IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY ,THE 17TH DAY OF DECEMBER 2018 / 26TH AGRAHAYANA, 1940

ITA.No. 32 of 2011

AGAINST THE ORDER/JUDGMENT IN ITA 848/2007 of
I.T.A.TRIBUNAL,COCHIN BENCH DATED 14-10-2010

APPELLANT/S:

M/S. STABILIX SOLUTIONS (P) LTD.
212, NILA TECHNOPARK CAMPUS, KARIAVATTOM, TRIVANDRUM - 695 581.

BY ADVS.
SRI.E.K.NANDAKUMAR (SR.)
SRI.P.GOPINATH (SR.)
SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS

RESPONDENT/S:

*THE INCOME TAX OFFICER, WARD-1(1)
RANGE - 1, KOWDIAR, TRIVANDRUM - 695 003.

BY ADVS.
SRI.P.K.R.MENON, SR.COUNSEL GOI TAXES
SRI.JOSE JOSEPH, SC FOR INCOME TAX

*THE NAME OF THE RESPONDENT IS CORRECTED AS “THE COMMISSIONER OF INCOME TAX, KOWDIAR, TRIVANDRUM-695003” AS PER ORDER DATED 10.03.2011 IN I.A.NO.537/2011.

OTHER PRESENT:

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 17.12.2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Ashok Menon, J.

The appellant-assessee M/s Stabilix Solutions Pvt.Ltd. is a company incorporated on 11.02.2002 as a 100% Export Oriented Unit (for short 'EOU') at Technopark Campus in Thiruvananthapuram. The venture was started in a premise, having an extent of 4,000/- sq.ft. built up area, sublet by the assessee's sister concern, namely, M/s Stabilix Techonologies Pvt.Ltd. (for short 'STPL'). The assessee-company and STPL are both wholly owned subsidiary of M/s Stabilix Corporation, USA, which holds 99.99% share in each of them. STPL had leasehold right over a total extent of 6,000 sq.ft. built up area from M/s Electronics Technology Parks, Kerala and M/s Health Care Media Pvt.Ltd. and was itself a 100% EOU, producing computer software and supplying the same to the parent company.

2. The Assessing Officer (for short "A.O.") observed in Annexure A order pertaining to assessment

year 2004-05 that the ratio of the plant and machinery leased by STPL was highly incongruent with or disproportionate to the space leased out, which was 4,000 sq.ft., out of 6,000 sq.ft., consisting of 66.66% of the total area. According to the A.O., the corresponding value of the machineries given on lease or allowed to be used by the assessee ought to have come to the tune of Rs.66 lakhs, which is 2/3rd of the investment of Rs.95.45 lakhs by STPL. The A.O. had inferred that the entire space utilised by the STPL for its purpose was sublet to the assessee on "as is where is" basis, involving only minor adjustments, as against the wholesale dislocation of plant and machinery and thus he came to the conclusion that the lease would qualify to be a transfer within the meaning of Section 10B(2)(iii) of the Income Tax Act, 1961 (for short 'the Act'), which provides that an eligible undertaking under the Section should not be formed by the transfer to a new business, of plant and machinery that stands previously used for any purpose. The A.O. was of the view that the leased machinery disqualify the assessee from being eligible for its claim under Section 10B(1) as the assessee through the instrumentality of a lease could not circumvent the provisions of Section 10B(2)(iii).

3. Aggrieved by the deletion of disallowance of assessee's claim for deduction under Section 10B(1), the assessee appealed before the C.I.T.(Appeals). On considering the arguments placed before him, the C.I.T.(Appeals) allowed the claim of the assessee for exemption under Section 10B(1) vide Annexure B order.

4. The Revenue was aggrieved and appealed before the Income Tax Appellate Tribunal, and to sustain the order of the C.I.T.(A), a cross-objection was filed by the assessee. The Tribunal, vide Annexure C order, held that the assessee has not satisfied the conditions of Section 10B(2)(iii) of the Act and was therefore, not entitled to be qualified for the benefit under Section 10B(2) of the Act and partly allowed the appeal.

5. The assessee impugn Annexure C order of the Tribunal before us.

6. The following questions of law, as re-framed by us, arise for consideration:

i) Was the assessee's undertaking a new one and not formed merely by transfer of plant and machinery from the lessor company ?

ii) Whether the Tribunal was right in holding that the assessee-undertaking was not entitled to the benefit of exemption under Section 10B of the Act ?

7. We heard the learned Counsel appearing for the appellant and the Senior Counsel, Government of India (Taxes).

8. There is no dispute that the assessee-company was formed substantially with the plant and machinery of STPL, which is its sister concern. According to the assessment made by the A.O., the extent of the area and the plant and machinery would come to about 66.66%. STPL, the sub-lessor, was also doing identical business and a 100% EOU, exporting software to USA. The very same work was being continued by the assessee-company, putting to use a substantial portion of the plant and machinery, used by STPL.

9. The fact whether the 'lease' would qualify to be a 'transfer' within the meaning of Section 10B(2)(iii) cannot be disputed in view of the decision of the Hon'ble Supreme Court in ***CIT v. Narang Dairy Products, [1996] 219 ITR 478 (SC)***, wherein, considering the assessee's claim for development rebate under Section 33(1)a of the Act, and explaining the meaning of transfer under Section 2(47) of the Act, the Hon'ble Supreme Court held that it is inclusive and should not be read in exclusion to its contextual or ordinary meaning. “Letting out” would stand to be considered as “otherwise transferred”.

10. The learned Counsel in support of the assessee's case, relies on the decision ***Bajaj Tempo Ltd. v. CIT, [1992] 196 ITR 188 (SC)***. The C.I.T. (Appeals) relying on this decision, had found that the assessee's unit could not be said to have been formed by transfer of second-hand machineries. In the above-cited decision, considering the provision under Section 15C of the Income Tax Act, 1922, which is analogous to the provisions under Section 10B(1),

it was held held that where the assessee had started a new industrial undertaking by taking on lease the building in which the promoter company had been carrying on its business, but the part played by the lease was not the dominant aspect in the formation of the new undertaking, the assessee was entitled to the relief under Section 15C in relation to the new undertaking. A reading of the decision would indicate the bare fact that therein the implements, worth only Rs.3,500/-, used in the earlier business, was transferred to the newly started undertaking and which was a very minor component in the formation of the new Company. Therefore, the Hon'ble Supreme Court held that the legislature, by clause (I) of sub-section (2) of Section 15C, intended control of any attempt or effort to abuse the benefit intended for new undertakings by change of label. The intention was not to deny benefit to genuine new industrial undertakings, but to control the mischief which might otherwise be occasioned and the exemption claimed by forming a new company using the assets of the earlier one. The Hon'ble Supreme Court was of the opinion that the restriction or denial of benefit arises not by transfer of building or material to the new company, but that the new entity 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 and not on mere use of the machineries or other assets of an existing company. In conclusion, the Hon'ble Supreme Court held thus:

> "Use of the negative before the word "formed" further strengthens it. In other words, building, machinery or plant used previously in other business should not result in the undertaking being formed by it. The transfer, to take the new undertaking out of the purview of sub-section (1), must be such that, but for the transfer, the new undertaking could not have come into being. In our opinion, on the facts found by the Tribunal, the part played by taking the building on lease was not dominant in the formation of the company."

11. The above-cited decision in ***Bajaj Tempo Ltd.*** *(supra)* according to us will not come to the rescue of the assessee in the instant case. Because, the assessee-company was formed using 66.66% of the site, apart from the computers, work stations and machinery, used by STPL, for the very same purpose. The only

difference is that it is leased out, instead of an outright transfer. In our view, lease could also be considered as a 'transfer' for the purpose of Section 10B(2). The argument of the learned Counsel for the assessee that the activity carried on by the company was manufacture of computer software, which requires input of intellectual, rather than tangible resources, is also not acceptable to us to find a dominant aspect not being involved in the transfer by lease of the premises, computers and peripherals.

In the light of the above discussion, we are of the view that the Tribunal was justified in holding that the assessee is not entitled to the benefit under Section 10B(2) of the Act. The I.T.A. is therefore dismissed answering the questions of law framed against the assessee and in favour of the revenue. No order as to costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
ASHOK MENON
JUDGE

dkr

APPENDIX

APPELLANT(S)' ANNEXURES

ANNEXURE A	**COPY OF THE ASSESSMENT ORDER PASSED BY THE RESPONDENT, DATED 29.12.2016.**
ANNEXURE B	**COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 29.05.2007.**
ANNEXURE C	**COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 05.10.2010.**
ANNEXURE D	**COPY OF THE ORDER OF THE INCOME TAX OFFICER, WARD-I(1), THIRUVANANTHAPURAM DATED 06.12.2010.**