Delhi High Court Degremont India Ltd. vs Deputy Commissioner Of Income ... on 28 June, 1996 Equivalent citations: (1998) 60 TTJ Del 473 ORDER B. M. KOTHARI, A.M. : This appeal is directed against the order passed by the learned CIT(A)-V, New Delhi, on 5th September, 1995 of asst. yr. 1992-93. The assessee has raised the following ground in this appeal : "That the CIT(A) erred on facts and in law in confirming the action of the AO in denying deduction under s. 80-I to the appellant on the ground that the appellant was not an"industrial undertaking engaged in production or manufacture of an article or thing." 2. The appellant company is an engineering company engaged in the business of designing, supply and installation of effluent treatment plant for treating the effluent to meet the discharge standards of Central/State Pollution Control Board as well as to achieve the quality of the treated effluent acceptable for reuse/recycle to the possible extent. The company submitted its return of income declaring taxable income of Rs. 1,61,83,313 on 30th December, 1992. The same was processed under s. 143(1)(a) in which the income was determined at Rs. 1,69,37,632. Subsequently the order under s. 154 was passed in which the income was reduced to Rs. 1,62,25,330. Thereafter notice under s. 143(2) was issued and an assessment under s. 143(3) was made on 27th March, 1995, determining the taxable income at Rs. 2,10,37,505. 3. During the course of assessment proceedings, the AO required the assessee to explain as to why the deduction claimed under s. 80-I should not be disallowed since the company was not engaged in the manufacturing activities as it appears from the records. According to the AO, the company was carrying on the business of engineering contractor for setting up of plant for treatment of effluent and water according to the customers requirements. The assessee submitted its reply dt. 5th December, 1994, inter alia, stating that the company is an engineering company engaged in the manufacturing and setting up of effluent and water treatment plant to the customers requirement and is eligible for grant of deduction under s. 80-I. The AO arrived at the conclusion that assessee is purely doing contract work and is not engaged in any manufacturing activity. Relying on the judgment of Honble Supreme Court in the case of CIT vs. N. C. Budharaja & Co. (1993) 204 ITR 412 (SC) held that the assessee-company is not entitled to deduction under s. 80-I. 4. The learned CIT(A) after considering the various submissions and arguments submitted on behalf of the assessee arrived at the conclusion that the appellant company is not entitled to deduction under s. 80-I as it is not an industrial undertaking engaged in production or manufacture of an article or thing, which is a specific condition for availing of benefit of deduction under s. 80-I of the IT Act, 1961. Thus, the assessees appeal was dismissed by the learned CIT(A). 5. Shri B. K. Khare, the learned chartered accountant, appeared on behalf of the assessee and vehemently argued that the view taken by the AO as well as by the CIT(A) is patently invalid, unjustified and is clearly contrary to the relevant provisions of law. Elaborate arguments were made by the learned counsel for three consecutive days and thereafter synopsis of the submissions orally made during the course of hearing was also submitted in writing along with letter dt. 20th May, 1996. The various submissions and arguments made by the learned counsel for the assessee are briefly stated here-

under : (a) He submitted that appellants claim for deduction under s. 80-I of the Act was allowed in asst. yr. 1990-91 (initial year) and asst. yr. 1991-92, after careful examination of the appellants claim for grant of such deduction. In the earlier two years the AO found that the appellants undertaking is an industrial undertaking which fulfills all the conditions mentioned in s. 80-I(2) and after his total satisfaction as to the fulfillment of all the required conditions, the AO allowed appropriate deductions under s. 80-I in the assessment for asst. yrs. 1990-91 and 1991-92. He submitted that qualification with quantification thus stood established on discharging the onus on the part of the appellant to prove eligibility of its industrial undertaking for relief under s. 80-I. The learned counsel submitted that the placid water were suddenly sought to be stirred for negativing the companys claim for deduction under s. 80-I for asst. yr. 1992-93 on the AOs plea that "the company was not engaged in the manufacturing activity, as it appears from the record". He submitted that the assessee submitted a detailed reply in response to the show cause notice issued by the AO vide appellants letter dt. 5th December, 1994, addressed to the Dy. CIT. In this letter the assessee explained before the AO that the company is engaged in the manufacture of water/effluent treatment plant and therefore, it will have to be regarded as an "Industrial undertaking engaged in the manufacture of water/effluent treatment plant, which is completely different from the business of construction. A detailed note on the activities carried out by the appellant company was also submitted along with the said reply. Copies of letters granting approval by the Ministry of Industries in respect of foreign collaboration entered with M/s Degremont, S. A. France, for manufacture of water and treatment plant was also produced before the AO along with the said reply. The AO, however, departed from the recognition and proved eligibility of the industrial undertaking under s. 80-I accepted in the earlier years, as the AO was of the view that the ratio of the decision of the Honble Supreme Court in the case of N. C. Budharaja & Co. (supra) was applicable on the facts and circumstances of the present case. He submitted elaborate arguments to show that the judgment of Honble Supreme Court in the case of N. C. Budharaja (supra) by no stretch of imagination be applied in the case assessee, as that decision was rendered by the Honble Supreme Court in relation to assessees in the activity of construction of a dam. It was held by the Honble Supreme Court in that case that the activities of construction of a dam bridge, road or canal or other similar construction would not qualify for grant of deduction under s. 8OHH or for grant of investment allowance under s. 32A. The said judgment cannot be applied in the case of the assessee which is engaged in the business of designing, manufacturing, supplying and installation of water effluent treatment plant carried on by the assessee. The elaborate arguments submitted by the learned counsel as to the non-applicability of the ratio in the case of N. C. Budharaja & Co. (supra) to the facts of the assessees case made by the learned counsel for the assessee will be further discussed in later part of this order. (b) the learned counsel was also fair enough to bring to our notice that assessments made for asst. yrs. 1990-91 and 1991-92 have been reopened under s. 147/148 and the matter is still pending before the Departmental authorities. He, however, submitted that completed

assessments have been reopened merely on the basis of the judgment of Honble Supreme Court in the case of N. C. Budharaja (supra). (c) the learned counsel further submitted that the issue involved in the present appeal should be restricted to the only real question agitated by the appellant as to whether the appellant manufactured or produced any article or thing, factually though the industrial undertaking of the appellant has fulfillled each and every provision or requirement, more particularly of s. 80-I(2). (d) The learned counsel then explained the legislative history relating to grant of various deductions and exemptions with a view to provide incentives for industrial growth. He explained that provisions relating to tax holiday such as contained in s. 15C of the old IT Act, 1922, ss. 80, 80J, 8OHH and 8OHHA, etc., all these sections talk of industrial undertaking manufacturing or producing"articles" whereas the new enacted sections, viz., ss. 80-I and 80-IA for the first time, mentions industrial undertaking which manufactures or produces any article or thing. He submitted that it is noteworthy to find that the word "article" or "thing" mentioned in s. 80-I is in singular. The learned counsel submitted that the Parliament generally does not indulge in tautology. In English language it is said that there are no synonyms. Therefore, the addition of an individual word "thing" cannot be lost sight of and it will require a specific consideration in order to determine the eligibility of the assessee for grant of deduction under s. 80-I. He also explained that s. 80-IA(8) uses the expression "goods". The expression "goods" has been defined in Art. 366 of the Constitution of India as including all materials, commodities and articles. He also invited our attention towards the new entry 29A, which is added in Art. 366 of the Constitution of India, entry 84 in the VII Sch. (Art. 246) List I of Union List, entry 54 in List II of the State List. He submitted that by inserting new entry 29A in Art. 366, the State Governments were empowered to levy sales-tax not in respect of the entire receipt from the works contract but only to the extent of transfer of property in the goods involved in the execution of contracts. He submitted that this is again very revealing amendment which will explain the argument advanced by the learned Departmental Representative that sales-tax was paid only on the value of goods used in the execution of such a turnkey project carried out by the assessee. (e) The learned counsel then invited our attention towards provisions of s. 8OHHA(8) and s. 8OHH(10) which excludes undertaking engaged in the mining. Such a specific exclusion in the aforesaid sections indicates that provision of s. 80-I are capable of being extended to mining and mining could be an industrial undertaking engaged in the manufacture or production of an article or thing. If that is so, the appellants case, who is manufacturing effluent water treatment plant would be much stronger. (f) The learned counsel then invited our attention towards various other provisions contained in IT Act such as ss. 10A and 10B in which the definition of manufacture has been given in the Explanations to those sections. The definition given in Expln. (iii) in s. 10A defines "manufacture" as including any process or assembling, or recording of programmes on any disc, tape, perforated media and other information storage device. Similar definition of manufacture has been given in Expln. to s. 10B. The learned counsel submitted that the lump sum know-how fee paid by the

appellant company to Degramont France has been allowed by the AO in six instalments as per s. 35AB. The Expln. to s. 35AB provides that for the purposes of this section "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil well or other source of mineral deposits. Since the Department itself has granted deduction under s. 35AB, the fact that such technical know-how is meant for assisting in manufacture or processing of goods has been accepted by the Department. (g) He then invited our attention towards s. 44AB with a view to highlight that the said section talks only of civil construction. Sec. 44BBB contains special provision for computing profits and gains of foreign companies engaged in the business of civil construction, etc., as well as certain turnkey power projects. Likewise he invited our attention to Expln. 2 to s. 9(1)(vii) as well as the definition of foreign project given in s. 8OHHB. All these provisions were brought to our notice with a view to canvass that a clear-cut distinction between the civil construction work and the construction /assembly and/or installation of any plant and machinery has been made wherever the legislature considered it necessary. He, further, submitted that the various Double Taxation Avoidance Agreements (DTAAs) make a clear-cut distinction between the works contract by way of predominantly civil construction on the one hand, and assembly, supply and installation of plant and machinery on the other. (h) The learned counsel submitted that one will, therefore, have to content with the expression "article" or "thing" used in s. 80-I as compared to the singular mention of the word "article" used in ss. 80-I, 80J, 8OHH and 8OHHA. We will also have to take due notice of the expression "goods" used in s. 80-I(8) which was not considered by the Honble Supreme Court in its decision of N. C. Budharaja (supra). (i) The learned counsel submitted that the appellant is not engaged in the business of civil construction but is engaged in the business of production/manufacture of effluent treatment plant. The nature of activities carried out by the assessee have been explained in the write up dt. 8th May, 1996, furnished in the course of hearing apart from voluminous data submitted in the paper book. He submitted that merely because the bulk of the activities is carried on at the site and merely because the plant is fastened to the earth, it does not become the part of civil construction as such and it also does not become immovable property in the sense the word "immovable" as is used with reference to civil work like dam, road, building, etc. The effluent treatment plant are capable of being dismantled and set up in any other place, unlike the case of civil construction simpliciter. The learned counsel submitted that the assessee is engaged in the business of manufacturing of effluent treatment plant which is a very high priority area. The concerning authorities of Government of India, Department of Industries, have accorded approval for the technical collaboration with Degremont France. If such an important manufacturing activity carried on by the assessee with the accumulated rich experience of their foreign collaboration is not regarded as qualifying for deduction under s. 80-I, it would defeat the very purpose of providing such an incentive for setting up of such high priority industries. (j) The learned counsel then submitted that the CIT(A) noted as a sample case an agreement made by the assessee with

Shree Dyaneshwar Sahakari Sakhar Kharkhana Ltd. (for short Dyaneshware). It was the common contention of the learned representatives of both sides that the agreement with the said customer may be treated as a sample case because agreements with various other customers are broadly on the same lines. The learned counsel submitted that the contract executed with Dyaneshware is an indivisible contract. The assessee agreed to design, engineer procure, supply, fabricate, assemble, manufacture, erect and commission a plant for recovery of methane gas, which serves the dual purpose, namely, effluent is disarmed while at the same time the plant yields produce like methane gas which acts as a fuel to the boiler and only excess methane, which should not be allowed to be let loose as it is highly poisonous, is burnt out through a special device. The assessee has undertaken the obligation to supply such a plant which will adhere to the various stipulations and conditions mentioned in the agreement including guarantees, warranties, performance tests and commissioning. The learned counsel in this regard invited our attention to various clauses of the said agreement. Our particular attention was drawn towards cl. 4 which provides that if the sellers (appellant company) shall have succeeded in giving the performance test, the plant as herein set out for the said period of 15 days, the plant shall be deemed to have been successfully commissioned and the purchasers shall be bound to issue a certificate accordingly to the sellers. Thereafter the sellers shall be entitled to claim 10 per cent of the agreed consideration, till then retained by the purchaser and the purchaser agreed to pay the same within 10 days of such successful performance test and having been completed, against submitting bank guarantee. (k) The learned counsel submitted that in view of such agreement executed with the customer, it is impossible for anyone to contend that the activities of the appellant company are of a civil nature like dam, roads, etc. In fact, the work carried out by the assessee could be described rather more than the manufacture, considering the onerous condition and stipulations in a tailor made plant. He submitted that it cannot be forgotten that Degremont France is the world leader in sanitishing the whole atmosphere, which is today vitiated. The learned counsel submitted that importance of effluent plant has been recognised everywhere. For example, 100 per cent is extended to such equipments under the IT Act. Recently, the Supreme Court has ruled that polluting unit in the industry should be either stopped or shifted and has also insisted that the effluent of various types, liquid, solid, etc., should be neutralised with the help of modern technology and equipment. The appellant company was fortunate to avail itself of the accumulated knowledge and R&D of its collaborators, who are world leaders in this field, whose techniques of visualization and diagnosis, designs, engineering, fabrication are utilised by the company while supplying water effluent treatment plant. Various types of equipments and other engineering components are produced as per the specific design and some of the items are proprietary items, which cannot be bought off the shelf, but are got manufactured as per Degromonts technology, design and drawings under the supervision and quality control, etc. He submitted that in the nature of things, the plant comes on the site. Merely because the plant comes on the site, it could not be compared to the cases of dam, building, road, etc., to dub this

activity as civil construction simpliciter. The learned counsel submitted that know-how consisting of visualization of all the aspects involved and to design and engineer the necessary effluent treatment plant is the name of the game. It is not necessary that every single component is to be manufactured by the manufacturer. In fact the mass production technique would not have been possible but for division of labour. Design Engineering, procurement, fabrication and putting them together require lots of skill, engineering techniques, and the requisite technical know-how. The learned counsel further submitted that assembling and other numerous operations involved in readying effluent treatment plant is certainly an activity which is covered by the expression manufacture or production of an article or thing. It is impossible for anybody to put up such a water effluent treatment plant with varied components without the technology and accumulated experience. (l) The learned counsel further submitted that the contention of the Departmental Representative that the assessee has preferred the bills for the items for the supply of equipments and therefore, they are only re-seller of goods and not a manufacturer is not correct. He submitted that with great respect to the learned Departmental Representative he has not understood the basic conditions contained in the agreement executed with Dyaneshwar by which assessee is under an obligation to not only design, manufacture and supply the various components of the effluent water treatment plant but the assessee is under an obligation to give successful performance test by running the said effluent treatment plant and only thereafter they are entitled to receive the balance amount of 10 per cent retained by the customers for ensuring successful commissioning of the plant. There is absolutely no intention to effect sales of various equipments. It was only a method by which the appellant company was being paid from time to time step with the progressive performance of the agreement, so that the assessee could be paid pro tanto and at the same time client has got the security by way of equipment reaching the site. (m) The learned counsel further submitted that the assessee is procuring various components, equipments and spare parts from different suppliers, some of the parts are got manufactured according to the requirement in accordance with the technical know-how provided by Degramont France. The company provides mother technology for manufacture of such a mega effluent water treatment plant and such technology is made applicable for procuring and getting manufactured each and every type of equipments required for manufacturing the water treatment plant. The technical know-how, the skill, the research and development and the accumulated experience of Degramont France are the heart of carrying out the manufacturing of effluent water treatment plant. The assembling of a water treatment plant from various components, spare parts, with the application of such technical skill at every stage would certainly come within the ambit of expression "manufacture or production of an article or thing". He explained the various process as per the note given at page 123 of the paper book and a diagram of the entire plant given at page 126 of the paper book. (n) The learned counsel submitted that in view of the aforesaid nature of work done by the assessee, it would be amply clear that the judgment of Honble Supreme Court in the case of N. C. Budharaja (supra) cannot be applied in the case of assessee. He submitted that

the Honble Supreme Court while observing that expression manufacture and produce are normally associated with movable articles of goods, big and small, but they are never employed to denote construction activity or the nature involved in construction of a dam or a building. At page 416 of 204 ITR, the Honble Supreme Court reversed the judgment of Bombay High Court only on the ground that it was engaged in the work of civil construction. The finding given by the Honble Supreme Court with regard to the expression thing are also confined to the assessees engaged in the business of constructing dam, roads and other similar civil construction work. The Honble Supreme Court has pointed out that a dam, bridge, road or canal or other similar construction cannot be treated as an "article or thing manufactured or produced by the assessee". The ratio or the said judgment by no stretch of imagination can be applied to a case where the assessee is engaged in the business of carrying out a turnkey project of designing, manufacture, selling and installing effluent water treatment plant. (o) The learned counsel further submitted that in carrying out the turnkey project of commissioning of effluent water treatment plant, the assessee has to carry out a small work of the nature of civil construction, for laying down foundation, etc., for installation of the said plant. That is an insignificant part of the total contract. The work of laying the foundation of the plant carried out by the assessee in some cases is a necessary activity for ensuring successful commissioning of the said plant. He submitted that in various contracts such civil work is done by the customers themselves while in some cases civil work is carried out by the assessee on behalf of the customers for ensuring successful running of the plant after it is installed. He invited our attention towards a consolidated chart submitted at page 273 of the compilation which shows that such civil work was carried out by the assessee only in cases of six contracts out of about 28 contracts partly or wholly carried out in the year under consideration. The portion of income attributable to such civil work was Rs. 13,223 lakhs while the corresponding expenditure for such civil work was Rs. 14,144 lakhs. Thus, there was a loss in the civil work carried out by the assessee. However, such civil work consisting of laying of foundation was necessarily required to be done by the assessee as per the terms of the contract in those cases with a view to successfully commissioning the plant in accordance with the terms of contract executed with those customers. These facts were brought to our notice with a view to indicate that the assessee cannot be said to be a concern engaged in the working of civil construction work. The ratio of judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra) was, therefore, not at all applicable in the case of the assessee, according to the learned counsel. (p) The learned counsel then invited our attention towards various decisions : (1) Union of India vs. Delhi Cloth & General Mills & Ors. ECRC 1-216 : 1981 CC (SC 6). In this case, it was held that manufacture implies a change but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation, a new and different article must emerge having a distinctive name, character or use. (2) CIT vs. Penwalt India Ltd. (1992) 196 ITR 813 (Bom) He invited our attention towards the concluding para at page

817 of ITR with a view to show that the manufacturing activity consisted of (i) canvassing of orders, (ii) preparing designs and drawings on the basis of orders; (iii) placing orders for manufacture of machinery with Turner Hoare; (iv) to see that the manufacturing process is carried on by Turner Hoare under the direct supervision of the assessee-company; (v) to have a check on the quality control and last but not the least, to be responsible for the proper functioning of the machinery and guarantee after sale service for a stipulated period. (3) CIT vs. U.P. Agro Industrial Corporation (1991) 188 ITR 370 (All) In this case it was inter alia, held that though the activity of the assessee was one of assembly of components parts of a tractor, it was not a case where a tractor was imported in a knocked down condition and re-erected. Large number of parts were imported and they were first knit into 23 components, which, in turn, were fitted together to form a tractor. Therefore, the activity of the assessee amounted to manufacture or production of articles and it was entitled to benefit of the provisions of ss. 80-I and 80J. (4) Jackson Engineers (P) Ltd. vs. ITO (1989) 31 ITD 79 (Del) The assessee in this case was purchasing from different parties (i) engine; (ii) alternators; (iii) engine instrument panels; (iv) base plate; (v) fuel tank; (vi) control panels; (vii) ball-bearing, (viii) measuring instrument and gauges; (ix) radiators, silencer and other components and converting them into several types of engines of different horse powers. It was held that what the assessee assembled and manufactured through its assembling was not the same name which was assigned to the parts. The engines made by the assessee was known as diesel generating set. With this process and there being a separate name in the market for what the assessee made, the assessee will have to be regarded as industrial undertaking qualifying for grant of deduction under s. 80-I. 5. ITO vs. Bandekar Engineers (1990) 33 ITD 680 (Bom) In this case the assessee, who obtained from others for designing, fabricating installation and supply of cyclone system claimed deduction under s. 8OHH. The Bombay Tribunal relying upon the judgment of Honble Bombay High Court in the case of Tata Locomotives & Engg. Co. Ltd. & Ors. held that the assessee was entitled to relief under s. 8OHH. 6. CIT vs. Kiran Tobacco Products (P) Ltd. (1993) 201 ITR 56 (St) In this case the Honble Supreme Court dismissed a special leave petition by the Department to appeal against the order of Honble Karnataka High Court rejecting a reference application on the question whether manufacture of zarda from tobacco involve any manufacturing activity and, therefore, the assessee was an industrial company entitled to lesser rate of tax, investment allowance and benefit under ss. 8OHH and 80J of IT Act, 1961. 7. CIT vs. Ajay Printers (1965) 58 ITR 811 (Guj) In this case the business of printing balance sheet P&L a/c, dividend warrants, share certificates, etc., required by companies is a business which consists wholly of "manufacture of goods" within the meaning of cl. (ii) of Expln. 2 to s. 23A of IT Act, 1922. 8. Kapri International (P) Ltd. vs. ITO (1984) 20 TTJ (Del) 220 : (1984) 9 ITD 820 (Del) In this case it was held that where a person manufactures goods, it is not always necessary that at every stage the labourers and workers should be in the factory and should be employed by the owner even though this is generally done. Manufacture of goods in modern times involves several steps, such steps themselves involving

expertise of different types which is not all available in the same factory. It is also not necessary that the proprietor of the business or a manufacturer should perform all the activities from the acceptance of the raw material to the disposal of the finished products himself. 9. CIT vs. Ion Exchange (I) Ltd. (1984) 147 ITR 3 (St) The Honble Supreme Court dismissed a special leave petition by the Department against the order of the Bombay High Court declining to call for a reference on the question whether the assessee, a manufacturer of water treatment plants and ion exchange resins was a manufacturer of Chemical machinery within the meaning of items 8A(9) of the First Schedule to the Industrial (Development and Regulation) Act, 1951. The learned counsel further invited our attention towards the commentary of learned author Sampath Iyengar, 9th Edn. p. 4089, with a view to convince us that it is not necessary for the industrial undertaking to carry out all the processes itself. (q) The learned counsel submitted that the most important and direct decision on this point, which is squarely and directly applicable to the facts of the present case is a recent decision rendered by the Tribunal, Ahmedabad Bench, in the case of Enviro Central Associates vs. Asstt. CIT ITA No. 1650/Ahd/90, dt. 28th June, 1994. A copy of the said decision was also supplied by the learned counsel for the assessee in the course of hearing on 8th May, 1996. The facts of the said decision are stated to be absolutely similar and identical with the facts of the present case. The Ahmedabad Bench of the Tribunal also took into consideration the judgment of Honble Supreme Court in the case of N. C. Budharaja (supra). After considering all the aspects and the aforesaid judgment of the Honble Supreme Court, the Tribunal came to the conclusion that keeping in view the nature of work carried on by the assessee-firm, the assessee is entitled to grant of deduction under s. 80-I. The order passed by the CIT under s. 263 was quashed. (r) The learned counsel thereafter submitted that though the principle of res judicata do not apply to income-tax proceedings but the rule of consistency should be followed. In this case the assessee was held to be entitled to grant of deduction under s. 80-I in asst. yrs. 1990-91 and 1991-92. The facts in the year under consideration are same and, therefore, following the rule of consistency the AO ought to have granted deduction to the appellant company under s. 80-I. He placed reliance on judgment of Honble Supreme Court in Radhasuami Satsang vs. CIT (1992) 193 ITR 321 (SC), Dy. CIT vs. New Commercial Mills (1994) 48 TTJ 662 (Ahd) and H. A. Shah vs. CIT (1956) 30 ITR 618 (Bom) to support the aforesaid contention. (s) The learned counsel submitted that assuming while denying that a part of the activity carried on by the assessee included civil construction work to a limited extent, it was held by the Kerala High Court in the case of CIT vs. Bhagiratha Engg. Ltd. (1992) 193 ITR 674 (Ker) that the assessee engaged in the production of reinforced concrete slabs and boulders of the various forms which were used for construction of tunnels, dam, etc., amounted to activity of manufacture or processing of various materials to be used in the construction activities. The assessee was held to be entitled to relief under s. 32A. He submitted that a review of the judgment of N. C. Budharaja (supra) was also sought before the Honble Supreme Court which was rejected by the Honble Supreme Court in the case of Builders Association of India vs. Union of

India & Ors. (1994) 209 ITR 877 (SC). However, in that judgment also it was clearly held that construction of dam, building bridge, road and the like do not amount to manufacture of a thing or article but there is no whisper in the said judgment to suggest that the same can be applied in a case where the assessee is manufacturing such a mega plant like the effluent water treatment plant. It nowhere suggests that the ratio of these two judgements of the Honble Supreme Court can be extended to a case where the assessee is engaged in the business of carrying out a turnkey project like the one carried out by the assessee in which he not only designed, manufactured, supplied and installed the aforesaid water treatment plant but also undertook to give the performance test for its successful running. (t) The learned counsel further invited our attention towards the judgment reported in CIT vs. D. K. Kondke (1991) 192 ITR 128 (Bom) wherein it was held that production of cinematographic films is a manufacturing activity. (u) The learned counsel thereafter invited our attention towards the judgment of Honble Supreme Court in the case of Bajaj Tempo Ltd. vs. CIT (1992) 196 ITR 188 (SC) in which it was held that a provision in a taxing statute granting incentive for promoting growth and development should be construed liberally. Since a provision for promoting economic growth has to be interpreted liberally, the restriction of it too has to be construed so as to advance the objective of the provision and not to frustrate it. (v) The learned counsel thus strongly urged that the assessee should be held to be eligible for grant of deduction under s. 80-I. 6. Shri B. K. Haldhar, the learned senior Departmental Representative with equal vehemence supported the orders of the Departmental authorities. He also made detailed arguments during the course of hearing which continued for three days. Thereafter he submitted a gist of the submissions made by him in writing vide written submissions dt. 16th May, 1996. He also placed heavy reliance on the elaborate reasons given in the assessment orders as well as in the order passed by the learned CIT(A). The gist of submissions made by him which were submitted later on in his writing are reproduced hereunder : (i) As per item No. 12 of Form 3CD the assessee-company is engaged in the business of construction of work (sic) treatment plants specifically to the customers requirement. The nature of material consumed and finished products are completely different and it is not possible to give quantitative details as major work is fabricated by contractor. The assessee has also filed copies of agreement with annexures claiming that such agreements are sample agreements. The assessee has also admitted that components of the plant are purchased by the assessee and they are not manufactured by the assessee-company. It is also seen that the assessee does not have any manufacturing facility. The assessee is neither registered with any authority as an industrial undertaking nor has it paid any excise duty during the relevant previous year. From the sales-tax order available in the assessees paper book in stay proceedings it is clear that assessee is paying sales-tax only on the components which are supplied to various contracting parties. In the above facts and circumstance this claim of the Department that assessee is not industrial undertaking and it is merely doing a work of trading on components and supplying of services for assembling the components to construct requisite plant, should be accepted. (ii) The plants which are constructed by the assessee

cannot be called an article or thing. It is aggregate of various articles or things. (iii) The plants which are constructed by the assessee are not capable of being manufactured or produced; it has to be constructed. In s. 80-I the word construction is absent. Thus, the scope of expression "manufacture or produce any article or thing" is narrower than the expression used in s. 32A, namely, "business of construction, manufacture or production of any article or thing". Thus, in view of the ratio laid down by the Honble Supreme Court in Budharajas case on s. 32A reported in (1993) 204 ITR 412 (SC) (supra), the assessee is not entitled to deduction under s. 80-I. (iv) There is a distinction between business undertaking and industrial undertaking. The assessee may qualify as a business undertaking but it is not industrial undertaking. Reliance is placed on the following case laws : (1) Kerala State Cashew Development Corpn. vs. CIT (1993) 205 ITR 19 (Ker); (2) CWT vs. Kishorilal Agrawal (1993) 203 ITR 975 (Pat); (3) Hind Nippon Rural Industries (P) Ltd. vs. CIT (1993) 201 ITR 581 (Ker); (4) Dy. CIT vs. India Cine Agencies (1995) 54 ITD 257 (Mad). (v) Without prejudice to the above submissions it is submitted that to qualify for deduction under s. 80-I an industrial undertaking should be wholly for manufacture and production of article or thing. For the above preposition support is derived from the following case law : (1) CIT vs. S. P. Jaiswal Estates (P) Ltd. (1992) 196 ITR 179 (Cal) (2) Grewal Hotels (P) Ltd. vs. Dy. CIT (1995) 54 ITD 32 (Chd). It is submitted that by no stretch of imagination the assessee can be construed as an undertaking entirely engaged for production and manufacture of an article or thing. (vi) For getting deduction under s. 80-I, onus is clearly on the assessee to show that all conditions mentioned in section are fulfillled. In assessees case this onus has not been discharged. Thus assessee is not entitled to deduction under s. 80-I. Reliance is placed on : (i) Minocha Bros. (P) Ltd. vs. CIT (1993) 204 ITR 628 (SC); (ii) Modern Const. Co. vs. ITO (1987) 28 TTJ (Del) (TM) 196 : (1987) 20 ITD 88 (Del) (TM). (vii) If assessees submission that it manufactures or produces article or things in the shape of various plant is accepted, then as per relevant ST Act and Excise Act the assessee would be liable to pay sales-tax and excise duty on the value of plant as a whole. The assessee has not paid any excise duty and it has paid sales-tax only on the components supplied. From the above it is clear that the assessee is not a manufacturer or producer of any article or thing. Reliance is placed on McDowell & Co. Ltd. vs. CTO (1985) 154 ITR 148 (SC). (viii) It has been submitted by the assessee that in the asst. yrs. 1990-91 and 1991-92, s. 80-I deduction was allowed by the Department and, therefore, same cannot be disallowed in the current year. It is admitted position that assessment for the asst. yrs. 1990-91 and 1991-92 have been reopened under s. 147. Thus, the matter is not settled and Department has rightly disallowed deduction in the current year. (ix) The assessee has claimed that the assessee itself is an industrial undertaking that the individual contracts carried on by it are not separate undertakings. This fact may kindly be kept in mind while deciding the issue. (x) It has been submitted by the assessee that income recognition is only a method of accounting and has nothing to do with the manufacture or production of plant. It is submitted that the charts filed with the various

agreements showing income under the various heads emanate from the terms of agreement and thus, income recognition is not a method of accounting but accrual of such income as per terms of contract. (xi) It has been submitted by the assessee that fabrication at site should not take away the benefit from the assessee. It is submitted that though site of production or manufacture is not very relevant, it has to be seen as to whether the fabrication was done by the assessee under its direct control and supervision or it was done by independent contractor. It is also to be seen as to whether assessee had a contract for supply of goods and services with the parties for whom plants were constructed or the plant as a whole was to be supplied by the assessee. (xii) It has been submitted by the assessee that assembling of plant would lead to manufacture where components are not manufactured by the assessee. Reliance has been placed on CWT vs. Gouri Shankar Bhar (1968) 68 ITR 345 (Cal); CIT vs. Penwalt India Ltd. (1992) 196 ITR 813 (Bom); CIT vs. U.P. State Agro Industrial Corpn. Ltd. (1991) 188 ITR 370 (All); Jackson Engrs. (P) Ltd. vs. ITO (1989) 31 ITD 79 (Del); ITO vs. Bandekar Engrs. (1940) 33 ITD 680 (Bom). It is submitted that the above case law are distinguishable as the issue as to whether construction of plant would amount to manufacture or production of article or thing has not been considered in the above cases with reference to the Honble Supreme Court decision in (1993) 204 ITR 412 (SC) (supra). It is also submitted that there are many more distinctive features between the facts in the above cases and facts obtained in the assessees case. That in the assessees case this will not amount to manufacture is supported by following judicial decisions : (i) Travancore Electro-Chemical (P) Industries Ltd. vs. CIT (1995) 214 ITR 195 (Ker); (ii) CWT vs. V. O. Ramalingam (1995) 216 ITR 566 (Mad). (xiii) The assessee has contended that it is doing industrial construction which is different from civil construction and, therefore, ratio of Budharajas case (supra) will not apply. It is submitted that assessee has highlighted decision of the Honble Supreme Court on s. 8OHH and nothing has been stated on the discussion made by the Honble Supreme Court on s. 32A. Reliance on following case law, namely, CIT vs. Pressure Piling Co. (P) Ltd. (1980) 126 ITR 333 (Bom), CIT vs. N. U. C. (P) Ltd. (1980) 126 ITR 377 (Bom), CIT vs. Minocha Bros. (P) Ltd. (1986) 160 ITR 134 (Del) are wholly misplaced. The Department places reliance on judgment of the Honble Supreme Court in (1993) 204 ITR 412 (SC) (supra) on the issue of s. 32A. (xiv) The assessee has also contended that all the process of manufacture need not be done by the assessee. Reliance has been placed on page 4089 Commentary of Sampath Iyengar and following case law : (1) CIT vs. Kiran Tobacco Products (P) Ltd. (1993) 201 ITR 56 (St); (2) CIT vs. Ajay Printers (supra); (3) Kapri International (P) Ltd. vs. ITO (supra); (4) CIT vs. Ion Exchange (I) Ltd. (supra); (5) Griffon Laboratories (P) Ltd. vs. CIT (1979) 119 ITR 145 (Cal); (6) Enviro Central Associates vs. Asstt. CIT (supra). It is pointed out that all the above cases are distinguishable on facts of that relevant legal issues and judicial decision were not brought out by the parties before the adjudicating authorities. With reference to the last cited case, it is pointed out that in para 7 of the order the Honble Tribunal has held that prima facie assessee is an industry. However, the facts as mentioned above from item Nos.

1 to 13 were not raised before the Honble Tribunal. It is also pointed out that in the cited case, the assessee was getting components manufactured under its direct supervision and even the work at site was either by the assessee or under its direct supervision. In the present case the components are purchased and most of the fabrication work has been done by the contractors. Thus, the above case laws is not applicable in the assessees case. That in such circumstances the assessee is not entitled to deduction under s. 80-I. Reliance is placed on the following case law : (1) Mahendra Kumar Agarwal vs. ITO (1986) 19 ITD 474 (Del); (2) R&P Exports vs. ITO (1993) 44 ITD 308 (Del); (3) Taylor Instruments Co. (I) Ltd. vs. CIT (1992) 198 ITR 1 (Del); (4) CWT vs. Smt. Asha Mittal (1994) 209 ITR 368 (Raj); (5) Travancore Electro Chemical Industries Ltd. vs. CIT (supra); (6) CWT vs. V. O. Ramalingam (supra). (xv) It has been submitted by the assessee that manufacture should be understood in its wider view. It is submitted that the issue has been dealt with by the Honble Supreme Court in great details in the following : (i) N. C. Budharajas case (supra). (ii) Builders Associations case (supra). It is submitted that meaning given by the Honble Supreme Court with reference to s. 32A is decisive in deciding the issue of deduction under s. 80-I. (xvi) It has been submitted by the assessee that per se all work contract will not be non-manufacture. It is submitted that it is not only manufacturing or production that is to be seen but manufacture and production of article or thing together with Sch. II is to be seen to decide as to whether assessee is entitled to benefit under s. 80-I. If component parts which could be truly said to be article or thing are produced by the assessee, the assessee would be entitled to s. 80-I with reference to income of undertaking which produces the same. In assessees case none of the component parts have been produced by the assessee. The assessee is not entitled to deduction under s. 80-I. (xvii) It has been argued by the counsel of the assessee that rule of consistency should be followed even though res judicata is not applicable in the present case. For the above proposition reliance has been placed on the following case law : (i) H. A. Shah & Co. vs. CIT (supra); (ii) Radhasuami Satsang vs. CIT (supra). It is humbly submitted that in the assessees case rule of consistency is inapplicable as earlier years cases have been reopened. Even otherwise that in such cases there is no estoppel on the AO has been held by the Supreme Court in the following : (1) CIT vs. British Paints Ltd. (1991) 188 ITR 44 (SC). (xviii) It has been further argued by the assessee that object of the provision should be achieved. Reliance has been placed on (1992) 196 ITR 188 (SC) (supra). It is humbly submitted that this issue is covered by (1993) 204 ITR 412 (supra), and (1991) 209 ITR 877 (SC) (supra). (xix) It has been further submitted by the assessee that circular of the Board is binding on AO. However, it is submitted that while judicial pronouncement is available the same gets precedence over circulars. Unless and until there is amendment in the Act, judicial pronouncement will be binding and not the circular. For this proposition reliance is placed on (1994) 209 ITR 877 (SC) (supra). (xx) The assessee has placed reliance on 16 SCT 364 (SC) wherein certain agreement was construed as sale of body and not as the contracts for works and labour. Thus, sales-tax was levied on the whole of price of the body. This case sup-

ports Departments viewpoint in so far as in the assessees case on the goods supplied sales-tax was charged and not on the whole price of the plant. (xxi) It is pointed out that assessee has failed to show that any of the component parts were manufactured by it, or got manufactured by it under its direct supervision and control. With reference to above issue, it is requested that following case law may also be considered : (i) Appeejay (P) Ltd. vs. CIT (1994) 206 ITR 367 (Cal); (ii) CIT vs. Madgul Udyog (1994) 208 ITR 541 (Cal); (iii) Fariyas Hotels (P) Ltd. vs. CIT (1995) 211 ITR 390 (Bom); (iv) CIT vs. Ravi Ratna Exporters (1995) 212 ITR 588 (Bom); (v) CIT vs. Sterling Foods (Goa) (1995) 213 ITR 851 (Bom); (vi) CIT vs. Khadars International Const. Ltd. (1995) 213 ITR 869 (Ker); (vii) R. M. Enterprises vs. ITO (1992) 43 TTJ (Bom) (SB) 165 : (1993) 199 ITR 40 (ITAT) (SB). 7. The learned counsel in the synopsis of submissions filed along with his letter dt. 20th May, 1996, has made various submissions to counter certain factual points made by the learned senior Departmental Representative during the course of hearing. Such gist of submissions submitted on behalf of the assessee in writing along with letter dt. 20th May, 1996, are reproduced hereunder : (a) Designing is only an integral part of the production/manufacture of an article/thing, in this case. (b) There is no warrant for saying that, ex hypothesis an engineering contract rules out production/manufacture of an article/thing. We have to look into the facts of the case and decide. (c) To say that an article/thing should be produced under the roof of a factory and sold across the counter is to be blind to the dynamics of present day industrial activity. (d) Assembling of mechanical devices/machinery parts into an integrated equipment is production/manufacture of an article/thing and that is what takes place during erection. (e) "Construction" : Though the word "construction" is used in conformity with commercial parlance, Form 3CD itself clearly states that there is manufacturing activity in that the final product is a distinct commercial product and distinct from the inputs. (f) A works contract does not rule out production/manufacture of an article/ thing. (g) Sec. 80-I applies to work contracts which involve production/manufacture of articles/things. (h) See. 80-I does not refer to construction because construction may by itself be production/manufacture. Construction may be a more apt word, commercially speaking, but must involve production/manufacture. Hence, s. 32A refers to construction. Budharajas is a civil construction case, pure, and simple. (i) Sec. 32A uses construction. Commercially construction may be more apt than manufacture or production and the terms must be read ejusdem generis. But s. 80-I does not use construction. Manufacture/production may be inherent in construction. In fact, the Supreme Court has observed that the meaning of the expression construction in the context of s. 32A is to be influenced from the following words production/manufacture and, therefore, all these words convey only one meaning, though use of the particular word would be more apt and appropriate in a given situation. (j) The learned Departmental Representative has cited CIT vs. S. P. Jaiswal Estates (P) Ltd. (supra) to say that the hotel is not engaged in manufacture or production of an article or thing for the purpose of granting investment allowance. Contrast this 78 ITR 277 (sic) East India Hotels Ltd. Extent of activity makes all the difference. The word manufacture

or produce is not defined in the Act. However, it has come up for notice in several High Court decisions and the Supreme Court in the case of Union of India vs. Delhi Cloth & General Mills Co. Ltd. AIR 1963 SC 791 held as under : "... The word manufacture used ... generally understood to mean as bringing into existence a new substance and does not mean merely to produce some change in a substance however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent edition of Words and Phrases, Vol. 20, from an American Judgment. The passage reads thus : Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use." This statement has become locus classicus. (k) The Supreme Court in the case of Patnaik & Co. vs. State of Orissa XVI STC 364 held that contract for the construction of bus bodies on chassis supplied by the State of Orissa as a whole was contract for sale of goods and, therefore, the appellant were liable to sales-tax on the amounts received from the State of Orissa for the construction of bus bodies. Copies of the aforesaid decision were separately supplied at the time of hearing. In this decision particular note is taken by the Supreme Court, when it approved of the decision of the Allahabad High Court in the case of Haji Abdul Majid. Observations on page 379 are as follows : "In CST vs. Haji Abdul Majid, the Allahabad High Court arrived at the conclusion that in the circumstances of the case, the transaction was a contract for the sale of bus bodies and not a contract for work and labour. Desai, C.J. rightly pointed out at page 443 that"since it makes no difference whether an article is a readymade article is prepared according to the customers specifications, it should also make no difference whether the assessee prepares it separately from the thing and then fixes it on it or does the preparation and the fixation simultaneously in one operation." (1) So also is the decision of the Bombay High Court in the case of CIT vs. Jayanand Khira & Co. (P) Ltd. (1987) 170 ITR 31 (Bom). (m) Ahmedabad Bench of the Tribunal in the case of Enviro Central Associates, Surat (ITA No. 1650/Ahd/1990, dt. 28th August, 1994), after taking into account Budharajas case (supra) held that deduction under s. 8OHH/80J of (sic) ... was engaged in the business of manufacturing water/air pollution control plant at the site of customer (copy of the said decision was separately made available at the time of hearing). Only decision on the point after Supreme Courts decision in the case of Budharaja. (n) The Bombay High Court in the case of CIT vs. Tata Locomotive & Engg. Co. Ltd. (1968) 68 ITR 325 (Bom) held that the work of the assessee by assembling automobiles from parts imported in a knocked down condition would give rise to an article, which is totally different from the parts and would amount to manufacture within the meaning of s. 15C of the IT Act, 1922 (corresponding to s. 80J of the IT Act, 1961). (o) The Allahabad High Court in the case of CIT vs. U.P. State Agro Industrial Corpn. (supra) has held that the activity of the assessee of assembly of component parts of a tractor to form a tractor amounted to manufacture and production of an ... ss. 80-I and 80J of the Act. SLP against the said decision has been dismissed

by the Supreme Court [(203) ITR (St) 3]. (p) The Supreme Court dismissed the SLP by the Department against the decision of the Bombay High Court declining to call for a reference on the question whether the assessee, a manufacturer of water treatment plant and ion exchange resin was a manufacturer of Chemical machinery entitling the, assessee to concession under s. 80-I of the Act [CIT vs. Ion Exchange (I) Ltd. : SLP Civil No. 8034 - (1984) 147 ITR (St) 31. (q) Tribunal Delhi Bench, in the case of Jackson Engg. (supra) which assembled diesel engines after purchasing different parts from different parties at the situation of the customers was an industrial undertaking entitling to the relief under s. 80-I of the Act so also the decision of the Bombay Bench of the Tribunal in the case of ITO vs. Bandekar Engg. (supra) and Special Bench Tribunal decision in Kapri International (supra). (r) In the case of CIT vs. Penwalt India Ltd. (supra) before the Bombay High Court, following para on page 817 is very instructive : "Coming to the facts of the instant case, we find from the facts found by the Tribunal that the assessees manufacturing activity consisted of (i) canvassing of orders, (ii) preparing of designs and drawings on the basis of orders, (iii) placing orders for manufacture of machinery with Turner Hoare, (iv) to see that the manufacturing process is carried on by Turner Hoare under the direct supervision of the assessee-company, (v) to have a check on the quality control and last but not the least, to be responsible for the proper functioning of the machinery and guarantee after sale service for a stipulated period. Out of so many activities except for one activity, namely, getting the machinery manufactured through Turner Hoare, all other activities are, admittedly, undertaken by the assessee-company. In the circumstances we find no difficulty in agreeing with the Tribunal that the assessee is engaged in the business of manufacture of sugar and tea machinery and is, accordingly, qualified for relief under s. 80-I. In the above view of the matter, we answer the third and fourth question also in the affirmative and in favour of the assessee." (s) Another decision to be noticed is the Supreme Court decision reported in 168 ITR 744 (supra) where supplying cool and filtered air through air-conditioning apparatus has been held to be manufactured. There are numerous examples of manufacture, namely, converting boulders into chips of stone, printing of P&L a/c, dividend warrant pamphlets as consisting wholly of manufacturing of goods [See Ajay Printary (supra)] production of cinematographic film [192 ITR 128, 131 (supra)]. Attention is also invited to numerous cases mentioned on page 4089 (by way of footnote) in the 9th Edn., Vol. 3 of the well known work of Sampath Iyengars, particularly Orient Longman Ltd. vs. CIT (1981) 130 ITR 477 (Del) and Addl. CIT vs. A Mukherjee & Co. (1978) 113 ITR 718 (Cal) explaining the various aspect of manufacture. (t) Now let us examine the decision of the Supreme Court in Budharajas as to whether it has given some different message. Dictionary meaning of the word "article", though s. 8OHH mentions articles, is referred to by the Supreme Court in the case of Budharaja & Co. (vide para B at page 425 of ITR). It is noteworthy that s. 8OHH uses the expression "articles". One cannot say that the word "articles" is simply a plural of the word article in the context of the provisions of s. 8OHH. Similarly, the Supreme Court noticed the dictionary meaning of the word thing (in the con-

text of s. 32A, not only mentions article) (note it is singular) but also mentions thing (again singular) (see page 431 paras D, F, G and H, as also reference is invited to page 432 - paras A, B and C). (u) Throughout the judgment the whole emphasis is that expressions manufacture and produce are normally associated with movable articles and goods, big and small, but they are never employed to denote construction activity of the industry involved in construction of a dam or building (see page 424 : Paragraphs E and F where reference is made to the cases of CIT vs. NUC (P) Ltd. (1980) 126 ITR 377 (Bom) and CIT vs. Shah Construction Co. (1983) 142 ITR 696 (Bom) relating to pure civil construction only). (v) It is also interesting to note the following observations of the Supreme Court at page 434 of ITR para 3 in the context of s. 32A : "We are, therefore, of the opinion, that sub-cl. (iii) of cl. (b) of sub-s. (2) of s. 32A does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions." (w) Similar observation was made by the Supreme Court in the subject decisions while upstaging the decision of the Bombay High Court in the case of CIT vs. Pressure Piling Co. (P) Ltd. (supra). Attention is invited to page 428 of ITR para E, F, G and H and page 429, paras A, B and C. It is significant to note that only here the Supreme Court has used the expression "work contract" and that too in the context of civil construction work proper. In fact, the whole refrain of the Supreme Court decision is civil construction of the nature involved in construction of a dam/bridge/road or a building. (x) In the case of Builders Association of India (supra), the Supreme Court, again, reiterated that sub-cl. (iii) of cl. (b) of sub-s. (2) of s. 32A did not comprehend within its ambit the construction of a dam, bridge, road, canal and other similar construction. It is, therefore, submitted with great deference that it cannot be gainsaid that the appellant-company is engaged in the manufacture or production of the effluent treatment plants. In Budharaja and other allied cases the Supreme Court was concerned only with the cases of predominantly civil work such as dams, roads, buildings, etc., and it is in this context the Supreme Courts observation is to be understood. (y) Without prejudice to the basis stand that there is a finding of fact that the appellant has established an industrial undertaking, the following submissions, in brief, are made on the point : - industrial undertaking is not defined under the IT Act, for the purpose of s. 80-I or otherwise, except as defined in s. 33B for specific purpose. - Cases have come up for decision bearing on definition of an industrial company as given in various Finance Acts and otherwise for specific purposes. However, the industrial undertaking and industrial company are two different concepts. See the following illustrative decisions : NUC (supra) Shah Construction (supra); Minocha Bros. (supra). In Kiran Tobacco (1993) 201 ITR 56 (St) : the SLP was dismissed by the Supreme Court on the question whether manufacture of Jarda from tobacco involved any manufacturing activity and, therefore, the assessee was an industrial company entitling it to lesser rate of tax and investment allowance and benefit under ss. 8OHH and 80J. This will put end to the controversy and doubting Thomasses. A clincher from the apex Court on every issue involved. (z) The Tribunal, Ahmedabad Bench, in the case of Enviro Central Associates (copy of order already furnished) has referred to the Supreme Court

decision as to what constitutes an industrial undertaking. Please refer to para 7 page 5 of the said order. (aa) In fact, the Supreme Courts decision in the case of Budharaja (supra) has not disturbed the conclusion reached by the various High Courts about the existence of an industrial undertaking in the various cases that came up for consideration of the Supreme Court along with the case of Budharaja. (bb) Any undertaking which satisfied the provisions of s. 80-I(2) is, in fact, an industrial undertaking. The registration of industrial undertaking under the Industrial Development and Regulation Act or any other enactment is not germane to the issue. (cc) One should not think that there is any mystique about the expression industrial undertaking. (dd) Last but not the least, it is common ground between the appellant and the Department that the appellant set up the industrial undertaking for the manufacture of effluent treatment plant (notwithstanding the eloquence of Departmental Representative on the issue) as is vouchsafed in the Memorandum of Association and Objects Clause of Memorandum of Association, Government approval to the technical and financial collaboration as per their letters (at pages 30 and 31 of the paper book). The collaboration agreements in question also talk ubiquitously about manufacture of plants. The only issue sought to be examined by the Department bears upon as to whether the appellants industrial undertaking could be said to have engaged in the business of manufacture/production of an article or a thing not mentioned in Sch. XI. (ee) The activities the appellant is engaged in will answer the distinction of manufacture or production of an article or thing not mentioned in s. 80-I. (ff) Voluminous information will be found in the paper book as also a write up is furnished in the course of the hearing. (gg) The observation of the apex Court in the case of Budharaja (supra) was with reference to construction of civil work in the nature of dam, road and the like and in that context alone it observed that the expression manufacture or produce are normally associated with the movables - articles and goods, big and small; they are never employed to denote an activity of the nature involved in construction of a dam or a building, etc. This exclusive ubiquitous dictum of the apex Court can never be elongated to include supply of effluent treatment plant, which has its own identity and functions, unlike dam, building, roads, civil work per se more often than not has no active role to play. It is sterile and only provides a setting from which business and manufacturing operations, etc., could be carried on; not taking any active part in the production or manufacture. Here, all the mechanical devices, equipment and parts of the effluent treatment plant are activities inexorably, for 24 hours, engaged in the processes for achieving the purpose, namely, sanitishing the polluted atmosphere, injurious to human health, more importantly in the case of hapless workers, who are working in the polluting industry at the risk of their lives, besides creation of wealth from the dangerous waste, like methane gas, which provides fuel to steam generating boilers - a single contribution in the days of energy starved society; not to speak of other products like fertilisers, etc. Add value by disarming poisonous effluent and release from this waste hidden wealth like bio-gas, bio-manure, etc. Does not the lovely flower lotus emerge from the filth and dirt. Here, of course, question is the production of effluent treatment plants and not its functions. (hh)

No decision of any Court, including that of the highest Court, is an authority, except on the facts of a given case. In this case more so as Budharaja (supra) decision has focussed sharply on exclusive civil construction. It is true that the judgment of the Supreme Court is binding on all High Courts and Tribunals; it is only the principle laid down in the judgment and not every word appearing therein that becomes the law of the land [CIT vs. Smt. Minal Ramesh Chandra (1987) 167 ITR 507 (Guj)]. (ii) Interpretation must keep pace with changing concepts and values and should undergo adjustment to meet the requirement of the developing economy and the fast changing social conditions. (jj) Provisions for deduction/exemption or relief should be construed liberally and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. It is a well settled legal proposition, which is recently revitalized by the Supreme Court decision in the case of Bajaj Tempo (supra). In this case, the Supreme Court was interpreting the provisions of s. 15C of 1922 Act, which has found a new Avtar in s. 80-I. In Budharajas case (supra), the Supreme Court has not taken an exception to this wholesome principle except pointing out that while interpreting exemption provisions liberally one should not do so as to cause violence to the language of the statute; this observation was in the context of a dam being considered as an article in the context of s. 8OHH. (kk) Again, the principle of justice is that the Department should not depart from the earlier decision where such departure would result in injustice to the assessee [Shahs case (supra)], Thus, the Department is bound to treat the accounts of a continuous business in a consistent manner. In this case, no material facts have appeared on the horizon to justify departure on the spacious plea that Budharaja has altered the basic fundamentals. The words like prism do not automatically reflect their meaning, represent language of the dynamic and ever changing society, they are the skin of the time. (ll) The appellant is undoubtedly engaged in the business of manufacture and production of article or thing in the form of effluent treatment plant, which adds value by sanitishing the polluted atmosphere, which threatens the ozone layers - so necessary for human life, not to speak of giving rise to wealth in the form of bio-gas and bio-manure, etc., thanks to the modern technology born out of R&D and accumulated knowledge kindly made available by Degroment France. The company is certainly engaged in the construction/manufacture or production of article or thing, namely, effluent treatment plant. Here the case is not of a user of effluent treatment plant, but that of a manufacturer of such plant. If this is not manufacture of an article or thing, then, what it is ? Answer is contained in the question. Excise duty (mm) The learned Departmental Representative sought to disqualify the industrial undertaking for the purpose of s. 80-I on the plea that no excise duty is paid on the article and plants manufactured/produced by the appellant. This contention is totally irrelevant. Sec. 3 of Central Excise and Salt Act, 1944, is a charging section which levies duties of excise on all excisable goods which are produced or manufactured in India. There is no definition of goods, but there is a definition of excisable goods in s. 2(a) of the aforesaid Act. The expression sale and purchase is also defined in s. 2(b). A notice has already been taken of Entry 84 in Sch. VII - List 1 to the Constitution of

India (duty of excise on tobacco and other goods manufactured or produced in India). The term goods is also defined in cl. 12 of Art. 366 of the Constitution as noticed earlier. It is well settled that the definition of goods in the Sale of Goods Act is applicable while interpreting the expression goods in the context of Excise law. The definition of goods is contained in cl. 7 of s. 2 of the Sale of Goods Act. Goods mean every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and thing attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. (nn) Evolution of effluent treatment plant on site does not answer the above description of goods. Excise duty is not leviable on design, engineering, supply, fabrication, assembly, erection and start up the plant coming on the site. This is well settled position in law; in no way it militates against appellants undertaking being said to be engaged in the business of manufacture or production of article or a thing on the facts and in the circumstances of the case. At worst, the excise law is fractured by the appellant, a circumstance wholly neutral to the issue on hand. Plant (oo) The learned Departmental Representative also pointed out that the dam was a plant and, therefore, industrial undertaking is unqualified under s. 80-I on the touchstone of Budharaja decision (supra). With respect, the question is not as to whether dam is a plant, here the real question is whether the plant supplied by the appellant, on the facts and in the circumstances of the case, could be equated with the civil construction simpliciter like dams, buildings, roads and the like. Civil construction here has a very minor role to play and that too for founding and the setting up of an installation of plant for which foundation is provided. Moreover, in the instant case, there are many examples where the appellant company was not called upon to execute any civil work. [See page 273 of the paper book]. The dominant activity is to supply the effluent treatment plant. Again, definition of plant as given in s. 43(3) is only for the limited purpose of ss. 28 and 41 and can take in dam but will have no influence for the purpose of interpreting the provisions of s. 80-I. In a broad sense even the land is plant. (pp) As per page 273 of the paper book out of the total receipts of about Rs. 13,95,00,000 the supply of equipment and fabrication involved is of the order of Rs. 11,28,00,000, design engineering Rs. 1,22,56,000 and the civil work of Rs. 1,32,00,000 (less than 10 per cent). Civil work which is only incidental is contracted outright and one will not find any account of civil work in the companys book. In other words, design, engineering, construction, supply and fabrication, etc., constitute a dominant activity in the total transaction. (qq) It is interesting to note that the decision of the Kerala High Court in the case of CIT vs. Bhageeratha Engg. Ltd. granting investment allowance under s. 32A in respect of plant and machinery used for construction was confirmed in Builders Association (supra) on the ground that finding of fact arrived by the Tribunal was that the assessee was engaged in the business of manufacture and production of articles/things though utilised in the construction of civil work. To the same effect the note was drawn by Justice Sujata Manohar in the decision of Shah Construction (supra). (rr) The pith and substance of the matter is what is constructed, manufactured or produced over here amounts to

a civil work of the nature of dams, buildings, roads and the likes. Answer is emphatic - no. Reference is again invited to the write up dt. 8th May, furnished in the course of hearing detailing what involves in supply and setting up of tailor made effluent treatment plant, could it ever be compared to a civil work in the nature of dam, building, road, etc. Plants always maintain their identity without irretrievably submerging their identity in the civil work which is in the nature of foundation on which emerges effluent/treatment plant which could be dismantled, shifted and re-erected anywhere also unlike the dams, roads etc. The learned counsel thus strongly urged that the assessees contention deserves total acceptance. 8. We have carefully considered the submissions made by the learned representatives of the parties and have also gone through the written submissions submitted by both of them, we have also gone through the orders of the Departmental authorities and several documents submitted in the compilation to which our attention was drawn during the course of hearing. We have also carefully gone through all the judgments which were cited by the learned representatives of the parties. 9. The sole ground on which the AO refused to grant deduction under s. 80-I to the assessee is that the assessee-company is engaged in the contract work and, therefore, it is not entitled to deduction under s. 80-I as held by the Honble Supreme Court in the case of N. C. Budharaja (supra). The execution of the turnkey project of supplying the effluent water treatment plant by the assessee to its customers cannot be treated as an activity of manufacturing or producing an article or thing which is a condition precedent for grant of deduction under s. 80-I. The AO has not disputed the eligibility of the assessee-company for grant of deduction under s. 80-I on any other ground and it has not been alleged in the assessment order that the various other conditions required to be fulfillled for grant of deduction under s. 80-I have not been satisfied in the case of the assessee. The CIT(A) has confirmed the order of the AO by holding that the assessee is not entitled to deduction under s. 80-I as it is not an industrial undertaking engaged in production or manufacture of an article or thing. It is a specific condition for availing of the benefit of s. 80-I of the IT Act, 1961. He has further observed that the ratio of the judgment of Honble Supreme Court in the case of N. C. Budharaja (supra) is squarely applicable to the facts of the assessees case. The activity of supply of plant cannot be treated as an industrial activity of manufacture or production of any article or thing. The expression manufacture and produce are normally associated with movable articles and goods. Since the assembly or installation can only be at site, the expression manufacture and produce cannot be associated with such activities carried on by the assessee. 10. We will, therefore, have to decide the point in issue on the basis of the aforesaid grounds mentioned in the assessment orders as well as in the order of the CIT(A). The various other arguments advanced by the learned senior Departmental Representative on the basis of entirely new facts such as that the assessee has not discharged the onus of proving that it employs more than the specified number of workers, etc., cannot be considered at this stage, as the fulfillment of other conditions for grant of deduction under s. 80-I was never doubted or disputed by the learned Departmental authorities in their respective orders. It is well settled law that

when a statutory authority makes any order passed on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh facts or reasons which would require de novo investigations of the facts and which were not at all disputed or doubted by the authority, who passed the impugned orders in question. Such a view is clearly fortified by the judgment of Honble Supreme Court in the case of Shri Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner AIR 1978 SC 851. Furthermore, in the present case, the assessee-company was held to be entitled to grant of deduction under s. 80-I in asst. yrs. 1990-91 and 1991-92 after total satisfaction as to the assessees eligibility for grant of such deduction. The assessments for asst. yrs. 1990-91 and 1991-92 have been reopened in view of the subsequent judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra). Neither the Departmental authorities nor the learned senior Departmental Representative has brought to our notice any other material to show that the cases were reopened for the earlier two years because of non-fulfilment of any other condition prescribed in s. 80-I. We will, therefore, restrict and confine our discussions to the only real question arising in the said appeal as to whether the appellant manufactures or produces any article or thing as required under s. 80-I(2) and as to whether the judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra) is applicable on the facts and circumstances of the present case. 11. The deduction under s. 80-I is available to assessee whose gross total income includes any profits and gains derived from an industrial undertaking, which fulfills all the conditions laid down in that behalf in s. 80-I(2). Sec. 80-I(2), inter alia, requires that such an industrial undertaking should manufacture or produce any article or thing, not being any article or thing specified in the list in the Eleventh Schedule to the IT Act, 1961. We will, therefore, examine as to whether the activities carried on by the assessee comes within the ambit of expression manufactures or produce any article or thing. It is not the case of the Department that the assessee is engaged in the activity of manufacture or production of any article or thing specified in the list in the Eleventh Schedule to the IT Act, 1961. We will, therefore, like to examine the nature of activities carried on by the assessee with reference to the entire material brought to our notice by the learned representatives of the parties during the course of hearing. 12. The appellant company was incorporated under the provisions of Companies Act, 1956, on 14th August, 1956, vide Certificate of Incorporation No. 25120 of 1986-87 issued by the Registrar of Companies, Delhi and Haryana. The certificate for commencement of business was granted on 14th October, 1986, by the Registrar of Companies. 13. The main objects as contained in the memorandum of association of the appellant company are as under : “Main objects to be pursued by the company on its incorporation are : 1. To carry on the business of designers, manufacture installers, maintainers and operators of all apparatus, machinery, instruments, devices, fittings, connections and things whatsoever required for or capable of being used in connections with or ancillary to the cleaning and treatment in any manner of water and liquid waste. 2. To carry on any business relating to the design, development, production, manufacture and preparation of and research for the purposes of any forms of such appara-

tus, machinery, instruments, devices, fittings, connections and of any things and materials whatsoever which may be usefully or conveniently combined with the manufacturing operation, maintenance or dealing with the business of cleaning and treatment in any manner of water and liquid waste. 3. To carry on the business of design, manufacture, engineering, construction, supply and erection, of installations and the commissioning, operation and maintenance and after-sales services for potable water, industrial and domestic waste water, process water, desalination and all other allied special application. 4. To carry on the business of development and establishment of suitable manufacturing facilities for the manufacture of specialised equipment, apparatus, machinery, instruments, devices, fittings, connections and of any things and materials capable of being used for the purpose of the abovementioned business. 5. To carry on the business of manufacture and/or marketing of water conditioning Chemicals. 6. To carry on the business of designing and building of systems for dealing with water and waste treatment in all their aspects and undertake contracts for the same either alone or jointly with collaborators or to act as consulting engineers or technical and management experts. 7. To arrange for training of staff in the matters and for the purposes of the above mentioned business through training courses held in India or abroad." 14. The company entered into a technical collaboration agreement with M/s. Degremont, a French company (hereinafter referred to as DF) for acquiring technical know-how in connection with the engineering, design, construction, erection, operation and maintenance of waste water systems in India. This agreement was subject to obtaining of the final consent and approval by the relevant Indian Government authorities. The said agreement contains various clauses relating to the following aspects : Pages of the paper book 1. Scope of the transfer of know-how 2. Supply of documentation 3. Training technical assistance 4. Supply of capital goods 5. Modification and quality requirements 6. Financial agreement 7. Duration of the agreement-termination 8. Financial collaboration agreement 9. Miscellaneous clauses Exhibits Exhibit A - Description of applications of the know-how Exhibit B - Details of equipment to be supplied by DF Exhibit C - Licence agreement 15. Exhibit A of the said technical collaboration agreement gives the description of application of the know-how relating to the following activities : - Municipal drinking water plants - Industrial process water plants - Industrial waste and effluent treatment plants - Municipal waste and sewage treatment plants -Desalination - Chemical conditioning Exhibit B of the said agreement gives the details of equipments to be supplied by DF to the appellant company (for short DI) : - Fouling index meter - Sludge cohesion measuring device -Field analysis sets - Spectrophotometer - Turnidity meter -Conductivity meter - Ph meter 16. The licence agreement was also executed between DI and DF in the year 1986 which is marked as Exhibit C of the technical collaboration agreement. The Contents of the licence agreement are as under : Licence agreements are as under : Page of the paper book 1. Definitions 2. Grant of licence 3. Registration of industrial property right and ownership 4. Infringements 5. Sub-licensing and sub-contracting 6. Ongoing contracts 7. Term and termination 8. Miscellaneous Annexure I-List of Patents Annexure II-List of Designs Annexure III-List of Trademarks Clause

6 of the technical collaboration agreement which gives the details of financial agreement is reproduced hereunder : “Original technical data payment 6.1.1 In consideration of the know-how the following lump sum subject to deduction of taxes if any will be paid by DI to DF; F.F. two million (2,000,000)(covering general information without specification). 6.1.2 Terms and conditions of payment 6.1.2.1 The lump sum will be paid of DF according to the following terms : (a) 1/5 payment on the date when (i) the agreement has come in force and (ii) the agreement has been filed with the Reserve Bank of India and (iii) technical documentation has been received by DI; (b) 1/5 payment one year from the date of payment of the first instalment. (c) 1/5 payment two year from the date of payment of the first instalment. (d) 1/5 payment three year from the date of payment of the first instalment. (e) 1/5 payment four year from the date of payment of the first instalment. The duration of the said agreement was a period of 8 years as from the date of payment of the first instalment. One Shri Mohan Gupta originally submitted an application for technical collaboration with DF for the manufacture of water and waste treatment plant of advanced technology for industrial and municipal application. The Department of Industrial Development, Ministry of Industry, Government of India vide letter dt. 9th January, 1986, accorded approval to the terms of collaboration subject to various conditions specified in that letter. The same Department vide a subsequent letter dt 25th February, 1987, took notice of the fact that a new company M/s. Degremont India Ltd. (the appellant) has been formed to implement the said project. The Department of Industrial Development, terefore, accorded their consent and approval in favour of the appellant company vide their letter dt. 25th February, 1987. It is noteworthy that the subject mentioned in the a for said letter issued by the Ministry of Industry reads as under :”Application for foreign collaborating with M/s. Degramont SA, France for the manufacture of water and waste treatment plant of advanced technology for industrial and municipal application." 17. The appellant company thereafter entered into agreement with various industries for designing, procuring, supplying, erecting and commissioning the plant of the pre-determined capacity at their respective industries for the purposes of ensuring environment protection, pollution control and/or to recover usable products like methane gas, fertilisers, etc. from the hazardous effluent discharged by those industies. The learned representatives of both the parties had submitted that an agreement dt. 14th January, 1991, executed by the appellant company with Dyaneshwar may be taken as an illustrative agreement executed by the assessee with its various customers as almost all the agreements in subsequentance are similar. We would, therefore, like to examine the relevant clauses of the agreement executed by the assessee-company with Dyaneswar in order to understand the true nature of activities carried on by the assessee. In the said agreement Dyaneswar has been referred to as purchaser and the appellant has been referred to as the seller. The preamble of the said agreement, inter alia, indicates the requirement of the purchaser : “Whereas the purchasers decided to install a Plant for the recovery of methane gas from out of the effluent emanating from the distillery already established by the purchasers at Dhyaneshwarnager, Post Bhede Sakhar Karkhana, Taluka Newasa, District

Ahmednagar." Clauses (a) and (b) of the said agreement is as under : "In consideration of an amount of Rs. 1,85,00,000 (Rupees one crore and eighty five lacs only) agreed to be paid by the purchasers to the sellers in the manner set out in cl. C hereunder, the sellers agree to design, manufacture, procure, supply, erect and commission a plant for recovery of methane gas in vol. 22000 m2 day (cubic meters) calorific value of 5500 K. Cal/kg after treating 720 m3 effluents per day effluents of composition as per Annexure I attached herewith emanating from the distillery of the purchasers reducing 90 per cent biological oxygen demand (BOD) and reducing 65 percent Chemical oxygen demand (COD) and to erect and commission the said plant within a period of twelve months computed from the date of the execution hereof, i.e., contract signature or release of advance whichever is later but difference should not be more than 15 days. (B) Out of the agreed total price of Rs. 1,85,00,000, Rs. 1,50,00,000 (Rupees One crore and fifty lacs only) represents the price of plant and machinery as per Annexure 2 designing of engineering drawings and it includes excise duty and sales-tax as prevailing on date of purchase committee meeting. Necessary concessional sales-tax declaration forms will have to be supplied by the purchaser. This price is exclusive of works contract tax as applicable. This price hereinafter referred to as Part I, and Rs. 35,00,000 (Rupees Thirty five lacs only) represents the price of designing and engineering for providing civil facilities, carrying out civil work, site fabrication, painting, installing and laying required electrical installation, packaging, forwarding, loading and unloading, transportation, storage at site, erection, supervision, insurance charges, etc., now hereinafter referred as Part II. However, works contract tax will be paid by the purchaser as applicable." Clause 5 reads as under : "The remaining balance of 10 per cent is to be retained by the purchaser shall be released upon which satisfactory performance set out in cl. 3K after continuous period of 15 days and after submitting equivalent bank guarantee valid for a period to cover one crushing season thereafter. In the event of new crushing season the bank guarantee will be suitably extended to cover one additional crushing season thereafter." Clause 3A reads as under : "The overall obligations undertaken by the sellers is to design, procure, supply, erect commission and to ensure guaranteed performance for a period of continuous 15 days and next full crushing season. In the evident the plant is not re-established within six weeks of the starting of new crushing season the performance should be obtained in additional crushing season with performance parameters as set out in cl. 3K hereinafter." Clause 3K reads as under : "The plant erected by the sellers will have the capacity to produce minimum 0.5 M3 methane gas per kg. of COD destroyed with 65 per cent methane content having calorific value of 5500K Cal/kg. with guaranteed removal of 90 per cent BOD cube and 65 per cent. COD with PH of treated effluent guaranteed at minimum 7-7-2 Ph. The sellers agree that the said plant shall be deemed to be ready for commissioning on a turnkey basis after the requisite civil work shall have been carried out till its finishing stage, fabrication and supply of the required equipment shall have been completed and duly installed at the site after all steel parts shall have been given three coats of red oxide paint and after the required epoxy lining shall have been coated with adequate thickness to all parts

exposed or likely to be exposed to corrosion. The sellers agree that the giving of performance trial within the period stipulated above is one of the essential conditions of this contract and the sellers agree that in the event of the sellers committing delay in completing the erection plant and giving performance trial beyond the said stipulated date, the sellers shall render himself liable for 0.5 per cent of the contract price per week of delay but subject to the provision that the reduction in the contract price in this manner shall not extend to more than 10 per cent of the contract price. The plant shall be deemed to have been ready for commissioning when the sellers undertake to commence operation of the plant for the purpose of giving satisfactory performance tests and the satisfactory performance shall be deemed to have been established by the sellers, if, within 3 months of the commencement of operation the sellers shall have attained the contracted parameters of performance as set out hereinabove and continue to attain the same for a continuous period of 15 complete days of 25 hours each." The extracts from cl. 4 giving details about the commissioning of the plant, inter alia, contains clause relating to avoiding of any sub-contract for any work to other parties. The said extracts as appearing at page 19 of the agreement are reproduced hereunder : "The sellers agree that the sellers shall not be entitled to assign the benefit of this contract to any third party. However, nothing herein contained, shall prevent the sellers from awarding any sub-contract for any work to any party of the choice of the sellers subject to the reservation that giving such sub-contract shall not absolve the sellers of the various obligation undertaken by the sellers by these presents and further subject to the reservation that the sub-contractor engaged, if any, by the sellers shall be subject to disciplinary jurisdiction of the purchasers, while such sub-contractors on their employees either work or stay in the premises of the purchasers." 18. It will also be pertinent to reproduce the functional objectives and methodology adopted by the appellant company as submitted by the assessee during the course of hearing on 8th May, 1996 : Degremonts functional objectives : - To design, supply and install effluent treatment plant which shall treat the effluent to meet the discharge standards of Central/State Pollution Control Boards. - To achieve the quality of the treated effluent acceptable for reuse/recycle in the process thereby reducing the requirement of fresh water. - Wherever possible, produce the use-full by products from the effluent. Methodology - Collection of the effluent samples and lab-scale or pilot plant studies. - Collection of information regarding the local climatic conditions like temperature variations, rainfall, etc. - Compilation of the information/data and application of Degremonts resource of know-how and experience to evolve the optimum treatment process for achieving the desired goal, i.e., discharge standards/recycle/etc. - Design and engineering of the treatment plant. - Identification of Degremonts proprietary equipment required in the plant - - Finalisation of the specifications of other equipment, to be fabricated as per Degremonts design or to be brought from the standard manufacturer. - Procure and supply the equipment at site. - Assemble, fabricate, erect and install the equipment at site, complete with interconnecting pipelines and electricals. - Provide the automation, i.e., programmable logical controller (PLC), etc. - Test run the complete assem-

bled plant and rectify the shortcomings. - Charge the plant with raw effluent, seed sludge for commissioning. - Meet the performance guarantee for which the plant is designed. Typically, the performance guarantees can be a combination of the following : - By product production (i.e., bio-gas - a source of energy, biomanure, etc.). - Discharge Norms of Central/State Pollution Control Boards/MINAS. - Quality of the effluent to meet the requirement of the process where it is to be recycled. 19. The learned senior Departmental Representative argued that the assessee-company does not own any factory premises or manufacturing facility. They are not registered with any authority as an industrial undertaking. The company is not paying any excise duty. It has paid sales-tax only on the value of components which are supplied to various contracting parties. The assessee is, therefore, engaged only in the work of trading/sale of components and supply of services for assembling the components to construct the requisite plant. They are not engaged in the activity of manufacturing or producing of any article or thing. The assessee is carrying out a works contract. The construction of such a plant at the site of the customer cannot be regarded as manufacture or production of an article or thing in view of the findings given by the Honble Supreme Court in the case of N. C. Budharaja (supra) in relation of interpretation of s. 32A which has a wider scope than the expression used in s. 80-I. 20. It will, therefore, be necessary for us to first carefully understand the ratio of the judgment of Honble Supreme Court in the case of N. C. Budharaja (supra). The Honble Supreme Court considered the provisions of ss. 80HH, 84 and 32A. The Honble Court also examined the meaning of the expressions such as manufacture, production, produce or article, etc. used in ss. 80HH and 84 of the Act. The Honble Court also examined the meaning and scope of the words construction, thing or things for the purposes of interpretation of s. 32A. All the cases which were considered by the Honble Supreme Court related to the assessees who were engaged in the business of constructing dam or other civil construction work. 21. At page 423 of 204 ITR the Honble Supreme Court briefly stated the question considered by their Lordships with regard to interpretation of s. 80HH : "In short, the limited question is whether the construction of a dam to store water (reservoir) can be characterised as amounting to manufacturing or producing an article or articles, as the case may be." The Honble Supreme Court then observed that the word production has a wider connotation than the word manufacture. While every manufacture can be characterised as production, every production need not amount to manufacture. The test evolved for determining whether manufacture can be said to have been taken place is, whether the commodity which is subjected to the process of manufacturing can no longer be regarded as the original commodity but is recognised in the trade as a new and distinct commodity. The word production or produce when used in juxtaposition with the word manufacture takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods. The Honble Court then examined the meaning of the word articles used in s. 80HH. It was observed that the words articles is preceded by the words it has begun or

begins to manufacture or produce. The Honble Court further observed that can we say that the word articles in the said clause comprehend and takes within its ambit a dam, a bridge, a building, a road, a canal and so on ? We find it difficult to say so. Would any person who has constructed a dam say that he has manufactured an article or that he has produce an article ? Obviously not. If a dam is an article, so would be a bridge, a road, an underground canal and a multistoreyed building. To say that all of them fall within the meaning of the word article is to overstrain the language beyond its normal and ordinary meaning. The Honble Supreme Court then further observed that it is true that a dam is composed of several articles such as stone, concrete, cement, plant and other manufactured articles. But to say that the end product, the dam, is an article is to be unfaithful to the normal connotation of the word. The dam is constructed; it is not manufactured or produced. At page 426 of ITR the Honble Supreme Court considered the meaning and scope of the conditions prescribed in s. 84 of the Act. The concerned assessees were engaged in the business of laying foundation for building and other structures by a specialised patented method known as pressure pilling. The Honble Supreme Court considered the question as to whether such assessees were engaged in the manufacture or production of articles within the meaning of s. 84(1). The Honble Court at pp. 428 and 429 of ITR gave the following findings in relation to the aforesaid question : "If the construction of a dam, a bridge or a building as a whole does not amount to manufacture or production of an article, it is difficult to see how the laying of foundation or foundations for such dam, bridge or building can be characterised as manufacturing or production of articles. The process of laying a foundation is an integral part of the construction of a dam, bridge or building. Each such structure requires a foundation. The assessee does no more than lay the foundation(s) by a technologically innovative method, which lends to the strength of the foundation. It cannot be said that if a person constructs the entire dam including the foundation, he is not manufacturing or producing an article but where he merely lays the foundation for such dam he is manufacturing or producing an article. The piles, which the assessee lays by his particular method become a fixture in the earth. It ultimately becomes an integral part of the dam, bridge or building, as the case may be. It is not as if the assessee supplies prefabricated piles, which are bored into the earth by the contractor or the owner, as the case may be. The work is done on the spot and it is a works contract. It is no different from any other works contract which is done on the spot and becomes part and parcel of a larger construction. In such matters, one has to look to the precise activity and decide whether it can be said to amount to manufacturing or producing an article." Thereafter the Honble Court considered the question relating to grant of investment allowance in respect of s. 32A. The learned Senior Departmental Representative wanted us to more carefully go through the findings given by the Court in relation to interpretation of s. 32A. At p. 430 the Honble Court has summarised the question relating to investment allowance considered by their Lordships as under : "The question before us is whether the assessee is entitled to investment allowance on the actual cost of the machinery and plant installed for the purpose of its business pertaining to

construction of dams and canals." The relevant words in s. 32A are construction, manufacture or production of any article or thing". At p. 432 the Honble Court observed as under :"The meaning of the word "construction" as well as the word "thing" must be determining having regard to the context in which the said words occur, viz., machinery or plant installed in an industrial undertaking for production of any article or thing; the word construction in the sub-clause is thus akin to manufacture or production; similarly, the expression thing is used as interchangeable with the expression article." At p. 434 the Honble Court gave the following findings with regard to s. 32A : "We are, therefore, of the opinion that sub-cl. (iii) of cl. (b) of sub-s. (2) of s. 32A does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar construction." It is apparent from a plain reading of the said judgment of the Honble Supreme Court that the various findings given by the Honble Court related solely and exclusively to concerns engaged in the business of constructing dams and other civil works. The Honble Supreme Court has repeatedly clarified that the word article or thing used in these sections cannot take within its ambit a dam, a bridge, a road, a canal and other similar construction. The Honbel Supreme Court also held that the work of laying as an activity of manufacturing or producing articles or things for the simple reason that such foundation work ultimately becomes an integral part of dam, bridge or building as the case may be. There is not a single word or whisper in the said judgment of the Honble Supreme Court by which it can be inferred that an assessee engaged in the activities of designing, fabricating, erecting, supplying, installation and commissioning of a plant like the one supplied by the assessee can be covered by the aforesaid judgment. The learned Senior Departmental Representative wanted us to specifically consider the findings given by the Honble Supreme Court in the case of N. C. Budharaja & Co. (supra) at p. 434 of 204 ITR gave the following findings : "In this background, it is not possible or permissible to read the word construction as referred to construction of dams, bridges, buildings, roads or canals. The association of words in former sub-cl. (ii) and the present sub-cl. (iii) is also not without significance. The words are : construction, manufacture or production of any articles and things ... " and "construction, manufacture or production of any articles and things ... " respectively. It is equally evident that in these sub-clauses as well as in the IX Sch. and the XI Sch., the words articles and things are used interchangeably. In the scheme and context of the provision, it would not be right to isolate the word thing, ascertain its meaning with reference to law lexicons and attach to it a meaning which it was never intended to bear. A statute cannot always be construed with the dictionary in one hand and the statute in the other. Regard must also be had to the scheme, context and - as in this case - to the legislative history of the provision." The judgment of N. C. Budharaja & Co. (supra) was affirmed once again in the cae of Builders Association of India (supra). At pp. 884 and 885 the Honble Supreme Court observed as under : "We are, therefore, of the opinion that sub-cl. (iii) of cl. (b) of sub-s. (2) of s. 32A does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions." The observations made by the Honble

Supreme Court that s. 32A does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions in the above referred two judgments clearly indicate that the findings given by the Honble Supreme Court clearly restricts its application in the cases of such civil construction work only and would not cover within its ambit construction or manufacture of plant at the site of the customers factories. It is well settled law that the judgment in each case has to be seen in the light of the facts of that case. A decision has to be understood in the context of the facts in which the decision is rendered. Such a view is fortified by the judgment of Honble Supreme Court in the case of Deen Dayal & Ors. vs. Union of India AIR 1983 SC 1155. The findings given by the Honble Supreme Court in the aforesaid judgment at p. 1156 are reproduced hereunder : "Any case, even a locus classicus, is an authority for what it decides. It is permissible to extend the ratio of a decision to cases involving identical situations, factual and legal, but care must be taken to see that this is not done mechanically, that is, without a close examination of the rationale of the decision which is cited as a precedent. Human mind, trained even in that strict discipline of law, is not averse to taking easy course of relying on decisions which have become famous and applying their ratio to supposedly identical situations. The question of discriminations arises under Art. 14 and not under Art. 19 of the Constitution. Where a case before the Court involved considerations limited and germane to the application of Art. 14, the principles enunciated therein cannot be treated as of universal application and in that process to apply them to cases arising under other articles of the Constitution, particularly Arts. 19 and 21 of Constitution." The Honble Kerala High Court in the case of CIT vs. K. Ramakrishnan (1993) 202 ITR 997 (Ker) also held as under : "As case is a precedent for what it explicitly decides and nothing more. The words used by judges are not to be read as if they are words used in an Act of Parliament. These words are not used after weighting the pros and cons of all conceivable situations that may arise. They constitute just the reasoning of the judges in the particular case, tailored to a given set of facts and circumstances. What is made relevant and binding is only the ratio decidendi and no more. The careful drafting - perhaps with reference to analogous statutes - the multiple reading in the legislature and the discussions which go behind the making of a statute inject a certain degree of sanctity and definiteness of meaning to the words used by the legislature. The same cannot be said of a judgment which deals only with the particular fact situation on hand. It will be too much to ascribe and read precise meaning to words in a precedent which the judges who wrote them may not have had in mind at all. Equally, it is not possible to impute an intent to render a decision on a point which was not before them and which they never intended to deal with, even though such an inference may seem to flow logically from the ratio decidendi of the case." The Honble Gujarat High Court also explained as to how the judgment of the superior Courts should be understood while deciding whether it constitutes a binding precedent. It was observed by the Honble Gujarat High Court as under : "The ration or principle laid down by the Supreme Court is binding on the High Court but each and every word stated by the Court while deciding a case does not become the law

of the land. The observations made by the Supreme Court in G. Venkataswami Naidu vs. CIT (1959) 35 ITR 594 (SC) and Janki Ram Bahadur Ram vs. CIT (1965) 57 ITR 21 (SC), that normally purchase of land represents investment of money in land, cannot be raised to the level of presumption of fact or that of law and its scope cannot be widened so as to be applied universally in all cases. In the context of a developing economy and fast changing socio-economic conditions of people, even the words occurring in a statute are required to be interpreted differently." The Honble Supreme Court in the case of CIT vs. Sun Engineering Works (P) Ltd. (1993) 198 ITR 297 (SC) observed as under : "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Supreme Court divorced from the context of the question under consideration and treat it to be the complete law declared by the complete law declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Supreme Court takes its colour from the questions inolved in the case in which it is rendered and, while applying the decision to a later case, Courts must carefully try to ascertain the true principle laid down by the decision." It is clear from the above referred judgments that a case is precedent for what it explicitly decides and nothing more is the context of a developing economy and fast changing socio-economic conditions of people, even the words occurring in a statute are required to be interpreted differently keeping in mind the context in which such expressions have been used in the relevant provisions of law. Keeping the aforesaid principles in mind coupled with the facts that the Honble Supreme Court gave its findings in relation to a case engaged in the construction of dams and the further fact that the Honble Supreme Court has used repeatedly the restrictive language while holding that the construction of a dam, building, canal or other similar construction cannot be treated as manufacture or production of an article or thing, we have no hesitation in holding that the judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra) and Builders Association of India (supra) would be applicable only in relation to works contract of a civil nature such as construction of a dam, building and other similar civil work and by no stretch of imagination be made applicable in relation to manufacture or construction of plant at the site of the customers factory premises. The judgment of the Honble Supreme Court in the case of N. C. Budharaja heavily relied upon by the Revenue authorities and by the learned Senior Departmental Representative before us, therefore, do not in any manner support the Revenues contention. 22. The learned Departmental Representative further strongly contented that the assessee is neither registered with any authority as an industrial undertaking nor it has paid any excise duty during the relevant previous year and therefore, it cannot be treated that the assessee is engaged in the business of manufacturing or producing articles or things. The Departmental Representative also contented that the assessee had paid sales-tax only on the value of components which were supplied to various contracting parties. Assessee was thus doing a work of trading of components and supplying of service for assembling the components to contrauted the requisite plant. Such plant contracted by the assessee

cannot be considered an article or thing and it is aggregate of various articles or things. He further submitted that the expression contraction is absent in s. 80-I as distinguished from the wider expression used in s. 32A. The assessees undertaking can be treated only as a business undertaking and cannot be treated as an industrial undertaking. The assessee is engaged in a works contracted and is not doing the activity of manufacturing or producing articles or things. On a careful consideration of the entire relevant material and after going through all the judgments cited by the learned Departmental Representative, we are clearly of the opinion that all such contention raised on behalf of the Revenue cannot be accepted. The Supreme Court has nowhere laid down in the case of N. C. Budharaja & Co. (supra) that the said decision will apply to all types of works contract. Its application is clearly restricted to works contracted for constructing a civil work such as a dam, building, road, canal, etc. The legislature itself has drawn a specific distinction between the civil construction and other types of works contrautedlike mining contracts or engineering contracts as is evident from the various decisions, sections contained in the provisions of IT Act as have been referred to hereinbefore while discussing the arguments submitted by the assessee. The appellant company had acquired a valuable technical know-how rights from DF in accordance with the technical collaboration agreement. The Central Government has accorded its approval for the aforesaid technical collaboration agreement for manufacture of water and water treatment plant as would be evident from letter dt. 25th February, 1987, issued by the Ministry of Industry, Government of India. The memorandum of association of the appellant company also clearly indicates that the aforesaid company was formed with the main object of designing, manufacturing, supplying, erecting and instalment of effluent treatment plant (hereinafter referred to as ETP). The activities carried on by the assessee as per the terms of contracts executed with the customers briefly consists of the following : (a) designing and engineering of the ETP after collecting effluent samples and slabs or pilot plant studies of the collection of information regarding the local climatic conditions like temperature, variation, rainfall, etc. Before designing the plant relating to ERP, the assessee has also to compile all the relevant information data required for achieving the desired goal, i.e., its standard, recycle, etc. Thereafter, the appellant company has to identify the equipments required in the plant. They also have to finalise the specifications of other equipments also to be fabricated as per Degramont design or to be brought from the standard manufacturers. After ascertaining the specific requirements of the various equipments, they procure and supply the equipment at site. It will also be worthwhile to state that at every stage of identifying the requirement of various components, equipments and spare parts, the assessee has to apply the technical know-how so as to ensure that they are successfully built, erect and commission the ETP. Various equipments, spare parts and components are required to be got manufactured from various other manufacturers according to the requirements and in accordance with the technical know-how acquired by the appellant company from DF. The plant is thus assembled with the constant application of the technical know-how at the premises of the customers. The assessee has to also make the performance guarantee for where the

plant is designed. The activities of the assessee reach to the concluding stage only when the successful performance of the ETP is given to the client to their entire satisfaction in accordance with the contract executed with them. These are briefly the activities which are required to be carried out by the assessee for the execution of the turnkey project carried out by the assessee in relation to supply and successful working of the ETP so that their customers can achieve the desired goal of pollution control and environment protection. All these activities are integral, incidental and ancillary activities which are necessary for manufacture, supply and commissioning of the plant. 23. The contention of the Revenue authorities and the learned Senior Departmental Representative that, since the plant is embedded and installed in the earth, it become an immovable property and therefore, it cannot be said that the assessee has manufactured or produced an article or thing within the meaning of s. 80-I(2), is also not valid and acceptable. The items of plant and machinery are apparently different articles or things than the immovable properties such as a building, a dam, road or other similar civil construction work. The ETP supplied by the assessee to its customers can be dismantled, shifted, removed and can be resold after such removal or dismantle from the existing premises while the civil construction work like the dams, roads, bridges, building cannot be shifted to any other premises after it is dismantled or removed. Therefore, the ETP supplied by the assessee to its various customers cannot be treated as immovable property in a sense of a dam, building, road or other civil construction is treated. It is an item of plant and machinery which is required by all industries which are generating effluent water hazardous to human life and which are required to be treated in accordance with the parameters prescribed in the relevant regulations. The Honble Supreme Court in the case of CIT vs. N. C. Budharaja (supra) have itself held that the meaning of the word construction, manufacture, produce, article or thing must be determining having regard to the context in which the said word occur. At p. 432 of 204 ITR, the Honble Supreme Court held that the word contraction used in s. 32A is akin to manufacture or produce. Similarly, the expression thing is used as interchangeable with the expression article. Therefore, the meaning of the aforesaid expression used in s. 80-I, namely, manufacture or produce or thing or article will have to be understood in the context in which such expression have been used. The provisions of s. 80-I are intended to provide an incentive for investment in certain desired sectors and promote industrialisation in developing countries which has adopted the policy of liberalisation. There is a repaid growth of industries in various parts of our country. The growth of industries also causes grave problems on account of pollution of water, air and environment. It is, therfore, simultaneously necessary to ensure that adequate measures of safety by way of pollution control and environment protection should be made. The Government, therefore, made various laws relating to pollution control and environment protection. The Central and State Pollution Control authorities have prescribed various parameters which are required to be achieved by the industrial units. The setting up of ETP is, therefore, not only a legal necessity but it is a core and infrastructural requirement for ensuring a healthy and balanced growth of industries so as to ensure environment protec-

tion and pollution control. The importance of installation of such ETP in all industries creating hazardous pollution has been well recognised not only by the legislative measures but by the Honble Supreme Court who in the recent past have rendered several important judgments in which a higher priority has been given to the necessity of pollution control and environment protection. The provisions contained in the IT Act and the relevant rules also provide grant of 100 per cent depreciation on various kinds of pollution plants and equipments. This clearly shows that the plants like the ETP prepared by the appellant company is one of the priority items which are necessarily required to be installed by all major industries. It will, therefore, be necessary to keep in mind the aforesaid objects with which the provisions of s. 80-I were introduced. The meaning of the expression manufacture explained in the judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra) at p. 423 of 204 ITR is that the test evolved for determining whether manufacture can be said to have taken place is, whether the commodity which is subject 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 Honble Supreme Court has further observed that production has a wider connotation than the word manufacture. While every manufacture can be characterised as production, every production need not amount to manufacture. The learned Departmental Representative had placed reliance on the tax audit report submitted by the assessee to support his contention that the assessee is not engaged in the activity of producing or manufacturing of any article or thing. The tax audit report on which reliance was placed by the learned Departmental Representative contains the following observations : "The company is engaged in the business of construction of Water Treatment Plants specifically to customers requirements. The nature of materials consumed and final product are completely different and it is not possible to give quantitative details as major work is fabricated by contractors." It is true that the assessee is purchasing different components, different equipments and spare parts from various other parties and are assembling those components equipments and accessories and thereby they are preparing fabricating and erecting a plant which is known as ETP. The ultimate end product which is prepared as a result of assembling of various components with the constant application of technical know-how is the ETP. The ETP is obviously distinct and different plant than the various components, equipments purchased or got manufactured according to the tailor-made requirement from the different suppliers. The activities carried out by the assessee are, therefore, clearly covered within the definition of manufacture of an article or thing. Such expressions article or thing have been used as heading in Schedules IX and XI of the IT Act, 1961 which gives the list of priority industries and non-priority industries. The plant and machinery required for the industries listed in those schedules are made eligible for different types of concessions, deductions provided in various provisions of IT Act, 1961. Such expression as things or articles are interchangeable so far as it relates to interpretation of the incentive provisions like s. 80-I is concerned. The contention of the learned Senior Departmental Representative that the assessee is constructing a plant which does not amount to manufacture

is also not tenable in view of the findings given by the Honble Supreme Court in the case of N. C. Budharaja (supra) wherein they have, inter alia, observed that the expression construction used in s. 32A is akin to manufacture or produce.
24. Let us now examine the contention of the learned Senior Departmental Representative that since the assessee is preparing bills for supplying of various components and equipments and receiving payments according of those sale invoices, the assessee should be held to be a seller of the equipments and components and apart from that the appellant has rendered services as contractors for assembling of the various components and equipments which cannot be treated as manufacturing or production activity. The learned Departmental Representative submitted that the work of assembling carried out by the assessee cannot be treated as a manufacturing activity. Such submissions made on behalf of the Revenue are clearly contrary of the various contracts executed by the appellant company with its various customers. It is evident from a perusal of the contracted executed with Dyaneswar that the assessee had undertaken to design, engineer, manufacture, supply, install and commission the ETP and also undertook to give performance test. The obligation of the assessee will come to a concluding stage only after successful commissioning of the plant. The various bills prepared by the assessee from time to time was merely a mode of payment during the currency of the long period of the carrying out of the entire work. It would be evident from the contracted that such mode of payment was mutually decided between the parties so that the assessee receives the payments on pro tanto basis with the progress of the work. Such an arrangement is quite usual and natural in cases of such turnkey project so that the supplier receives the payment from time to time and the interest of the customer is also safeguarded, as the material in the form of equipments and components, etc., reached the destination, i.e., at the site of erection of the plant in question. The mere fact that the assessee has been receiving payments simultaneously with the bringing of equipments and components of the plants at site would not in any way diminish the responsibilities of the assessee to ensure the overall obligation to complete the plant and give its successful performance test. In fact the amount which is retained during the currency of the entire work will be finally paid only after commissioning of the plant and its successful performance test given by the assessee to their customers. It cannot, therefore, be said that the assessee was selling the components or equipments or spare parts which were used in the execution of the turnkey project by which the ETP was supplied, installed and commissioned in the customers factory. The contention of the learned senior Departmental Representative that the assembling of various parts, equipments and components by which the assessee prepared the ETP at the site cannot amount to manufacture or production of article or thing is also not sustainable. We have already indicated hereinbefore that the end product which has been supplied by the assessee is ETP, which is a distinct and different thing or article than the components and spare parts purchased by the assessee which were assembled by the constant use of Degremont technology for manufacturing an ETP at the site of the customers factory premises. Such plant would not become an immovable property merely because the assessee undertook the work of laying down the

foundation for installation of the ETP. The plant so supplied by the assessee after carrying out a series of activities is a movable article or thing, as it can be dismantled and it can be shifted to any other place. All mega plants in heavy and infrastructure industries are installed or embedded in the earth and by that process such items of plant and machinery would not by themselves be treated as immovable property. The plants which are embedded and installed in earth can be regarded as immovable property only for the limited purpose of stamp duty laws or the Registration Law, if such items of plant and machinery are transferred along with the building. However, for the purposes of grant of various deductions such as depreciation, investment allowance or deductions under ss. 80HH and 80-I, it can by no stretch of imagination be treated as immovable property such as dam, building, roads or other similar civil construction work. It will also be worthwhile to make a useful reference to the various decisions cited by the learned representatives of the assessee such as the cases reported in (1968) 68 ITR 325 (Bom) (supra), (1991) 188 ITR 720 (sic) (supra) (SLP dismissed by Supreme Court) (1993) 203 ITR 3 (St) (supra), 31 ITD 79 (supra) and 33 ITD 680 (supra) and 8 ITD 820 (supra). In all these cases the concerns which were carrying out the work of assembling of automobile vehicles, tractors, diesel engines, etc., were held to be manufacturers. In those cases the process of assembly was comparatively very simple as compared to the assembly work done by the assessee. In the case of the assessee various equipments and other engineering components were got produced as per the specific design prepared and supplied by the assessee. The required components, equipments and spare parts were got manufactured or purchased keeping in view of the design and drawings the technology provided by the assessee and those were subjected to supervision and quality control of the assessee. Application of technical know-how, skill, technology, engineering mechanism at all stages of these activities is the heart and soul in the process of manufacture of ETP. We are, therefore, of the considered opinion that the activities carried out by the assessee by way of designing, procuring various components, equipments and spare parts, assembly of all those parts with constant application of the technical know-how obviously amounts to manufacture of article or thing as contemplated in s. 80-I. 25. The contention of the learned Departmental Representative that the assessee did not pay any excise duty on the total value of ETP is also not relevant for determining the point in issue before us. The levy of excise duty depends on the various provisions contained in the excise laws. The excise laws give the definition of excisable goods. If the end product manufactured by the assessee namely the ETP is liable to excise duty in accordance with the provisions of excise laws, it is for the excise authorities to determine the duty on the end product in question manufactured by the assessee. That cannot in any manner affect the assessees claim for grant of deduction under s. 80-I. Similarly, the contention of the learned Senior Departmental Representative that the assessee has paid sales-tax only on the value of the components indicates that the assessee sold only the parts, components and equipments to the clients and rendered the technical services for assembly of the plant and machinery in question is not valid. The provisions of sales-tax laws clearly provides that the sales-tax

in the case of engineering works contracted can be charged only in respect of the value of goods used in the execution of such turnkey projects. That also has no relevant bearing for determining as to whether the assessee is entitled to grant of deduction under s. 80-I. It may also be relevant to go through the language of s. 80-I(2)(i) and (iii) which specifies one of the conditions for grant of deduction under the said section. It only requires that the assessee should manufacture or produce any article or thing. It does not further say that such articles or things which are manufactured or produced by the assessee should be sold and should not be used for the execution of works contract. If the gross total income of the assessee includes any profits and gains derived from industrial undertaking, it will be eligible for grant of deduction under s. 80-I on the fulfillment of various conditions prescribed in sub-s. (2). In the present case the dominant activity carried on by the assessee is preparation of the ETP by applying its technical know-how rights from the stage of drawings and designing till the commissioning of the plant as a whole. The learned senior Departmental Representative had submitted that the activity of designing and drawing are pre-production activities and the activities of laying of foundation and installation of machine and subsequent activities are post-production activities. Such a contention submitted on behalf of the Revenue is also not valid. It will be worthwhile to once again go through the judgment of the Honble Bombay High Court in the case of CIT vs. Penwalt India Ltd. (supra) in which it was, inter alia, held that the activities like preparing of designs and drawings on the basis of the order, placing order for manufacture of machinery with others, to see that manufacturing process is carried on by others under the direct supervision of the assessee, who have check over the quality control and put responsibility for the proper functioning of the machinery and guarantee after sales and service for a stipulated period are all integral part of the manufacturing activities carried on by the assessee. In that case the assessee was held to be entitled to grant of deduction under s. 80-I. in the present case, it will also be imperative to go through the contracts executed by the assessee with the customers such as the contracted executed with Dyaneswar. One of the clauses of the said agreement which clearly provides that the assessee while giving any sub-contracted for any part of the work shall not be absolved from the various obligations undertaken by the assessee under the contract. This clearly indicates that whatever items, components or equipments which were got manufactured by the assessee or purchased from the market were subject to quality control and supervision of the assessee. In fact, the ETP had to be prepared according to the specific requirement of their customers. The entire work had to be carried out according to the tailor-made requirement, which necessarily require constant application of the technical know-how, the accumulated experience of the assessee which he had acquired from DF. Such activities carried on by the assessee cannot be treated as a mere sale of the spare parts or mere rendering of services for assembling of the different parts. The most relevant test is as to what is the end product which was obtained as a result of series of such activities carried on by the assessee. The end result was that an ETP was manufactured, supplied and installed by the assessee in accordance with the technical know-how acquired by it from their

foreign collaborators M/s DF. The ultimate product was the ETP supplied by the assessee to the customers. Such a contracted was an indivisible contracted as the assessee was under an obligation to supply a complete integrated ETP and was also under an obligation to ensure its successful performance. 26. In view of these facts, the contention of the Senior Departmental Representative that only those industrial units who derive their total income from such industrial undertaking alone are entitled for grant of deduction under s. 80-I while the part of the activities carried out by the assessee cannot be treated as manufacturing or production activity is also not sustainable. The entire activities carried on by the assessee are activities which are necessarily required or which are incidental or ancillary for the purposes of manufacturing of the ETP. The learned Senior Departmental Representative had also argued that the assessee has carried out civil works in several contracts executed with various customers. The execution of civil works by the assessee are definitely hit by the judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra). Let us examine this contention of the learned Senior Departmental Representative. The total consideration in respect of the ETP supplied by the assessee to Dyaneswar was Rs. 1,85,00,000 as per the agreement executed with them. The price break-up given in the said agreement shows that a sum of Rs. 1,50,00,000 represents the value of various material required for the aforesaid ETP including the charges for designs and engineering works, etc. The value of other work was Rs. 35 lakhs only which included cost of civil work only to the extent of Rs. 15 lakhs. Such civil works consisted of the laying of the foundation for installation of the said equipment. The assessee has also furnished a consolidated chart in relation to the various projects undertaken during the year under consideration at p. 273 of the paper book. Out of the several plants manufactured/supplied by the assessee, such civil work was undertaken by the assessee only in six contracts. The income from such civil works was Rs. 13,223 lakhs while corresponding expenditure on such civil work was Rs. 14,154 lakhs. The total receipts derived by the assessee from supply of such ETP's to various customers during the year under consideration was Rs. 1,39,475 lakhs. The receipts of civil work thus comes to less than 10 per cent of the gross receipts. It can, therefore, be safely concluded that the civil work carried out by the assessee represented only an insignificant part. Such civil work consisted of laying of the foundation and other necessary constructions which was necessarily required for installation of the mega effluent treatment plant. In this connection let us once again go through the judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra). The Honble Supreme Court while considering the question relating to eligibility under s. 84 observed that if the construction of a dam, a bridge or a building as a whole does not amount to manufacture or production of an article, it is difficult to see how to laying of foundation or laying of foundation for such dam, bridge or building can be characterised as manufacture or production of articles. The process of laying foundation is an integral part of the construction of dam, bridge or building. Each such structure requires the foundation. The foundation so laid down by the assessee ultimately becomes an integral part of the dam, bridge or building as the case may be. In the present case, the end

product and the ultimate product is the ETP. The foundation laid down by the assessee as per its technical know-how and technology will ultimately become an integral part of the ETP. Therefore, the civil work done by the assessee for laying down of foundation for installation of ETP will become an integral part of the ETP and, therefore, the same will also be treated as an activity which is necessary for completion of the manufacturing and commissioning of the ETP. We have already indicated hereinbefore that the various activities carried out by the assessee is an indivisible work and the entire activities carried out by the assessee will be covered by the expression manufacture or production of an article or thing which is known in the commercial circle as a ETP and it is necessarily required for pollution control and environment protection. This contention of the learned Senior Departmental Representative also does not in any manner help the Revenue. 27. The various findings given by us in the earlier paras are fully fortified by the decision of the Tribunal, Ahmedabad Bench in the case of Enviro Central Associates (supra). The facts of the said decision rendered by the Ahmedabad Bench of the Tribunal are almost identical and similar to the facts of the present case. The Ahmedabad Bench of the Tribunal after taking into consideration the judgment of the Honble Supreme Court in the case of N. C. Budharaja (supra) arrived at the conclusion that the assessee engaged in the business of supply of water/air pollution control plants in similar manner would be eligible for grant of deduction under s. 80HH and 80J of the IT Act. The scope of s. 80-I is wider as compared to ss. 80HH and 80J as the word thing has been added in the provisions contained in s. 80-I which were not found in the corresponding provisions contained in s. 80J and not in s. 80HH. Assessees claim of deduction under s. 80-I is fully supported by the aforesaid decision of the Ahmedabad Bench of the Tribunal. 28. After giving our thoughtful and deep consideration, entire relevant material and the decisions of various Honble Courts, we are of the clear opinion that the assessee is an industrial undertaking engaged in production or manufacture of an article or thing contemplated under s. 80-I. The view which we have expressed in earlier paras that on the facts of the present case, it should be accepted that the assessee is manufacturing or producing an article or thing is further fortified by the judgment of the Honble Supreme Court in the case of Narne Tulaman Manufacturers (P) Ltd. vs. Collector of Central Excise AIR 1989 SC 79. It will be imperative to reproduce the headnote to the said decision delivered by the Honble Supreme Court : "The word manufacture includes any process incidental or ancillary to the completion of a manufactured product. Hence any process by which an object becomes new commercial goods, having a distinctive name, character or use would be manufacture. The appellant claimed that assembling of weighbridges by it out of imported load cells, platforms manufactured by other persons, and indicator systems manufactured by it and on which it had paid excise duty, did not amount to manufacture, that therefore, the weighbridges were not chargeable to excise duty under the Central Excise and Salt Act, 1944, and that, in any case since the indicator systems manufactured by it had already suffered taxation, the end-product could not be charged; Held, (i) that as a result of the work of the appellant, a new product known in the market, and falling under

the tariff item weighbridges came into being. The appellant was, therefore, a manufacturer of weighbridges, liable to pay excise duty thereof; and (ii) that a part of a manufactured product may be goods as known in the excise laws and may be dutiable. But if the end-product is a separate product which came into being as a result of the endeavour of the appellant, the end product was also chargeable to duty". 29. We are not concerned with the leviability or non-levi ability of the excise duty on the manufacture/supply of ETP by the assessee to its customers as its chargeability on the end product will depend on the relevant provisions contained in the excise law but the aforesaid judgment clearly supports the view that the various activities carried on by the assessee amount to manufacture of production of a new commercial article or thing, namely, the effluent treatment plant, as the final end product having a distinct name, character and use. 30. In view of the foregoing discussions, we are of the clear opinion that as a result of various activities and processes, such as designing; drawing; engineering activities; acquiring of various components, equipments, spare parts whether by way of purchase or getting the same manufactured by various supporting manufacturers under its supervision and control and in accordance with its technology and technical know-how; assembling of various components and equipments with constant application of its mother technology and know-how at all stages; fabrication; erection; laying of foundation; installation and commissioning etc., carried out by the appellant company in the course of execution of such turnkey project, a new article or thing known in the commercial world as Effluent Treatment Plant (ETP) has been brought into existence, having a distinctive name, character and use. All such activities carried on by the assessee certainly and surely come within the ambit of expression manufacture or production of an article or thing envisaged in s. 80-I of the IT Act, 1961. The appellant company is, therefore, clearly entitled to grant of deduction under s. 80-I of the IT Act, 1961. The AO is accordingly directed to grant deduction under s. 80-I of the IT Act, 1961, to the appellant company. 31. In the result, the assessees appeal is allowed.