case. There the finding was that the assessee-company was a firm of contractors constituted for the purpose of construction of a dam in Orissa. The contention there was that the activity of constructing a dam was an industrial activity and the company was an industrial undertaking for the purpose of section 80HH. The Orissa High Court had taken the view that it was an industrial undertaking and that was reversed by the Supreme Court. Therefore, that decision does not directly apply to the facts of the present case where there is a finding of fact recorded by the Tribunal that the assessee-company was carrying on manufacturing activities. In this view of the matter, we need not go into the other decisions cited by learned counsel for the revenue. (p. 566)

Yet again Quadri, J. in Commissioner of Income Tax Vs. Elemech Industrial Constructions, followed the aforesaid decision of Beehive Engg. Co. & Allied Industries (P.) Ltd.''s case (supra) stating:

For the purposes of section 2(7)(c) of the Finance Act, 1978, a Division Bench of this court, of which one of us, i.e., Syed Shah Mohd. Quadri, J., was a member, in Commissioner of Income Tax Vs. Beehive Engineering Co. and Allied Industries (P.) Ltd., considered whether the assessee-company therein, which was purchasing angles, joints and channels, cutting them into required sizes and welding the pieces to manufacture trusses, would fall within the meaning of industrial company. The Bench opined that it was an industrial company. Following the said opinion, in this case also, the activities carried on by the assessee-company cannot but be held to be the activities of an industrial company. (p. 504)

36. The applicability of the end-product test has been considered by the Apex Court in Commissioner of Income Tax, Gujarat Vs. M/s. Cellulose Products of India Ltd., Therein reversing the decision of the Gujarat High Court in Cellulose Products of India Ltd. (supra), the Apex Court observed:--

Having given our anxious consideration to the respective submissions made by learned counsel for the parties, we are inclined to agree with the contention of learned counsel for the appellant that the High Court, on the facts and in the circumstances of the instant case, committed an error in interfering with the conclusion of the Tribunal. It is settled law that a High Court hearing a reference under the Act does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal and that it acts purely in an advisory capacity. If the Tribunal, after considering the evidence produced before it on a question of fact,

records its finding, it cannot be interfered with in a reference by the High Court unless of course such finding was not supported by any evidence, was perverse or patently unreasonable. In our opinion, the finding of the Tribunal in the instant case did not suffer from any of these infirmities. The finding that the production of cellulose pulp during the month of March, 1961, was not a trial production and that cellulose pulp as manufactured by the respondent was a finished product which was a marketable commodity was essentially a finding of fact based on appraisal of evidence. It is true that cellulose pulp constitutes raw material for manufacture of CMC but it has not been disputed before us by learned counsel for the respondent that it was even by itself a finished marketable commodity. The circumstance that the industrial licence granted to the respondent was for the manufacture of CMC and not of cellulose pulp is, in our opinion, keeping in view the nature of the two articles, not of much significance. In the same manner as a licence, for instance, for the manufacture of cloth includes the manufacture of cotton yarn, an intermediate product necessary for manufacturing cloth, the licence granted to the respondent for the manufacture of CMC included the manufacture of cellulose pulp which was an intermediate product to be used in its turn as a raw material for the manufacture of CMC. The relevant clause of the memorandum of association of the respondent-company, already quoted above, is obviously wide in its amplitude. It contemplates manufacturer of "chemical products of any nature and kind whatsoever and particularly of CMC, cellulose pulp and other chemical products". Manufacture of cellulose pulp was thus indeed one of the objects of the company. The question involved had to be considered in this background and the Tribunal having done so and recorded the finding of fact referred to above, the High Court obviously committed an error in holding that manufacture of cellulose pulp during March, 1961, was of no consequence and that the first year of production would be the assessment year 1962-63 when CMC was actually manufactured. The decision of the Madras High Court relied on by the learned counsel for the respondent reported in Madras Machine Tools Manufacturers Ltd. Vs. Commissioner of Income Tax, in view of what has been observed above on the facts of the instant case, does not advance the case of the respondent any further than the reasons recorded in the judgment under appeal. (p. 159)

37. Having regard to the fact the question as to whether the assessee is an "Industrial Company" or not itself has been directed to be determined by the Assessing Officer by the learned Tribunal, we are of the opinion that the matter requires fresh consideration at the hands of the Tribunal again. The decision of the Apex Court as also the other High Courts must, therefore, be considered while taking into the account of fact situation obtaining in each case - Dr. Nalini Mahajan, Ram Lal Mahajan Charitable Trust, Shri Rakesh Mahajan, Pan Foods Ltd. and Others and Mahajan Industries Pvt. Ltd. and Others Vs. Director of Income Tax (Inv.) and Others, and Haryana Financial Corpn. v. Jagdamba Oil Mills JT 2002 (1) SC 482.

38. Furthermore, we may notice that as regards investment allowance in Commissioner of Income Tax, Karnataka, Bangalore Vs. M/s. Shaan Finance (P) Ltd., Bangalore, and another matter, it has been held:--

Sub-section (2) of section 32A, however, requires to be examined to see whether there is any provision in that sub-section which requires that the assessee should not merely use the machinery for the purposes of his business, but should himself use the machinery for the purpose of manufacture or for whatever other purpose the machinery is designed. Sub-section (2) covers all items in respect of which investment allowance can be granted. These items are, ship, aircraft or machinery or plant of certain kinds specified in that sub-section. In respect of a new ship or a new aircraft, section 32A(2)(a) expressly prescribes that the new ship or the new aircraft should be acquired by an assessee, which is itself engaged in the business of operation of ships or aircraft. Under sub-section (2)(b), however, any such express requirement that the assessee must himself use the plant or machinery is absent. Section 32A(2)(b) merely describes the new plant or machinery which is covered by section 32A. The plant or machinery is described with reference to its purpose. For example, sub-section (2)(b)(i) prescribes "the purposes of business of generation or distribution of electricity or any other form of power". Sub-section (2)(b)(ii) refers to small-scale industrial undertakings, which may use the machinery for the business of manufacture or production of any article, and sub-section (2)(b)(iii) refers to the business of construction, manufacture or production of any article or thing other than that specified in the Eleventh Schedule. Sub-section (2)(b), therefore, refers to the users to which the machinery can be put. It does not specify that the assessee himself should use the machinery for these purposes. In the present case, the person to whom the machinery is hired does use the machinery for specified purposes u/s 32A(2)(iii). That person, however, is not the owner of the machinery. The High Courts of Karnataka and Madras have held that looking to the requirements specified in section 32A, the assessees, in the present case, fulfil all the requirements of that section, namely, (1) the machinery is owned by the assessee; (2) the machinery is used for the purpose of the assessee''s business; and (3) the machinery is as specified in sub-section (2). (p. 312)
We are inclined to agree with the reasoning of the High Courts of Karnataka and Madras.

39. Yet again in relation to development rebate in Commissioner of Income Tax, Madras Vs. M/s. Rambal Private Ltd. etc., it has been held:--

According to section 33(1)(a) development rebate is allowable if the assessee uses the machinery wholly for the purpose of the business carried on by him. It is not in dispute that in the present case, and as has been found by the Tribunal, the items, which are manufactured by the respondent are wholly for the purpose of its business. Therefore, one of the conditions stipulated by sub-section (1)(a) of section 33 stands satisfied.

Clause (b) deals with the rate at which the development rebate is to be allowed. It, inter alia, provides that in the case of machinery or plant which is installed for the purposes of manufacture or production of any one or more of the articles specified in the list in the Fifth Schedule and that machinery has been installed before April 1, 1970, then the development rebate will be allowed at the rate of 35 per cent of the actual cost of the machinery. In the instant case, the machinery was installed before April 1, 1970. It cannot be disputed that it was installed for the purpose of manufacture of nuts, bolts and screws for automobiles falling under item No. (20) in the Fifth Schedule being ''automobile ancillaries''. These items were in fact manufactured. Section 33(1)(b) does not state that the machinery which has been installed for the manufacture or production of one or more of the articles specified in the Fifth Schedule should be used solely or exclusively for the manufacture of that/those article/articles. As long as the machinery, which is installed, manufactures any of the articles specified in the Fifth Schedule, the assessee would be entitled to claim development rebate at the rate of 35 per cent. If the machinery is installed before April 1, 1970, notwithstanding the fact that in addition to the manufacture of the listed items, the assessee also manufactures some other goods with the help of that machinery. If the contention of the Department is accepted, the effect would be that if the machinery is used for the manufacture of one of the items listed in the Fifth Schedule for a few hours a day and lies idle thereafter for the rest of the day, the assessee would be entitled to claim development rebate at the rate of 35 per cent but if the machinery instead of remaining idle is used for the manufacture of some other items also for the assessee''s business, then he would not be entitled to development rebate at the rate of 35 per cent. We do not see any logic in this contention nor does the language of section 33 warrant such a conclusion.

We are in agreement with the decision of the High Court that the machinery, which was being used for the manufacture of some of the items mentioned in the Fifth Schedule, would be entitled to development rebate at the rate of 35 per cent and it need not necessarily have been used exclusively for the manufacture of those items alone. (p. 413)

40. In the instant case, the questions have not been formulated in a pedantic manner. The questions referred to this Court for its opinion are of wide amplitude.

41. The contention of Mr. Jolly to the effect that this Court having regard to the claim of the assessee before the Assessing Officer could not have raised the said question, cannot be accepted as the same arise out of the order of the Tribunal. We may further notice that despite the aforementioned decisions, in Hydel Construction (P.) Ltd. v. CIT [I.T.C. No. 5 of 1998 dated 14-8-1998], Lahoti, J. formulated following questions:--

A. Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in disallowing the deduction claimed by the petitioner-company u/s 32A of the

Act?

B. Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in disallowing the deduction claimed by the petitioner-company u/s 80HH of the Act?

C. Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in disallowing the deduction claimed by the petitioner-company u/s 80J of the Act?

42. Yet again a Division Bench of this Court comprising Pasayat, J., as his Lordship then was, in ITRs 246-247 of 1982 decided on 16-7-2001 remitted the matter back to the Tribunal stating:--

3. Learned counsel for Revenue placed reliance on a decision of this Court in Bhagat Construction Co. (P) Ltd. Vs. Commissioner of Income Tax, , in assessee''s own case for 1985-86 and submitted that the views of CIT(A) and Tribunal cannot be maintained. Learned counsel for assessee submitted with reference to decision of the Apex Court in Minocha Bros. Pvt. Ltd. Vs. Commissioner of Income Tax, that the view expressed by CIT(A) and Tribunal are on terra firma.

4. It is to be noted that the decision of the Apex Court in Minocha Bros. was in respect of a decision of this Court in Commissioner of Income Tax, Delhi-I Vs. Minocha Brothers P. Ltd., . We find from the case of Minocha Bros. as decided by the Apex Court that the determinative factor would be percentage of the total income attributable to manufacturing, processing and mining activities undertaken by the assessee. If it is not less than 51%, it has to be treated as industrial company. Assessee with reference to certain observation made by CIT(A) and Tribunal claimed that there was positive finding in this regard. We find that CIT(A) and the Tribunal referred to some profits which were held to be relatable to manufacturing activities in terms of decision in Budharaja''s case which was decided by the Orissa High Court, i.e., Commissioner of Income Tax Vs. N.C. Budharaja and Company, Said decision was overruled by the Apex Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, . Said decision was relied upon by this Court in assessee''s case as referred to above. In the circumstances, we feel it would be appropriate to direct the Tribunal to rehear the appeal and to find out on facts as to whether or not 51% of the total income is attributable to manufacturing, processing and mining activities. While doing so, the decision in Budharaja''s case (supra) and Minocha Bros. case (supra) as decided by the Apex Court shall be kept in view.
The said order has also been reiterated in ITRs 208-209 of 1986 decided on 16-7-2000; ITR 562 of 1983 decided on 10-7-2001; and ITR 291 of 1988 decided on 16-7-2000.

43. In this view of the matter, we are of the opinion that the interest of justice would be sub-served if the contention of the parties, which is the crux of the matter, to the effect that ''whether in relation to the intermediate products, the assessee-company fulfils the criteria of an industrial undertaking or not'' may be determined by the learned Tribunal in the light of the observations made hereinbefore and on the basis thereof necessary reliefs can be granted in terms thereof.

These references are disposed of accordingly.