
(2010) 12 KAR CK 0142
In the Karnataka High Court
Case No : IT Appeal No. 3167 of 2005

Sami Labs Ltd.

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-12-2010

Acts Referred:

Income Tax Act, 1961 — Section 10 B, 148, 80 I (2), 80 J

Citation : (2011) 239 CTR 510 : (2011) ILR (Kar) 1601 : (2011) 334 ITR 157 : (2011) 2 KCCR 121 SN

Hon'ble Judges : Manjula Chellur, J;Aravind Kumar, J

Bench : Division Bench

Advocate : Sarangan, for H. Vani, for the Appellant; E.R. Inter Kumar and M.V. Seshachala, for the Respondent

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—The Assessee is in appeal questioning the correctness and legality of the order passed by the Tribunal, Bangalore Bench "A", in ITA No. 484/Bang/2005, dt. 9th Sept., 2005, whereunder appeal filed by the Assessee has been dismissed.

2. This Court by order dt. 18th Dec, 2006 has admitted the appeal to consider the following substantial question of law:

Whether on the facts and circumstances of the case, the Appellant's Kunigal unit was entitled to the relief u/s 10B of the IT Act, 1961, for the asst. yr. 2002-03?

3. The facts in nutshell leading to the filing of this appeal are as under:

Assessee is carrying on the business in manufacturing and selling/export of fine chemicals and herbal medicines and has its units at Kunigal- Tumkur District and Nelamangala-Bangalore District. For the asst. yr. 2002-03 Assessee claimed deduction u/s 10B of the IT Act, 1961 (hereinafter referred to as the "Act") in respect of its Kunigal unit. For the asst. yr. 2002-03, return of income was filed

on 31st Oct., 2002, declaring a loss of Rs. 4,79,39,611 which was claimed to be a carried forward loss. This loss was arrived at, after claiming deduction of Rs. 9,35,80,445 u/s 10B of the Act. This deduction claimed was considered by the AO as incorrect and as such, notice u/s 148 was issued to the Assessee calling upon to show-cause as to why this amount of Rs. 9,35,80,445 is to be not treated as income escaped. In response to this, the Assessee filed revised return on 27th April, 2004 showing a loss of Rs. 4,79,39,611. On scrutiny, AO found that Assessee was not eligible for deduction u/s 10B of the Act and disallowed the same by assessment order dt. 31st Jan., 2005.

4. Aggrieved by the same, Assessee preferred an appeal before CIT(A)-III. Bangalore, and the appellate authority by order dt. 17th Feb., 2005, dismissed the same and confirmed the order of AO.

5. Being aggrieved by the said order, Assessee preferred an appeal before the Tribunal, Bangalore Bench "A" in ITA No. 484/Bang/2005 and Tribunal on considering the contentions raised by the Assessee, dismissed the appeal and confirmed the orders passed by the assessing authority as well as the appellate authority. It is this order of the Tribunal dt. 9th Sept., 2005 which has been questioned in this appeal by the Assessee and praying for the substantial question of law being answered in favour of the Assessee.

6. Heard Sri Sarangan, learned Senior Counsel appearing on behalf of Ms. M. Vani and Sri E.R. Inder Kumar, learned Senior Counsel appearing for the Respondent-Revenue.

7. Sri Sarangan would contend that issue pertains to claim of exemption/ deductions of the income of the Assessee from the profits and gains as per Section 10B of the Act. He would contend that there is no dispute with regard to the Assessee being a 100 per cent export-oriented unit and would contend that exemption claimed by the Assessee was in respect of profit derived by it in the accounting year relevant to assessment year namely 2002-03 from its Kunigal unit and Assessee had made substantial addition to its plant and machinery during the assessment year in question and the AO ought to have considered the WDV of the plant and machinery which also consisted of the machinery acquired from M/s Kanfa Chemo Organic Ltd., which amounted only 14.22 per cent and as such the extent of machinery was less than 20 per cent in the accounting year relevant to the assessment year and thus exemption u/s 10B of the Act ought to have been granted to the Assessee. It is contended by Mr. Sarangan that Assessee has to satisfy that plant and machinery installed in the unit to which exemption is claimed u/s 10B was the new plant and machinery insofar as Assessee is concerned and this fact having not been taken note of by the authorities below, has resulted in denial of the exemption and as such he seeks for allowing the deduction claimed by the Assessee before the AO.

8. He would elaborate his submissions and contend that while interpreting a beneficial provision like Section 10B, liberal construction is to be adopted and a

provision in a taxing statute which grants incentives for promoting growth and development of trade and industry should be construed liberally and restriction on it has to be so construed so as to advance the objective of the provision with which it was enacted and not to frustrate it. He would submit that on a reading of Section 10B it would emerge that AO would be entitled to consider the claim for deduction every year and in the event of Assessee being entitled to claim exemption in the accounting year relevant to the assessment year by satisfying the conditions stipulated therein, Assessee should not be deprived of such benefit and he would submit that in the instant case, Assessee though had not claimed exemption from the date of commencement of its production in the year 1996 and said exemption being available to the Assessee for 10 consecutive years, Assessee was within its right to claim exemption in the accounting year relevant to the assessment year on account of conditions stipulated in Section 10B being satisfied and when same is applied to the case on hand, Assessee would be entitled to claim such deduction since the WDV of the machinery for the asst. yr. 2002-03 was 14.22 per cent during the accounting year relevant to the assessment year. He would contend that similar provision is found in Section 80J of the Act and same having been interpreted by the Madras High Court in Commissioner of Income Tax Vs. Gopal Plastic (P.) Ltd., by following the judgment of Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-II, Bombay, , same would be applicable to the facts of the present case and as such, he would submit that exemption provision benefit flowing therefrom would flow to the Assessee and denial of the same is required to be set aside in this appeal by answering the substantial question of law in favour of the Assessee. In support of his submissions, he relies upon the following judgments apart from the one above referred to:

- (1) Bajaj Tempo Ltd. v. CIT (supra)
- (2) Commissioner of Income Tax Vs. Orissa Cement Ltd. (No. 2),
- (3) Commissioner of Income Tax, Gujarat-IV Vs. Suessin Textile Bearing Ltd.,
- (4) Commissioner of Income Tax, Gujarat-I Vs. Satellite Engineering Ltd.,
- (5) Commissioner of Income Tax Vs. Seeyan Plywoods,
- (6) Electronic Corporation of India Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad,

He would also draw the attention of the Court to the Circular No. 1 of 2005, dt. 6th Jan., 2005 [(2005) 193 CTR (St) 85] issued by CBDT to buttress his argument that Assessee would be entitled for exemption available to it u/s 10B of the Act in any of the financial years relevant to the assessment year which would be subject to the Assessee satisfying the conditions stipulated u/s 10B. Thus, he would contend that in the event of the Assessee satisfying the criteria in any accounting year relevant to the assessment year, Assessee would be entitled to claim deduction. Thus he would contend that Assessee having satisfied the

same for the asst. yr. 2002-03, denial of benefit flowing from Section 10B is erroneous.

9. Per contra, Sri Inder Kumar, learned Senior Counsel appearing for the Revenue, would support the orders passed by the authorities as also Tribunal and contends, exemption provision has to be construed strictly and while so interpreting the natural meaning as assigned in the language of the section should alone be adopted. He would contend that in interpreting a taxing statute, Courts should refrain itself from embarking upon either adding, altering or modifying the plain language used in the statutory provision unless it leads to unreasonable or unworkability of the said provision if it is to be so read and thus he contends that strict construction of the language used in the section is to be made. He would elaborate his submissions by contending that Assessee in question had commenced its production in the year 1996 by purchasing land, building, plant and machinery worth Rs. 5.20 crores and the value of plant and machinery purchased was Rs. 2.60 crores and the Assessee had to satisfy the condition stipulated u/s 10B in the first year of commencement of production which according to him is the plain and unambiguous language employed in Section 10B of the Act. As such, he contends that Assessee having not satisfied the initial test in the year of commencement of production, thereafter in the succeeding year, he cannot alter the situation and cannot contend that by virtue of the conditions having been satisfied in the succeeding years, the Assessee would be entitled to claim deduction as contemplated u/s 10B of the Act. He would also contend that Section 15C was the analogous provision under the Indian IT Act, 1922, to Section 80J(I) and Section 80J(4) of IT Act, 1961, and the words used u/s 15C to disentitle the Assessee to claim exemption were the use of words "plant and machinery previously used in any other business" (under 1922 Act) and in the present Act, the words which have been used as "machinery or plant previously used for any purpose" and thus contends that even if it is used for any other purpose and is installed in the unit in which the exemption is claimed, it has to satisfy the other parts of Section 10B. He would submit that Section 80J(4)(ii) came up for consideration before this Court in the case of Commissioner of Income Tax Vs. Nippon Electronics (India) Pvt. Ltd., whereunder it was held that Assessee had not fulfilled the stipulated condition u/s 80J(4)(ii) in the initial year of manufacture and had been denied the relief u/s 80J in the subsequent year under consideration namely 1973-74 to contend that principle enunciated therein was squarely applicable to the facts of the present case and as such he seeks for answering the substantial question of law in favour of the Revenue and against the Assessee. In support of his submissions, he relies upon the following judgments apart from the one above-referred to:

- (1) Kanhiyalal Rameshwar Das Vs. Commissioner of Income Tax, ;
- (2) Commissioner of Income Tax Vs. Subramanian and Co., ;
- (3) Commissioner of Income Tax Vs. Mayur Laminators, ;

(4) Polestar Electronic (P) Ltd. v. Addl. CST and Am. 1978 CTR (SC) 20 : 41 STC 409 (SC);

(5) Assessing Authority-cum-excise and Taxation Officer, Gurgaon and Another Vs. East India Cotton Mfg. Co. Ltd., Faridabad,

(6) Commissioner of Income Tax, Bombay-i Vs. Suessin Textiles, Ball Bearing and Products (P.) Ltd.,

(7) Phagoo Mal Sant Ram Vs. Commissioner of Income Tax,

(8) Capsulation Services Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay City-I,

(9) State Level Committee and another Vs. M/s. Morgardshammar India Ltd.,

(10) (10) State of Jharkhand and Ors. v. Ambay Cements and Anr. 139 ITR 85(sic).

10. In order to appreciate the rival contentions, we are of the considered view that same has to be examined under the following headings:

(1) Provisions of law

(2) Authorities of Hon''ble Supreme Court and other Courts

(3) Facts of the present case

(4) Our discussions and findings.

The Assessee has claimed deduction of its income u/s 10B in respect of its Kunigal unit and claim for deduction has been disallowed by the AO. Tribunal has examined the provision of Section 80J(4)(ii) while considering the grounds urged by the Assessee in the appeal memorandum. Explanations 1 and 2 to Sub-section (2) of Section 80-I having been made applicable to Clause (iii) of Sub-section (1) of Section 10B, same is also extracted. Hence, these provisions are required to be considered by us for answering the substantial question of law formulated hereinabove and these provisions as were prevailing during the assessment year in question are extracted as under:

(1) Provisions of law:

Section 10B Special provisions in respect of newly established hundred per cent export-oriented undertakings- (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the Assessee:

Provided that where in computing the total income of the undertaking for any

assessment year, its profits and gains had not been included by application of the provisions of this Section as it stood immediately before its substitution by the Act 10 of 2000, the undertaking shall be entitled to the deduction referred to in this Sub-section only for the unexpired period of aforesaid ten consecutive assessment years:

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st April, 2010 and subsequent years.

Provided also that for the assessment year beginning on the 1st day of April, 2003, the deduction under this Sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software.

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

(i) it manufactures or produces any articles or things or computer software;

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

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

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

Explanation: The provisions of Expln. 1 and Expln. 2 to Sub-section (2) of Section 80-1 shall apply for the purposes of Clause (iii) of this Sub-section as they apply for the purposes of Clause (ii) of that Sub-section.

Section 80J. Deduction in respect of profits and gains from newly established industrial undertakings or shops or hotel business in certain cases.-(I)....

(1A)....

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

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence;

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

Explanation 2: Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new

business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of Clause (ii) of this Sub-section, the condition specified therein shall be deemed to have been complied with and the total value of the machinery or plant or part so transferred shall not be taken into account in computing the capital employed in the industrial undertaking.

Section 80-I(2)

Explanation 1: For the purposes of Clause (ii) of this Sub-section, any machinery or plant which was used outside India by any person other than the Assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely:

(a) such machinery or plant was not, at any time previous to the date of the installation by the Assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the Assessee.

Explanation 2: Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of Clause (ii) of this Sub-section, the condition specified therein shall be deemed to have been complied with.

Section 80J was the subject-matter of consideration by a Co-ordinate Bench of this Court in CIT v. Nippon Electronics (India) (P) Ltd. (supra) and it was also considered by the Hon'ble Madras High Court in the case of CIT v. Gopal Plastics (P) Ltd. (supra). In these two cases, the substantial questions of law which came to be formulated by the Courts are extracted in comparison table below:

Nippon Electronics Gopal Plastics

Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the Assessee is entitled to get the relief u/s 80J notwithstanding the fact that the conditions stipulated under s. 80J(4)(ii) were not fulfilled in the initial year? Whether it was disentitled to relief u/s 80J although the old machinery was less than the prescribed percentage of 20 per cent during the relevant year, but in excess of 20 per cent in an earlier year?

This Court in the case of Nippon Electronics (supra) has referred to Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, whereunder the object of enactment of Section 80J came to be

considered analysed and explained by the Hon''ble Supreme Court wherein it has been held to encourage setting up of new industrial undertakings, the said provision was brought in by offering tax incentives and the relief is granted under the said provision in respect of profits and gains of an undertaking to the extent which does not exceed the amount calculated @ 6 per cent per annum on the capital employed in such industrial undertaking. It was held in the Nippon's case (supra) as under:

There are two aspects to be noticed in this connection. First the percentage is to be worked out on a time basis depending on the whole or part of the previous year in which any item of capital is employed in the undertaking @ 6 per cent. The second is that the capital employed in the undertaking during the previous year relevant to the assessment year has to be computed in the manner specified in the provision or under the rules, as the case may be. After the capital is so computed, tax relief to the extent of 6 per cent or 7-1/2 per cent thereof is to be allowed. The expression "per annum" cannot be understood in contrast with any broken period, that is, the relief cannot be restricted to the period for which assets were actually in use. The expression "aforesaid" has been added only to ensure that the Assessee gets the relief for each of the five years as available under the section. Deduction u/s 80J(1) of the Act is for the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture articles and for the next four assessment years (or six years in the case of a co-operative society). Section 80J(4) of the Act provides for certain conditions on the fulfillment of which the industrial undertaking becomes entitled to the benefit available u/s 80J(1) of the Act.

(2) Authorities of Hon''ble Supreme Court and other Courts:

The Hon''ble Supreme Court has repeatedly reiterated and laid down the contours for examining the provisions of a taxing statute. The Hon''ble Supreme Court in the following cases, has examined, analysed and has held as to how a provision in a taxing statute requires to be examined and applied to the facts of a case. Hence, these decisions are extracted hereinbelow:

(a) In the case of Polestar Electronic (P) Ltd. v. Addl. CST and Anr. (supra), it has been held as under:

A statutory enactment must ordinarily be construed according to the plain natural meaning of its language and no words should be added, altered or modified unless it is plainly necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute. This rule of literal construction is firmly established and it has received judicial recognition in numerous cases.

When there are two expressions which might have been used to convey a certain intention, but one of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the legislature used that one of the two expressions which would convey the intention less clearly, it does not intend

to convey that intention at all.

In construing a taxing statute "one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law". If the legislature has failed to clarify its meaning by use of appropriate language, the benefit must go to the taxpayer. Even if there is any doubt as to interpretation, it must be resolved in favour of the subject.

(b) In the case of Assessing Authority cum Excise and Taxation Officer and Anr. v. East India Cotton Mfg. Co. Ltd. (supra), Hon"ble Supreme Court has held as under:

A statute must be construed according to its plain language and neither should anything be added nor should anything be subtracted unless there are adequate grounds to justify the inference that the legislature clearly so intended.

(c) In the case of State of Markhand and Ors. v. Ambay Cements and Anr. (supra). Hon"ble Supreme Court has held as under:

23. Mr. Bharukha further submitted that in taxing statutes, provision of concessional rate of tax should be liberally construed and in respect of the above submission, he cited the judgment of this Court in CST v. Industrial Coal Enterprises (1992) 2 SCC 607 and in the case of Bajaj Tempo Ltd. v. CIT (1999) 3 SCC 78. We are unable to countenance the above submission. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the Court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the Respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, noncompliance of the same must result in cancelling the concession made in favour of the grantee-the Respondent herein.

Judgments relied upon by Assessee

(i) Hon''ble Madras High Court in the case of CIT v. Gopal Plastics (P) Ltd. (supra), while examining the claim of Assessee to the relief u/s 80J of the Act answering the substantial question of law extracted hereinabove has held as follows:

The Supreme Court has approved in its judgment, a judgment of the Calcutta High Court in COMMISSIONER OF Income Tax, WEST BENGAL II Vs. SAINTHIA RICE AND OIL MILLS., and that of the Punjab and Haryana High Court in the case of Phagoo Mal Sant Ram Vs. Commissioner of Income Tax, to the extent that previously used in any other business" cannot be construed so narrowly as to confine it to the building of the Assessee only and disapproved the Bombay view that if a new undertaking is established in premises taken on lease, then, it always amounts to formation of the undertaking by transfer of the building previously used. The test that follows from this judgment is, is the business or the undertaking the same old one or has it changed beyond recognition and thus, is it a new business and a new undertaking, to which of course some old plant or machine is transferred, but such transfer has a nominal effect, i.e., it is within the limits as indicated in the Explanation aforequoted.

For the reasons above, we are inclined to agree with the Gujarat High Court's view and hold accordingly in the case of the Assessee before us that it has made out a case that its undertaking is a small scale industry and that in the year previous to the year of assessment, it has satisfied the requirements of Section 80J(4)(ii) of the Act. The reference is answered accordingly. No order as to costs.

(ii) Their Lordships having agreed with the view expressed by Hon''ble Gujarat High Court in the case of CIT v. Satellite Engineering Ltd. (supra) and same also having been pressed into service by learned Counsel for the Appellant-Assessee, same is extracted hereinbelow:

... the taxing authority was required to determine whether in the year of its formation, that is to say. coming into existence by incorporation or otherwise, the newly established industrial undertaking satisfied the conditions for the applicability of the provisions of Section 84. Alternatively, it was urged that the latest point of time by reference to which the applicability could be ascertained was the date of the commencement of manufacture or production by such undertaking.... Section 84(2)(ii) was satisfied either in the year of formation or latest in the year of commencement of manufacture or production by the new business then, the tax holiday would be available in the assessment year relevant to the previous year in which the manufacture started and in the immediately four succeeding assessment years. If, however, the condition was not satisfied in any of those two years, then, the benefit of tax holiday would not be available, even if by subsequent addition of an entirely new building, machinery or plant or part thereof in the course of any of the succeeding four years, the total value of the previously used thrilding, machinery or plant, still in the employment of the new undertaking, fell below the statutory percentage. The submission in other words was that the condition for earning tax holiday was

inextricably linked up with the previous year relevant to the assessment year in which the new undertaking was formed or it began to manufacture or produce articles, that its satisfaction or otherwise had to be considered at that point of time alone and that if it was not so satisfied, the benefit could not be claimed in the succeeding four years....

...For the purposes of Section 84(2)(ii) all that is to be seen is, whether the manufacturing or productive apparatus of a newly established industrial undertaking or, in the case of a pre-existing industrial undertaking, that of its new business, is formed of that is to say, consists of previously used building, machinery or plant transferred to such new undertaking or business. The point of time for the applicability of Section 84 is prescribed in Sub-section (7) and, accordingly, in relation to a new industrial undertaking, the said section is first attracted in the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles. Therefore, it is in the course of assessment to income tax for such assessment year that the taxing authority will have to consider for the first time whether the new industrial undertaking was during the relevant previous year, formed by transfer of building, machinery or plant which were previously used for any purpose, and, if so, whether the condition as to statutory percentage prescribed in the proviso to Sub-section (3) was satisfied. A new business, at the stage of its coming into existence and long before the manufacture or production commences, might have acquired or be possessed of previously used building, plant or machinery which might constitute but a fraction of the entire building, plant or machinery which it requires in order to start manufacture or production. By the time the stage of manufacture or production arrives, however, it might acquire and install new plant or machinery of substantial value and in that manner, the whole manufacturing unit might be set up at a subsequent stage, that is to say, not in the year of birth but in the year of commencement of manufacture or production. Could it ever be said in such a case, in spite of the clear terms of Sub-section (7) r/w Clause (ii) of Sub-section (2) and the Explanation to Sub-section (3) that the benefit of tax holiday would not be available to such new industrial undertaking ? In our opinion, therefore, the first submission must be rejected outright.

...As explained earlier, the scheme of the statute is to make available the benefit of tax holiday for a period of consecutive years, the commencement point of such period being the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles. According to this scheme, there are two limitations on the claim of a new industrial undertaking to the benefit of tax holiday: first, that the benefit will be available for a total of such period would be the year in which the manufacture or production of the article begins. Therefore, in each assessment year falling within the five-year period, the question will arise whether the new industrial undertaking, which claims the benefit of tax holiday, satisfies the conditions laid down in Clause (ii) of Sub-section (2). In other words, according to the legislative scheme, it is apparent that in each assessment year commencing from

the assessment year relevant to the previous year in which such new industrial undertaking begins manufacture or production the taxing authority will have to consider whether the industrial undertaking was formed by the transfer to its new business of building, machinery or plant previously used for any purpose, and, if so, whether the total value of such transferred asset exceeded 20 per cent of the total value of the building, machinery or plant used in the business of such undertaking during the relevant year if the new industrial undertaking, which has not satisfied such test in any of the earlier assessment years comprised in the five-year period, acquires new building, machinery or plant during any one of the succeeding assessment years and as a result of such acquisition the condition prescribed in Clause (ii) of Sub-section (2) is fulfilled, then, as from the assessment year in which such condition is satisfied, the benefit of tax holiday will be available to it for the remaining period of the five-year term....

The view which we are inclined to take as aforesaid on the plain language of the statute is supported also by the object behind the enactment and avoids the frustration of such object. We have already adverted to the object of the enactment namely, to encourage the setting up of new industrial undertakings in which there is substantial investment of fresh capital. The legislature could not have intended that the outlay of substantial capital for the purpose of new machinery, plant or building should necessarily be in the very first year of the commencement of manufacture or production. In fact, there are many industrial units which add to their building, machinery or plant as the business grows and more capital becomes available, if the construction for which the Revenue contends were accepted, such industrial units would be denied the benefit of tax holiday, even though they are still going through the teething trouble and are still in their infancy. Such a construction would totally nullify the object of the enactment. A converse case than the one illustrated above would, however, still clearly show how the construction for which the Revenue contends will lead to a manifest contradiction of the apparent purpose of the enactment. Take the case of an industrial undertaking which in the year in which it undertakes or begins manufacture or production, satisfies the condition enacted in Section 84(2)(ii) r/w Explanation but in the immediately succeeding year adds to its manufacturing unit building, machinery or plant which has been previously used and thereby varies the ratio of the new and old assets. If the only point of time at which the condition as to the applicability of the relevant provisions has to be satisfied is when the new undertaking starts the manufacturing activity, such an industrial undertaking which subsequently adds used assets to its new business will continue to have the tax holiday for the full period of five years even though it has in fact and reality ceased to be a new industrial undertaking. Could it ever have been intended by the legislature that the benefit of tax holiday should still be available to such an industrial undertaking in all the subsequent years even though the essential condition for earning the tax holiday is not satisfied in those assessment years ? It is well-settled that even if the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction

of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies meaning of the words, and even the structure of the sentences [see *Tirath Singh Vs. Bachittar Singh and Others*,]. This is not a case where the meaning of the word is to be modified or the structure of the sentence is to be changed to achieve the legislative object. At the highest, this is a case where the language employed by the legislature might be capable of bearing more than one construction and, in such a case, in arriving at the true meaning, regard must be had to the fact that such construction is not adopted which defeats the very purpose for which the enactment was made. In our opinion, therefore, even the alternative submission made on behalf of the Revenue must be rejected.

(iii) Sri Sarangan, learned senior counsel, has also pressed into service, the judgment of Hon'ble apex Court in the case of *Bajaj Tempo Ltd. v. CIT* (supra) whereunder it is held as follows:

The initial exercise, therefore, should be to find out if the undertaking was a new one. Once this test is satisfied, then Clause (i) should be applied reasonably and liberally in keeping with the spirit of Section 15C(1) of the Act. While doing so, various situations may arise, for instance, the formation may be without anything to do with any earlier business, i.e., the undertaking may be formed without splitting up or reconstructing any existing business or without transfer of any building, material or plant of any previous business. Such an undertaking undoubtedly would be eligible to the benefit without any difficulty. On the other extreme may be an undertaking, new in its form but not in substance. It may be new in name only. Such an undertaking would obviously not be entitled to the benefit. In between the two, there may be various other situations. Difficulty arises only in such cases. For instance, a new company may be formed, as in this case—a fact which could not be disputed, even by the ITO. But tools and implements worth Rs. 3,500 were transferred to it from the previous firm. Technically speaking, it was transfer of material used in a previous business. One could say, as was vehemently urged by learned Counsel for the Department, that where the language of the statute was clear, there was no scope for interpretation. If the submission of learned Counsel is accepted, then once it is found that the material used in the undertaking was of a previous business, there was an end of the inquiry and the Assessee was precluded from claiming any benefit. The words of a statute are undoubtedly the best guide. But, if their meaning gets clouded, then the Courts are required to clear the haze. Sub-section (2) advances the objective of Sub-section (1) by including in it every undertaking except if it is covered by Clause (i) for which it is necessary that it should not be formed by transfer of building or machinery. The restriction or denial of benefit arises not by transfer of building or material to the new company but that it should not be formed by such transfer. This is the key to interpretation. The formation should not be by such transfer. The emphasis is on formation not on use. Therefore, it is not every transfer of building or material

but the one which can be held to have resulted in formation of the undertaking.

Judgments relied upon by Revenue

(iv) Sri Inder Kumar, learned Senior Counsel appearing for the Revenue, has pressed into service several decisions and in particular has relied upon the following decisions:

(a) Kanhiyalal Rameshwar Das v. CIT (supra)

A little deliberation on the other wording of Sub-section (4)(ii) would confirm the correctness of our reading of this Sub-section, as discussed above. Mindful of the plain meaning of the language employed by it in enacting Sub-section (4)(ii) and conscious of the fact that the said language takes in machinery previously used for any purpose, no matter whether such use was by the Assessee or by a third person, the legislature took care to use the explanatory words "(not being a building taken on rent or lease)" in order to make an exception in respect of a leasehold building which, even if previously used for any purpose by the lessor would still entitle the Assessee to tax relief in respect of the capital employed in acquiring the lease. However, if the building transferred to the new business is not a building taken on rent or lease by the Assessee, the capital employed on the acquisition of such a building, if it happens to be a previously used building, would not qualify for tax relief u/s 80J, Sub-section (4). We may further mention here that Sub-section (4)(ii) has been amended since 1976 in that the words "a building (not being "a building taken on rent or lease)" have been omitted from it and the second proviso and the Explanation, reproduced in an earlier part of this judgment, have been inserted in it. We are not called upon for the purpose of this reference to express any opinion on the effect of these amendments on the transfer to a new business of a building previously used for any purpose by the lessor.

So far as previously used machinery is concerned, there is no change in Sub-section (4)(ii) even as a result of its amendment in 1976. The Explanations which were inserted into this Sub-section in 1976 would, however, further show that if an industrial undertaking is formed by the transfer to it of machinery previously used for any purpose, the capital employed on the acquisition of such machinery would not qualify for tax relief u/s 80J. Explanation 1 deals with machinery or plant used outside India. If the Assessee acquires such machinery, the capital employed on such acquisition would qualify for tax relief if the machinery had been under use by a person other than the Assessee. Had Sub-section (4)(ii) been intended to mean that machinery previously used by a person other than the Assessee, if acquired by the Assessee for his new business, would qualify for tax relief the legislature would not have felt the necessity of inserting Explan. 1, for this Explanation has obviously been inserted by way of an exception to Sub-section (4)(ii) to provide tax relief to an Assessee who acquires old machinery from another person who had used it outside India. If Sub-section (4)(ii) was adequate enough to provide tax relief to an Assessee in respect of acquisition of

used machinery from, another person, Expln. 1 would become redundant. We cannot attribute redundancy to the legislature.

(b) CIT v. Mayur Laminators (supra)

The burden is on the Assessee when a deduction is claimed by him to prove that he is entitled to the said deduction. The object of Section 80J may be for industrial growth, but the relief can be given only when the Assessee falls within the four corners of law. On an interpretation which is not supported by law, the scope of this section cannot be enlarged. The Assessee cannot be entitled to the relief in accordance with this section and if the Assessee does not fall within the purview of the exemption, then for the purpose of beneficial legislation; the extended meaning cannot be given. In these circumstances, we are of the view that the Assessee has failed to prove that the conditions which have been contemplated under Clause (a) and (b) of Explns. 1 and 2 of Clause (4) of Section 80J has been complied with. Therefore, the Tribunal was not justified in holding that if used and old machinery is purchased from the open market for the formation of an industrial undertaking it will not be a disqualification u/s 80J(4) (ii) of the IT Act, 1961, for the purpose of deduction u/s 80J of the Ac.

(3) Facts of the case:

The Assessee is carrying on the business in manufacturing and export of fine chemicals and herbal medicines. It has units at Kunigal (Tamil Nadu District) and Nelamangala (Bangalore District). For the assessment year in question namely 2002-03 the Assessee claimed to be an eligible undertaking u/s 10B. The Assessee made its claim in the return for deduction of Rs. 9,35,80,445 in respect of Kunigal unit from its total income. In the Form No. 56G enclosed to the return of income the following qualification was indicated therein:

The Assessee contends that the plant and machinery acquired from M/s Kanfa Chemo Organic Ltd. amounting to Rs. 5.20 crores does not fall u/s 10A(2)(iii) as the said machinery was not previously used by the Assessee for any purpose which however, is not verifiable by us.

In view of this endorsement made or qualification made in Form No. 56G, the AO doubted the Assessee's claim to its entitlement for deduction u/s 10B. In reply dt. 28th Jan., 2005 the Assessee through its auditors submitted a written representation contending that Kunigal unit was purchased from M/s Kanfa under agreement dt. 28th March, 1996 and entire unit including land and building was purchased for an aggregate sum of Rs. 5.20 crores and the plant and machinery out of these 14 items purchased by the Assessee, the value of the plant and machinery was Rs. 2,65,75,695. It was contended that after acquisition in the year 1996 the Assessee has made considerable additions to new unit by way of plant and machinery of which major additions were made during the accounting year ending 31st March, 2002 and the machinery acquired from M/s Kanfa as a percentage of the total plant and machinery as on 31st March, 2002 at the Kunigal unit forms only 14.22 per cent of the WDV of the total plant and

machinery of the Kunigal unit and as such it contended that disqualification which was present at the initial stage stands fully removed in the asst. yr. 2002-03, which is in question and as such Assessee was eligible for claiming deduction u/s 10B was sought for. However, the AO concluded that plant and machinery acquired to the tune of Rs. 5.20 crores from M/s Kanfa were already put to use by the earlier unit and therefore provisions of Section 10B(2), Sub-Clause (iii) were violated/not complied and accordingly exemption came to be disallowed. This order of assessment came to be questioned by the Assessee before CIT(A) and the first appellate authority concurred with the view of the AO by relying upon Nippon's case (supra) and dismissed the appeal of the Assessee. The Assessee pursued the matter unsuccessfully before the Tribunal in ITA No. 484/Bang/2005 which held that the eligibility criteria has to be seen in the first year itself, rejected the plea of the Assessee that subsequent fulfillment of criteria by way of investment in new machinery would not be construed as sufficient compliance and accordingly rejected the appeal of the Assessee.

(4) Our discussions and findings:

The eligibility criteria u/s 80J(1) of the Act is provided in Section 80J(4)(ii) of the Act. The condition is that the undertaking must not have been formed by transfer to the new business of machinery or plant previously used for any purpose. As against words "used for any purpose" in the 1961 Act, the words that were used under 1922 Act were "previously used in any other business". Thus, framers of the enactment have consciously omitted to use the words "in any other business" and have used the words "previously used for any purpose". No doubt, plant and machinery which may be installed by an Assessee insofar as that plant or unit and machinery secured during the year of commencement of production may become "new" insofar as the Assessee is concerned. However, the Assessee also has to establish and demonstrate that said machinery or plant is not or was not previously used for any purpose before being installed or being put into use by the new unit in which the eligibility is claimed and deduction is sought for. This aspect will have to be kept in mind while examining the eligible criteria which is pressed into service and deduction of income so earned from total income is sought for by pressing into service eligibility criteria prescribed u/s 10B.

11. From a reading of Section 10B(1), it would emerge that it is a special provision extended to newly established 100 per cent Export Oriented Unit (EOU) which entitles the said EOU to claim deduction of its profits and gains derived by it from the export of its articles or things or computer software. The period for which the Assessee would be entitled to claim deductions of such profits is not eternal. It is for a fixed period of "ten consecutive years" in which the undertaking begins to manufacture or produce articles or things or computer software depending upon the activity of the Assessee. Thus, it would emerge that an Assessee would be entitled to claim deduction of such profits and gains derived by it and it would be entitled to claim such deduction for a period of 10 consecutive years from the date of commencement of its manufacture as

envisaged in the section itself. Learned advocates appearing for the Assessee as well as Revenue, have canvassed and addressed their arguments to contend that Assessee would be entitled to claim deduction in any of these 10 years. We are required to examine in the instant case about the entitlement of the Assessee to claim deduction of its income earned from its Kunigal unit from out of its total income for the asst. yr. 2002-03 which has been negated by the AO on the ground that plant and machinery purchased by the Assessee was already put to use by the said concern namely, M/s Kanfa Chemo Organic Ltd. Thus, within this narrow sphere i.e., whether the said finding of the AO as confirmed by both the appellate authorities which are fact-finding authorities, is required to be affirmed or rejected, is being examined.

12. It would emerge from reading of Section 10B that following conditions would be the criteria to claim deduction under the said section:

(a) Assessee should be a newly established 100 per cent EOU

(b) it should have derived profits and gains by such unit

would be entitled to seek deduction for ten consecutive years from the day the undertaking begins to manufacture or produce as the case may be. This means that in a given case, if the Assessee were to commence its manufacture, say for instance in the year 1995, it would be entitled to claim 100 per cent deduction from out of its total income in respect of profits and gains derived by it in the assessment year relevant to the previous year for 10 consecutive years. This principle would be applicable in normal circumstances. Now let us take another example where the Assessee commenced production or manufactured or produced articles or tilings or computer software in the year 1995 and would be unable to derive profits and gains for three consecutive years, but would be able to derive profit in the asst. yr. 1998-99, then it would arise as to whether Assessee would be entitled to claim for the balance period remaining in the 10 year period so fixed. To say that Assessee would not be entitled to claim deduction in that financial year in which it had derived profits and gains, would render the provision itself nugatory in as much as it is a special provision made to encourage the EOU and particularly when such EOUs would be able to earn foreign exchange for the country.

13. A situation arose where the Assessee had set up their units in Domestic Tariff Area (DTA) which was subsequently approved as 100 per cent EOU by the Board appointed by the Central Government in exercise of powers conferred u/s 14 of the Industries (Development and Regulations) Act, 1951, and the question which arose before the Central Government was:

Whether such EOUs from DTA would be eligible for deduction u/s 10B ?

The Board has issued Circular No. 1 of 2005, dt. 6th Jan., 2005 (F No. 149/194/2004-TPL) [(2005) 194 CTR (St) 225] and has clarified as under:

4. The matter has been examined and it is hereby clarified that an undertaking

set up in Domestic Tariff Area (DTA) and deriving profit from export of articles or things or computer software manufactured or produced by it, which is subsequently converted into an EOU, shall be eligible for deduction u/s 10B of the IT Act, on getting approval as 100 per cent EOU. In such a case, the deduction shall be available only from the year in which it has got the approval as 100 per cent EOU and shall be available only for the remaining period of ten consecutive assessment years, beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software as a DTA unit. Further, in the year of approval, the deduction shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100 per cent EOU. Moreover, the deduction to such units in any case will not be available after asst. yr. 2009-10.

(Emphasis, italicised in print, supplied by us)

Thus, it would emerge from reading of Section 10B together with circular issued by the Board above-referred to that in a given case, if an Assessee was operating as a DTA and had commenced production and was later converted into EOU, it would be eligible for deduction u/s 10B from the year in which it has got the approval as 100 per cent EOU and this deduction to be claimed by an Assessee would be available to it for claiming the benefit for remaining period out of 10 consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking had commenced to manufacture or produce articles or things or computer software as a DTA unit. On a combined reading of Section 10B, Expls. 1 and 2 to Section 80-1 and above-referred circular, it would emerge that even in case of an Assessee which was operating in DTA and later on was converted into 100 per cent EOU still it would be eligible to claim the benefit flowing from Section 10B for the remaining of 10 consecutive years. Say for instance, the Assessee commences production in DTA in the asst. yr. 1995-96 and converts the unit into 100 per cent EOU in the asst. yr. 1998-99, the Assessee would be entitled to claim the benefit flowing from Section 10B for the remaining period of seven years excluding 1995-96 to 1997-98 (3 years). However, the question that would arise would be whether the condition prescribed u/s 1013(1) namely "undertaking begins to manufacture" is to be taken or the date on which unit got itself into 100 per cent EOU from DTA is to be taken is to be examined. At this juncture itself, it would be necessary to extract the judgment of Nippon Electronics referred to supra, which reads as under:

The word formed" also suggests that the transfer contemplated is one at the time of formation of the new undertaking. The eligibility for exemption has to be tested in the initial assessment year. Therefore, the exemption would not be available if in the initial assessment year, the proportion of old assets transferred or utilised for the new business is above 20 per cent of the total investment, though in any subsequent year even if it be within five years, new investment is made so as to reduce the proportion of the value of the old assets below 20 per

cent. Therefore, the eligibility stands determined in the initial assessment year of manufacture, such benefit could be availed of in any of the succeeding four years. In the present case, admittedly, the Assessee being not eligible in the initial year, the question of granting exemption in subsequent years does not arise. We, therefore, respectfully disagree with the decision of the Gujarat High Court and answer the question in the negative and in favour of the Revenue.

14. On a conjoint reading of the above decision with Section 10B as also the Circular dt. 6th Jan., 2005. it would emerge that Assessee in a given case would be entitled to claim deduction of such profits and gains derived by it as a 100 per cent EOU beginning with the assessment year relevant to the previous year in which, "the undertaking begins to manufacture or produce articles or things or computer software, as the case may be". Thus, year of commencement of manufacture would be the criteria and none else. At this juncture it would be of benefit to extract the decision of Hon"ble Supreme Court in the case of State of Jharkhand and Ors. v. Ambay Cements and Anr. (supra) wherein it is held as under:

23. Mr. Bharukha further submitted that in taxing statutes, provision of concessional rate of tax should be liberally construed and in respect of the above submission, he cited the judgment of this Court in CST v. Industrial Coal Enterprises (1992) 2 SCC 607 and in the case of Bajaj Tempo Ltd. v. CIT (1999) 3 SCC 78. We are unable to countenance the above submission. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the Court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the Respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, noncompliance of the same must result in cancelling the concession made in favour of the grantee the Respondent herein.

15. Sri Sarangan, learned senior counsel appearing for the Assessee. has pressed

into service. Gopal Plastic's case (supra) whereunder the scheme of Section 80J came up for consideration to distinguish the decision of this Court in Nippon Electronics (supra). The substantial question of law which came to be formulated therein was as under:

Whether it was entitled to relief u/s 80J although the old machinery was less than the prescribed percentage of 20 per cent, during the relevant year, but in excess of 20 per cent in an earlier year ?

While answering the substantial question of law formulated by it. Hon''ble Madras High Court has referred to the decision of CIT v. Satellite Engineering Ltd. (supra) rendered by Gujarat High Court which had taken the view that an undertaking which did not fulfill the conditions for the relief in the first year of commencement of production, but subsequently during the period of tax holiday fulfilled the conditions, enjoys the benefit of Section 84 (new Section 80-J). In these two cases namely Gopal Plastics and Satellite Engineering (supra) what came to be considered was the entitlement of the Assessee to claim deduction u/s 84(2)(ii) r/w Explanation to Sub-section (3) on the ground that during the period of tax holiday, it had acquired and installed new machinery and as such it was entitled to deduction. It is to be noticed that in Satellite Engineering's case (supra), it was a case where the Assessee through its factory commenced production on and w.e.f. 1st June. 1962: in substance and reality, manufacturing activity could not be commenced or started in the said year since all the component parts required for the manufacture of switches were not procured and its products were not produced in its factory all the new machinery was installed and therefore it was contended that the first year of the formation of new undertaking should be construed to be the year in which the Assessee set up its entire unit along with new machinery. This contention of the Assessee had been negated by the AO and on examination of facts it was found by the Tribunal, the Assessee in the said case in the year of assessment had satisfied the conditions laid down in Section 84(2)(ii) and thus Satellite Engineering's (supra) case came to be followed in Gopal Plastics (supra). In both these decisions, it is opined that starting point of the holiday period would be the year in which the manufacture or production of the article begins and there is no dispute on this. At this juncture itself it would be of necessity to extract the relevant portion of the judgment in Satellite Engineering Ltd. (supra) wherein it has been held as under:

According to this scheme, there are two limitations on the claim of a new industrial undertaking to the benefit of tax holiday: first, that the benefit will be available for a total period of five consecutive years only and, secondly, that the starting point of such period would be the year in which the manufacture or production of the article begins!

(Emphasis, italicised in print, supplied by us)

When these two decisions are examined with reference to Nippon Electronics''

case (supra), we find that eligibility test has to be in the initial assessment year and if for any reason like not earning profits and gains in the initial years on account of its infancy and on account of non-stabilization of its unit, as the case may be, it may not be able to derive the benefits flowing from Section 10B in that year, but would be eligible to avail the same in any of the succeeding years, once it is found eligible in the initial year of manufacture. It is held in Nippon Electronics (supra) as under:

Therefore, the eligibility stands determined in the initial assessment year and once an industrial undertaking is found eligible in the initial year of manufacture, such benefit could be availed of in any of the succeeding four years. In the present case, admittedly, the Assessee being not eligible in the initial year the question of granting exemption in subsequent years does not arise.

(Emphasis, italicised in print, supplied by us)

16. The contention of the Assessee is that in the cases of Satellite Engineering and Suessin Textiles (supra) of Gujarat High Court and Orissa Cement Ltd. (supra) of Delhi High Court by relying upon Bajaj Tempo Ltd. (supra), it has been held that an Assessee having installed machinery at a subsequent period i.e., during the period of holiday and in that assessment year in which benefit is claimed if the Assessee is able to satisfy the conditions laid down in Section 80J(4)(ii), it should not be deprived of such exemption, would not be applicable to the facts of the present case. In the instant case, what is to be noticed is that Section 10B stands on a separate and distinct footing whereunder the special provision is extended to newly established 100 per cent EOUs which would necessarily mean that they would be earning foreign exchange which would be the yardstick for measuring national economy. Hence, we are unable to accede to the prayer made by the learned Counsel for the Assessee that the provisions of Section 80J(4)(ii) and Explanation provided thereunder has to be read in conjunction with Section 10B, though appears at the first blush deserves to be accepted, it cannot be done so since the provision of Section 1013 is a special provision extended to 100 per cent EOUs. Thus, starting point of limitation for claiming the benefit flowing from Section 10B would commence from the year of manufacture or production of the undertaking and if such condition is not satisfied in the year of commencement of production, it would not be able to claim such deduction in the subsequent years unless the said initial test on the date of the starting point of limitation had been satisfied. This view of ours is fortified from the decision of the Hon"ble Supreme Court in the case of Textile Machinery Corporation Ltd. v. CIT (supra) which has also been referred to in Nippon Electronics India (P) Ltd. (supra) by Coordinate Bench of this Court, as also in the circular issued by the Board dt. 6th Jan., 2005.

17. Yet few other facts which require to be noticed by us are as under:

(a) In the judgments relied upon by learned Counsel for the Assessee namely Gopal Plastics (supra) and Satellite Engineering (supra), what came up for

consideration was interpretation of Sections 80J and 84 and what we are considering in the instant case is Section 10B and in those two decisions, the issue regarding "starting point of limitation" to claim the benefit was not under active consideration vis-a-vis initial fulfillment of mandatory criteria.

(b) When the AO sought for reply from Assessee as to why the benefit claimed by Assessee is not to be disallowed, a reply came to be submitted by the Assessee through its chartered accountant dt. 28th Jan., 2005 whereunder Assessee has enclosed the valuation report of the valuer and it is stated therein as under:

7. Status of the Unit: The unit which started production in 1994-95 by M/s Kanfa Chemo Organics Ltd., was taken over by M/s Sami Chemicals and Extracts during 1996, is in running condition.

(c) Even under Explan. 2 to Section 80-I which is mutatis mutandis made applicable to Clause (iii) of Sub-section (2) of Section 10B it is to be noticed that, "plant and machinery" should not have been "used for any purpose" so transferred to a new business and in the instant case it is not by transfer of portion of "plant and machinery" to Assessee's new unit from M/s Kanfa Chemo, but a defunct unit as a whole has been taken over by Assessee as is evidenced from valuation report and there was no existing unit at Kunigal belonging to the Assessee. Hence, even on this count Assessee would not be entitled to the benefit flowing from Section 10B. Even according to Assessee itself, the percentage year-wise is as under:

Statement showing Surnmanj of Kunigal undertaking?-Plant and Machinery

Particulars Kanfa Labs Additions by SAMI Total WDV % Kanpha to to

For the year ended 31.3.97 2,73,62,456 1,32.76.571 3,06,42.027 8931%

For the year ended 31.3.98 2,05.24,092 1,13,18,597 3.13.42,889 64.45%

For the year ended 31.3.99 1,53.93,067 1,56,79.557 8,10.72,624- 49.54%

For the year ended 31.3.2000 115,44,800 1.37,51,731 2.52.96,53 1 45.64%

For the year ended 31.3.2001 86,58.600 1.36.17.900 2.22,76,500 38.87%

For the year ended 31.3.2002 48,58,065 2,93,11,583 3,41.69.648 14.22%

And even otherwise, the value of plant and machinery as on the date of commencement of production i.e., in 1996 was more than 20 per cent and thus Explan. 2 would also not come to the rescue of Assessee to claim the benefit u/s 10B.

18. In view of the above discussion, we are of the considered view that the substantial question of law formulated hereinabove deserves to be answered in the negative i.e., against the Assessee and in favour of the Revenue. Accordingly the following order is passed:

ORDER

Appeal is dismissed. The substantial question of law is answered in the negative i.e., in favour of the Revenue and against the Assessee and the order passed by the Tribunal, Bangalore Bench "A", in ITA No. 484/Bang/2005. dt. 9th Sept., 2005, is hereby affirmed. Costs made easy.