**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

****

**I.T.R. Nos.336 & 337 of 1995**
**Date of Decision:28.02.2007**

**The Commissioner of Income-tax, Patiala**

**.....Petitioner**

**Vs.**

**M/s Metalways (P) Ltd., Chandigarh**

**.....Respondent**

**CORAM:- HON'BLE MR. JUSTICE M.M.KUMAR**
**HON'BLE MR. JUSTICE RAJESH BINDAL**

Present:- Mr. Sanjiv Bansal, Advocate for the revenue.

Mr. S.K.Mukhi, Advocate for the assessee.

****

**RAJESH BINDAL, J.**

The following question of law has been referred for opinion of this Court, arising out of a common order passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (for short, `the Tribunal') in I.T.A. Nos.1322 and 1323/Chandi/87 dated 8.4.1993, in respect of assessment years 1979-80 & 1980-81:-

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in allowing deduction u/s 80J for assessment years 1979-80 and 1980-81 when the period of five years laid down in sub-section (2) of section 80J had already expired?"

Briefly the facts as noticed in the statement of case are as under:-

> "The assessee company is manufacturing hand-knitting machines developed by one of the directors. It was claimed that the assessee was an Industrial undertaking, and, therefore entitled to deduction under section 80J of the Income-tax Act @ 7.5%. The concern M/s Metalways Engineering works was under the sole proprietorship of Sh R.K.Mahajan and this business, as a running concern, was transferred to a limited

company named M/s Metalways (P) Ltd. In the new company, Sh Mahajan, who was earlier the sole proprietor of the business, became one of the directors. The new company, namely, the assessee, claimed deduction under section 80J at Rs.71,636/- on the ground that the production was started after 31.3.1976. The new company had been incorporated on 29.6.1977 and it took over the running business from Sh Mahajan who was earlier doing the business in his individual capacity. The assessee-company claimed that it was a new industrial undertaking. The assessing Officer disallowed the claim on the ground that the business had been purchased by the assessee as a running concern already in existence and old plant and machinery had been transferred to the assessee. It was also noted that the industrial undertaking taken over by the assessee had actually commenced manufacturing activity during the year 1973 and, therefore, initial year for the purpose of section 80J was assessment year 1974-75. Therefore, in the view of the Assessing Officer, deduction could be allowed up to assessment year 1978-79 in the case of Sh. Mahajan."

In appeal before the Commissioner of Income Tax (Appeals) (for short, `the CIT(A)'), the claim of the assessee was accepted and the CIT (A) while referring to Explanation 2 of Section 80J(4)(ii) of the Income Tax Act, (for short,`the Act') held that for the assessment years in question, the assessee- Company fulfilled the conditions laid down for grant of deduction under Section 80J of the Act. Accordingly, a direction was issued to the Inspecting Assistant Commissioner to allow deduction to the assessee. In further appeal before the Tribunal, the order passed by CIT(A) was upheld.

We have heard Shri Sanjiv Bansal, learned counsel appearing for the revenue and Shri S.K. Mukhi, learned counsel appearing for the assessee and with their assistance perused the paper book.

Primarily, learned counsel for the revenue has raised two issues, namely, that the machinery having been installed in the year 1974-75, the assessee would not be entitled to any deduction under Section 80J of the Act on that machinery after the assessment year 1978-79 and

accordingly the relief claimed for the years in question i.e. 1979-80 and 1980-81 would not be admissible to the assessee. He further submitted that the Tribunal has held the assessee to be entitled to deduction for use of old machinery under Section 80J of the Act which is totally contrary to the bare language of the provisions of law.

On the other hand, learned counsel for the assessee submitted that the assessee is not claiming any benefit on the value of old machinery as is the impression gathered from the language used in the order of the Tribunal as the same is not admissible in terms of provision of Section 80J (4) of the Act as evident from explanation 2 to Section 80J (4) of the Act. Repelling the argument raised by learned counsel for the revenue, it is submitted that the assessee is not claiming any benefit on the machinery which was purchased and used by him as sole proprietor in the year 1974-75 rather, as the language of Section 80J of the Act suggests, for the benefit available to assessee, the eligibility is to be considered in terms of Sub Section (4) thereof. In fact, the assessee is fully eligible to claim the benefit from the assessment year 1978-79 onwards and even if an assessee is not eligible for claiming the benefit during the first year of operation, it is not debarred to claim the same during subsequent years within overall maximum period provided in case the conditions, therefor are fulfilled.

To substantiate the plea, learned counsel for the assessee has referred to and relied upon judgments of High Courts, namely: **Kerala State Cashew Development Corporation Vs. Commissioner of Income-Tax (1994) 205 ITR 19, Commissioner of Income-Tax Vs. Gopal Plastics (P.) Ltd. (1995) 215 ITR 136** and **Commissioner of Income-Tax Vs. Laxmi Metal Industries (1999) 236 ITR 130.**

To appreciate the controversy in the present case, it would be appropriate to extract relevant provisions of Section 80J of the Act, which read as under:-

> "80J.(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains (reduced by

the deduction if any, admissible to the assessee under section 80HH or section 80HHA) of so much of the amount thereof as does not exceed the amount calculated at the rate of six per cent per annum on the capital employed in the industrial undertaking or ship or business of the hotel, as the case may be computed in the manner specified in sub-section (1A) in respect of the previous year relevant to the assessment year the amount calculated as aforesaid being hereafter, in this section, referred to as the relevant amount of capital employed during the previous year

(2) The deduction specified in sub-section (1) shall be allowed in computing the total income in respect of the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts functioning such assessment year being hereafter, in this section, referred to as the initial assessment year and each of the four assessment years immediately succeeding the initial assessment year:

**Provided** that in the case of an assessee, being a co-operative society, the provisions of this sub-section shall have effect as if for the words "four assessment years", the words "six assessment years" had been substituted.

(3) xx xx xx xx xx

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

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

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

(iii) it manufactures or produces articles, or operates one or more cold storage plant or plants, in any part of India, and has begun or begins to manufacture or produce articles or to operate such

plant, or plants, at any time within the period of thirty-three years next following the 1st day of April, 1948, or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

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

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

**Provided further** that, where any building or any part thereof previsouly used for any purpose is transferred to the business of the industrial undertaking, the value of the building or part so transferred shall not be taken into account in computing the capital employed in the industrial undertaking.

**Provided also** that in the case of an industrial undertaking which manufactures of produces any article specified in the list in the Eleventh Schedule, the provisions of clause (iii) shall have effect as if for the words "thirty-three years", the words "thirty-one years" had been substituted.

*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 the India Income-tax Act, 1922 (11 of 1922), or 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 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."

Having heard learned counsel for the parties, we are of the view that the revenue is merely misconstruing the order passed by the Tribunal as far as grant of benefit on the value of old machinery is concerned. The import of the order of the Tribunal is not in that term. The benefit admissible is calculated in terms of provisions of Section 80J of the Act. It cannot be over-ridden or re-written by the Tribunal. This plea of the counsel for the revenue has not even been disputed by the learned counsel for the assessee considering explanation 2 to Section 80J (4) of the Act. As far as the issue regarding the availability of benefit to the assessee during the years in question is concerned, we find that even the answer thereto is available on a plain reading of Sub Section (4) of Section 80J of the Act. Contention raised by the learned counsel for the revenue that whenever new entity is formed by the transfer of machinery or plant previously used for any purpose to the new entity, the benefit on the old machinery would be

restricted upto 5 years from the date of first purchase of the machinery and for that reason the assessee would not be entitled to the benefit of deduction under Section 80J of the Act during the years in question as period had already expired during the year 1978-79 if calculated from the first year of use of machinery in the assessment year 1974-75. As is found from plain reading of provisions of Section 80J of the Act, the benefit is not available on the machinery or plant rather the same is referable and calculated on the capital employed in the industrial undertaking. As far as eligibility of the petitioner and fulfillment of condition (ii) in Sub Section (4) thereof, is concerned a deeming provision has been added in explanation 2 thereof which provide that in case the value of machinery and plant so transferred to the new entity does not exceed 20% of the total value of plant used in the business then the new entity shall be deemed to be complying with the condition put in clause (ii) of Sub Section (4) thereof. However, value of such machinery was not to be computed for the purpose of calculation of deduction under this Section. It has not been disputed on the basis of facts on record that the value of machinery transferred by the assessee to the new entity was less than 20% of the capital employed during the year in question. Accordingly, the assessee was eligible for availing benefit under Section 80J of the Act.

Once it is found that new entity coming into existence in the assessment year 1978-79, being eligible for deduction under Section 80J of the Act, the assessment years i.e. 1979-80 and 1980-81 would fall within the permissible period of 5 years and accordingly the assessee would be entitled to deduction under Section 80J of the Act during the assessment years in question.

In view of our above discussions, the question referred is answered against the revenue and in favour of the assessee.

The reference is disposed of accordingly.

**( RAJESH BINDAL)**
**JUDGE**

**February 28, 2007** **( M.M.KUMAR )**
**renu** **JUDGE**