**(1995) 12 CAL CK 0031**

**Calcutta High Court**

**Case No:** IT Reference No. 26 of 1993

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| Commissioner of Income Tax | | APPELLANT |
| | Vs | |
| P.K. Engg. and Forging (P.) Ltd. | | RESPONDENT |

**Date of Decision:** Dec. 22, 1995

**Acts Referred:**

- Income Tax Act, 1961 - Section 119, 119(1), 256(2), 80J, 80J(4)(ii)

**Citation:** (1996) 87 TAXMAN 101

**Hon'ble Judges:** Dibyendu Bhusan Dutta, J; Bhagabati Prosad Banerjee, J

**Bench:** Division Bench

**Judgement**

Bhagabati Prosad Banerjee, J.
The following questions of law have been referred to this Court by the Tribunal pursuant to the direction given by this Court u/s 256(2) of the income tax Act, 1961 ("the Act") :

1. Whether, on the facts and in the circumstances of the case and on a correct interpretation of the provisions of section 80J(4) (ii) of the income tax Act, 1961, the Tribunal while deciding the issue relating to section 80J of the said Act was correct in law in following the Circular F. No. 15/6/63/IT/A-2 dated 13th December, 1963 issued by the Board u/s 84 of the Act, which was omitted by the Finance (No. 2) Act, 1967, with effect from 1st April, 1968 ?

2. Whether, on the facts and in the circumstances of the case and on a correct interpretation of the provision of section 80J(4) (ii) of the income tax Act, 1961, the Tribunal was correct in law in holding that the Board"s Circular F. No. 15/5/63/IT/A-1 dated 13th December, 1963 relating to section 84 of the Act (Since omitted) would equally apply to section 80J of the Act ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in directing the income tax Officer to examine the assessee''s claim for relief u/s 80J of the income tax Act, 1961 in the light of the Circular P. No. 15/5/63/IT/A1 dated 13thDecember, 1963 issued by the Board u/s 84 of the Act, which was omitted by the Finance (No. 2) Act, 1967 with effect from 1st April,1968 ?

The brief facts of the case are that during the year of account relevant to the assessment year of account relevant to the assessment year 1980-81, P.K. Steel Industries a registered firm, was carrying on the business. In that year the registered firm claimed relief u/s 80J of the Act. The ITO disallowed the claim, but the Commissioner (Appeals) allowed the assessee''s claim, in that he directed the ITO to allow deduction u/s 80J for nine months and to recompute the capital employed by the firm. This was done.

P.K. Engg. & Forging (P.) Ltd., the assessee before us, acquired the business of the said registered firm as a going concern, the first year of operation being the year of account relevant to the assessment year 1981-82. The assessee claimed relief u/s 80J not only for the assessment year 1981 -82, but also for two subsequent assessment years, namely, 1982-83 and 1983-84. The ITO rejected the assessee''s claim on the ground that the claim cannot be allowed u/s 80J(4) (ii). The Commissioner (Appeals) upheld the decision of the ITO on this point for the said three assessment years.

2. Being aggrieved by the order of the Commissioner (Appeals), the assessee moved the Tribunal. The Tribunal, on examination of the facts and the circumstances of the case and taking into account particularly the Board Circular F. No. 15/5/63 - IT(AI), dated 13-12-1963, which was issued in relation to section 84 of the Act, in this connection had held that :

10. We have examined the matter. The lower authorities have rejected the assessee''s claim u/s 80J because its case is hit by the pro visions of section 80J(4) (ii). However, the Board Circular referred to supra is directly on the point, and according to it in the case of the type under consideration, the claim for deduction u/s 84 is admissible. The provisions of section 80J are in material respects, identical with those of section 84. Therefore, the Board circular referred to above will equally apply to section 80J.

11. It is well-settled that any circular of the Board which confers a benefit on the assessee must be followed by the departmental officers. In view of the foregoing therefore, we direct the ITO to examine the assessee''s claim in the light of the Board circular referred to supra and to allow to the assessee the deduction admissible to it u/s 80J...

Mr. Prasad, the learned counsel appearing on behalf of the revenue, submitted that the circular dated 13-12-1963, was issued by the Board in connection with section 84 and not in connection with the provisions of section 80J and as such the said circular had no manner of application and accordingly the Tribunal was wrong in granting relief to the assessee on that score relying on that circular.

3. The learned counsel appearing on behalf of the assessee submitted that the said circular is applicable in the facts and circumstances of the case, in view of the fact that the provisions of section 84 and section 80J were in pari materia and the Tribunal has rightly held that the said circular, which was issued in connection with section 84, is applicable in full force in respect of the cases u/s 80J.

4. The provisions of section 84, as originally there, is as follows :

Income of newly established industrial undertakings of hotels. -(1) Save as otherwise hereinafter provided, income tax shall not be payable by an assessee on so much of the profits and gains derived from any industrial undertaking or business of a hotel or from any ship, to which this section applies, as does not exceed six per cent per annum on the capital employed in such undertaking or business or ship, computed in the prescribed manner.

(2) This section applies to any industrial undertaking which fulfills 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 a building, machinery or plant previously used for any purpose;

(iii) it manufactures or produces articles or operates one or more cold storage 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 twenty-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;

5. Subsequently, section 80J was incorporated replacing section 84. The provisions of section 80J is as follows;

New section 80J seeks to replace section 84 as proposed to be amended by clause 24 of the Bill. u/s 80J, where the gross total income of an assessee includes any profits and gains from an industrial undertaking or ship or the business of a hotel to which this section applies, the profits and gains of such industrial undertaking or ship or the business of the hotel up to 6 per cent per annum of the capital employed therein will be allowed as a straight deduction in computing the total income of the assessee. Under the provisions of section 84, such income qualifies for a rebate of tax at the average rate of tax applicable to the total income of the assessee.

Section 80J further provides for the carry-forward of any deficiency in the tax holiday benefit from the assessment year 1967-68 onwards to the subsequent assessment years

for being allowed as a straight deduction in computing the total income of the assessee for such subsequent assessment years. Such carry-forward is to be allowed up to the eighth assessment year commencing with the assessment year in which the industrial undertaking started producing articles or operating a cold storage plant or the ship was brought into use by the Indian company for the purpose of its business or, as the case may be, the business of the hotel started functioning. The "deficiency" in the "tax holiday" benefit is the amount by which the profits and gains derived from the industrial undertaking or ship or business of the hotel in each year falls short of six per cent, of the capital employed in the business. While the carry-forward and allowance of deficiency is, as stated above, permissible up to the 8th assessment year from the year of commencement of the business the deduction on account of profits and gains up to 6 per cent of the capital employed is to be allowed, as under the present law, for a total period of 7 years from the year of commencement in the case of a co-operative society, or 5 years in the case of any other assessee.

In other respects, the provisions of section 80J are, in substance the same as those of section 84 as proposed to be amended by clause 24 of the Bill.

It is not in dispute that section 80J seeks to replace section 84 by the Finance (No. 2) Act, 1967.

6. u/s 119 of the Act, the Board may from time to time, issue such orders, instructions and directions to the income tax authorities as it may deem fit, for the proper administration of the provisions of the Act and such authorities and all other persons employed in execution of the said Act, should observe and follow such orders and instructions of the Board. It is well-settled principle that section 119(1) provides in unmistakable terms that every officer and persons employed in the execution of the circulars issued by the Board are generally binding on officers and persons employed in the execution of the said Act. This view was taken by the Supreme Court in the case of Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, and other cases.

7. In the instant case, the question is whether the circular in question is binding upon the ITO and on the strength of the said circular, the ITO was bound to grant relief to the assessee as provided in the said circular and accordingly it is beyond the scope of the reference to determine whether the said circular is a law and whether the said circular is binding upon the Courts. These questions are beyond the scope and ambit of this reference.

8. Mr. Prasad, led by Mr. P.K. Mullick, submitted that the said circular could not be made applicable in the facts and the circumstances of the case as it has been rightly pointed out by the Commissioner that the said circular was issued in connection with the relief u/s 84, not in connection with the section 80J. We are unable to accept this position in view of the fact that not only the two sections are in pari materia, section 84 has since been

deleted and has been replaced by section 80J and that the purpose and the object of the said two sections, section 80J and section 84, were the same and it is not a case that the fields covered by section 80J and section 84 are different. The field which was originally covered by section 84 after the deletion of section 84, has been replaced by section 80J.

It was further submitted by Mr. Prasad that the circular is in conflict with the provisions of the Act, inasmuch as the benefit could not be allowed to an industrial undertaking if it was formed by the transfer to a new business of the building, machinery or plant previously used for any purpose. But (the circular provided that the benefit of the section attaches to the undertaking and not to the owner thereof and that the successor of the plant and machineries would be entitled to the benefit for the un expired period of five years provided the undertaking is taken over as a running concern.

9. In the facts and circumstances of the case, it is clearly evident, for the order of assessment, that according to the deed, the business of P.K. Steel Industries has been taken over by the assessee-company with all its asset sand liabilities as a going concern. The purpose of the said circular, from the language used in the said circular, it is clear that the benefit of the said circular would be available if it is not formed by the transfer to a new business of the building, machinery, and plant previously used for any purpose. The purpose is to grant benefit for a period of five years and if the benefit has been enjoyed for a period of less than five years in respect of the said plants and machinery, in that event, the successor would be entitled to the benefit of the residual period or, in other words, if an industry has been set up with certain plant and machineries and that plant and machineries have been used for three years by the company, and the successor and the successor-company which has taken over the said plant and machinery as a going concern with all the assets and liabilities, the said business is continued; in that event, the residuary period of two years'' benefits would be available in respect of the plant and machineries used by the successor.

It is not the object of the provisions of section 80J and/or section 84, to give concession or benefit to a concern which had started with the plant and machineries of another concern which had started as a new set-up and enjoyed the benefit of concession and if further concession is allowed by transfer of business or set-up a new business with the old plant and machinery, that would result in encouraging, evasion of income tax by unscrupulous assessees. Once on the basis of the plant and machinery, an industry has enjoyed the benefit of five years, in that event, the same plant and machinery is transferred or a new industry is set up with that plant and machinery; that newly set-up, whether a transferee or not, would not be entitled to get any further benefit. That is the exact scope and ambit of the provisions of the Act, read with the circular.

10. Accordingly, in the facts and circumstances of the case, when section 80J has been replaced by the Parliament in place and state of section 84, in that event, we are of the view that the said circular would apply in the same field. The purpose of the two sections being the same and the said two sections are in pari materia.

Accordingly, we are the view that the Tribunal was right in holding that the said circular was applicable in case of the industry set up u/s 80J even though the original circular was issued u/s 84.

Accordingly, we are rejecting the contention raised by the revenue.

11. In the facts and circumstances of the case, the first question is answered in the affirmative and in favour of the assessee.

12. Question No. 2 is also answered in the affirmation in favour of the assessee.

13. The question No. 3 is also answered in the affirmative and in favour of the assessee.

Dutta, J. - I agree.