BAJAJ TEMPO LTD., BOMBAY

v.

COMMISSIONER OF INCOME TAX, BOMBAY CITY-III, BOMBAY

APRIL 24, 1992

[R.M. SAHAI AND A.S. ANAND, JJ.]

Income Tax Act, 1922 :

Section 15C—Industrial undertaking established by taking on lease building previously used for other business—Transfer of machinery or plant of very nominal value—Whether the undertaking entitled to claim benefit of exemption.

Interpretation of Statutes :

Taxing statute—Provision granting incentives for promoting economic growth and development—To be liberally construed.

The appellant-Company, which was formed for exploiting the manufacturing licence issued by the Government in favour of its promoter-Corporation, entered into an agreement with the promoter Corporation to secure and take over from the promoter Corporation the rights under the licence to manufacture tempo vehicles and to take over its factory as a going concern with its assets, liabilities, machinery, power, quotas etc. Clause 10 of the agreement provided that the transferee, the appellant-Company, should be in possession of the premises of the factory and the building on payment of monthly rent as a lessee. Tools and implements valued at Rs. 3,500 of the promoter Corporation, were also transferred to the company. After the take-over, the licence was endorsed by the appropriate authority of the Government of India in favour of the assessee-company.

In assessment proceedings for the year 1960-61, the appellant Company, the assessee claimed benefit of partial exemption from payment of tax under Section 15C of the Act of 1972 as the Company was a new undertaking. The Income Tax Officer rejected the claim on the ground that though the undertaking was new, it was not entitled to the benefit, as it

A was formed by splitting up of business already in existence and also by transfer to the new business of the building and machinery previously used in the other business. However, the Income Tax Officer observed that it could not be held, on the facts of the case, that it was a case of reconstruction of the business already in existence.

B On appeal by the assessee-Company, the Appellate Assistant Commissioner held that taking premises on lease could not be held to amount transfer of the building as the building in which the undertaking was set up was not purchased but taken on lease only and that since, admittedly, the value of the building could not be included in the capital computation C for the purposes of Section 15C, the value of which would be negligible as compared to the value of the assets installed, the assessee was entitled to claim the benefit. In further appeal, the Income Tax Appellate Tribunal agreed with the order of the Appellate Authority and rejected Revenue's contention that since the premises in question were earlier used for the D purpose of business, the assessee was disentitled from claiming the benefit as the 'newly established undertaking must also refer to a building previously used by the assessee himself in any other business'. It held that lease could not be held to be transfer, and that an industrial undertaking to be covered in the mischief of Clause (i) of sub-section (2) of Section 15C should have been 'formed' by transfer of building, plant or machinery, E which was substantial and prominent in the formation of the undertaking; in other words, the part played by such transfer should have been such that the industry without it could not have come into being, and that it could not stand to reason that a big industrial undertaking should be denied the benefit of Section 15C, only because it took the business F premises on lease or used its implements and tools worth a small amount previously used for the purposes of business.

On a reference made by the department, the High Court answered the question of law raised by the department in its favour and against the assessee. Hence the appeals by the assessee.

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On the question whether the assessee was entitled to claim partial exemption from payment of tax under Section 15C of the Income Tax Act, 1922 on profits and gains derived from an industrial undertaking established in a building taken on lease used for other business, and whether H the assessee-Company, which had been found by the Tribunal, to be a new

Company, could be denied the benefit as visualised in Section 15C(1) because of operation of clause (i) of sub-section (2). A

Allowing the appeals by the assessee-Company, this Court,

HELD : 1.1. Section 15C of the Income Tax Act, 1922 read as a whole, was a provision, directed towards encouraging industrialisation by permitting an assessee setting up a new undertaking to claim benefit of not paying tax to the extent of six per cent in a year on the capital employed. But the legislature took care to restrict such benefit only to those undertakings which were new in form and substance, by providing that the undertaking should not be 'formed' in any manner provided in Clause (i) of sub-section (2) of Section 15C. Each of these requirements, namely, formation of the undertaking by splitting up or reconstruction of an existing business or transfer to the undertaking of buildings, raw material or plant used in in any previous business results in denial of the benefit contemplated under sub-section (1). Clause (i) of sub-section (2) is a restrictive clause. By this clause, the Legislature intended to control any attempt or effort to abuse the benefit intended for new undertaking by change of label. The intention was not to deny benefit to genuine new industrial undertaking but to control the mischief which might have otherwise taken place. Therefore, a provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. Consequently, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it. Adopting a literal interpretation would result in defeating the purpose of Section 15C. Therefore, it becomes necessary to resort to a construction which is reasonable and purposive to make the provision meaningful. [773 D-F, 774 B, 774D] B C D E F

Broach Distt. Co-operative Cotton Sales Ginning and Pressing Society Ltd. v. *Commissioner of Income Tax, Ahmedabad,* 177 ITR [1989] 418 SC *and Commissioner of Income Tax, Amritsar* v. *Strawboard Manufacturing Company Ltd.,* 177 ITR [1989] 431 SC, relied on.

1.2. Initial exercise, therefore, should be to find out if the undertaking was new. Once this test is satisfied then clause (i) should be applied reasonably and liberally in keeping with spirit of Section 15C (1) of the Act. While doing so, various stituations may arise. For instance, the formation may be without anything to do with any earlier business. That is, the undertaking may be formed without splitting up or reconstructing G H

A any existing business or without transfer of any building material or plant of any previous business. Such an undertaking undoubtedly would be eligible to 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, for instance, a new company may be formed, as was in the instant case, but tools and implements worth Rs.3,500 were transferred to it of previous firm. Technically speaking it was transfer of material used in previous business.

[777 C-F]

C 1.3. 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 the 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. Even if the undertaking is established by transfer of building, plant or machinery but it is not formed as a result of such transfer the assessee could not be denied the benefit. [777 G-H, 778 A]

Commissioner of Income Tax, West Bengal-II v. *Sainthia Rice and Oil Mills,* 82 ITR [1971] 778 (Cal.); *Commissioner of Income Tax* v. *Ganga Sugar Corporation Ltd.,* 92 ITR [1973] 173 (Delhi); *Commissioner of Income Tax, West Bengal-I* v. *Electric Construction and Equipment Company Ltd.,* (Cal.) 104 ITR [1976] 101; *Commissioner of Income Tax, Bombay City-I,* v. *Kopran Chemical Co. Ltd.,* 112 ITR [1978] 893; *Commissioner of Income Tax, Bombay City-II* v. *Sawyer's Asia Ltd.,* 122 ITR [1980] 259 and *L.G. Bala Krishnan & Bros. Ltd.* v. *Commissioner of Income Tax, Madras,* 151 ITR [1985] 270, approved.

1.4. The words 'Previously used in any other business' cannot be construed so narrowly as to confine it to building of the assessee only. But it cannot be said that if new undertaking was established in a premises

taken on lease then it, always, amounted to formation of the undertaking by transfer of the building previously used. [779 B] A

Capsulation Services Pvt. Ltd. **v.** *Commissioner of Income Tax, Bombay,* **91 [1973] ITR 566;** *Phagoo Mal Sant Ram* **v.** *Commissioner of Income Tax, Patiala,* **74 ITR [1969] 734 and** *Commissioner of Income Tax, Bombay City-II* **v.** *Fordham Pressing (India) Pvt. Ltd.,* **121 ITR 426, partly approved.** B

Commissioner of Income Tax **v.** *Ganga Sugar Corporation Ltd.,* **92 ITR [1973] 173 Delhi and** *Commissioner of Income Tax, Gujarat-IV* **v.** *Suessin Textile Bearing Ltd.,* **135 ITR [1982] 443, approved.**

Textile Machinery Corporation Ltd. **v.** *Commissioner of Income Tax, West Bengal,* **107 [1977] 195 SC, affirmed.** C

1.5. 'Form' according to the dictionary has different meanings. In the context in which it has been used it was intended to connote that the body of the company or its shape did not come up in consequence of transfer of building, machinery or plant used previously for business purpose. Use of the negative before word 'formed' further strengthens it. In other words, building, machinery or plant used previsouly in other business should not result in the undertaking being formed by it. The transfer to take out the new undertaking out of purview of sub-section (1) must be such that but for transfer the new undertaking could not have come into being. [779 C-D] D E

1.6. In the instant case, the part played by taking the building on lease was not dominant in formation of the company. The High Court was therefore not justified in answering the question in favour of the revenue. The assessee was entitled to partial exemption under Section 15C of the Income Tax Act, 1922. [779 E] F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1211(NT) of 1982.

From the Judgment and Order dated 25.8.1981 of the Bombay High Court in Income Tax Reference No. 154 of 1971. G

WITH

Civil Appeal No. 1258 to 1260 (NT) of 1982

AND H

A Civil Appeal No. 1257 (NT) of 1982

P.H. Parekh for the Appellant.

J. Ramamurthy, P. Parameswaran for the Respondents.

B The Judgment of the Court was delivered by

R.M. SAHAI, J. The question of law that arises for consideration in these appeals directed against order of the Bombay High Court, in an Income Tax reference relating to assessment year 1960-61, is if the assessee C was entitled to claim partial exemption from payment of tax under Section 15C of Income Tax Act of 1922 on profits and gains derived from an industrial undertaking established in building taken on lease used previously for other business.

D M/s Bachhraj Trading Corporation (in brief 'Corporation'), incorporated on 29th September 1945, carried on business of import-export in various items. In 1957 it was granted licence for manufacturing tempo 400cc three wheeled transporters. It entered into an agreement with foreign collaborator, who agreed to grant the licencee the know-how rights for the manufacture, in India of tempo commercial three wheeler vehicles, against E payment of German marks. Accordingly the assessee company M/s Bajaj Tempo Ltd., Bombay (in short 'Company') was, formed, for exploiting the manufacturing licence issued by the Government 32% of the shares capital of which was subscribed by the foreign collaborators and remaining 68% share capital was issued to the shareholders of the Corporation. The F assessee company entered into an agreement with the Corporation, which was the promoter company, to secure and take over from the promoter company the rights under the licence to manufacture tempo vehicles and to take over the factory registered under the name of Auto Rickshaw Engineering Factory as a going concern with its assets, liabilities, machinery, power, quotas etc. Clause 10 of the agreement provided that G the transferee, that is, the company shall be in possession of the premises of the factory and the buildings on payment of monthly rent as a lessee. Tools and implements, valued at Rs.3,500 of the Corporation, were also transferred to the company. After take over the licence was endorsed by the appropriate authority of the Government of India in favour of the H company.

In assessment proceedings the assessee claimed benefit of partial exemption from payment of tax as the company was a new undertaking. The Income Tax Officer rejected the claim as even though the undertaking was new it was not entitled to the benefit as it was formed by splitting up of business already in existence and also it was formed by transfer to the new business of the building and machinery previously used in other business. But while rejecting the claim the Income Tax Officer observed that on facts furnished it was difficult to hold that it was a case of reconstruction of the business already in existence. He did not find much merit even in transfer of tools and implements worth Rs.3,500. In fact the main ground for rejection of the claim was establishing of business in a building which was used previously for business. The Appellate Commissioner did not agree with the Income Tax Officer as according to him taking premises on lease could not be held to amount to transfer of the building as the building in which the undertaking was set up was not purchased but taken on lease only. The appellate authority held that since it was admitted that the value of the building could not be included in the capital computation for the purposes of Section 15C the value of which would be negligible as compared to the value of the assets installed, the assessee was entitled to claim the benefit. In further appeal the Income Tax Appellate Tribunal agreed with the order of the appellate authority. It rejected the contention, advanced on behalf of the revenue, that since the premises in question were earlier used for the purpose of business the assessee was disentitled from claiming the benefit as the, 'newly established undertaking must also refer to a building previously used by the assessee himself in any other business'. It was further of opinion that lease could not be held to be transfer. The tribunal held that an industrial undertking to be covered in the mischief of clause (i) of sub-section (2) of Section 15C should have been 'formed' by transfer of building, plant or machinery, which was substantial and prominent in the formation of the undertaking. In other words the part played by such transfer should have been such that the industry without it could not have come into being. According to tribunal it could not stand to reason that a big industrial undertaking should be denied the benefit of Section 15C only because it took the business premises on lease or used its implements and tools worth a small amount previously used for the purposes of business. On further reference made by the department in the High Court the question of law raised by department was answered in its favour and against the assessee without any

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A discussion, only, in view of the decision in *Capsulation Services Pvt. Ltd.* v. *Commissioner of Income Tax, Bombay,* 91 [1973] ITR 566. The finding of the tribunal, thus, that the assessee company cannot be said to have been formed by the reconstruction of promoter company as, 'the business of the new industrial undertaking established by the assessee company did not exit prior to its incorporation and was neither carried on by the promoter company nor by any other company' has become final. The dispute centres round if the company was formed by transfer of building or material used in previous business. It had two aspects one taking of building on lease and other transfer of tools and implements valued at Rs.3,500.

C Section 15C of the Income Tax Act, 1922 is extracted below :

> "15C (1) Save as otherwise hereinafter provided, the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking to which this section applies as do not exceed six per cent per annum on the capital employed in the undertaking, computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue.
>
> (2) This section applies to any industrial undertaking which -
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> (i) is not formed by the splitting up, or the reconstruction, of business already in existence or by the transfer to a new business of building, machinery or plant previously used in any other business....."

F The limited question is whether the assessee which has been found by tribunal to be a new company could be denied the benefit as visualised in Section 15C(1) because of operation of the clause (i) of sub-section (2). It is a restrictive clause. It denies benefit which is otherwise available in sub-section (1). A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally! In *Broach Distt. Co-Operative Cotton Sales Ginning and Pressing Society Ltd.* v. *Commissioner of Income Tax, Ahmedabad,* 177 ITR [1989] 418 SC the assessee a cooperative society claimed that the receipts from the ginning and pressing activities was exempt under Section 81 of the Income tax Act. The question for interpretation was whether the cooperative society which H carried on the business of ginning and pressing was society engaged in

'marketing' of the agricultural produce of its members. The Court held that object of Section 81(1) was to encourage and promote the growth of cooperative societies and consequently a liberal construction must be given to the operation of that provision. And since ginning and pressing was incidental or ancillary to the activities mentioned in Section 81(1) the assessee was entitled to exemption and the proviso did not stand in way. In *Commissioner of Income Tax, Amritsar* v. *Strawboard Manufacturing Company Ltd.,* 177 ITR [1989] 431 SC was held that the law providing for concession for tax purposes to encourage industrial activity should be liberally construed. The question before the Court was whether Straw Board could be said to fall within the expression "paper and pulp" mentioned in the Schedule relevant to the respective assessment years. The Court held that since word "paper and pulp" was mentioned in the Schedule the intention was to refer to the paper and pulp industry and since Straw Board Industry could be described as forming part of the paper and pulp industry it was entitled to benefit.

The section, read as a whole, was a provision, directed towards encouraging industrialisation by permitting an assessee setting up a new undertaking to claim benefit of not paying tax to the extent of six per cent in a year on the capital employed. But the legislature took care to restrict such benefit only to those undertakings which were new in form and substance, by providing that the undertaking should not be, 'formed' in any manner provided in Clause (i) of sub-section (2) of Section 15C. Each of these requirements, namely, formation of the undertaking by splitting up or reconstruction of an existing business or transfer to the undertaking of building, raw material or plant used in any previous business results in denial of the benefit contemplated under sub-section (1). Since a provision intended for promoting economic growth has to be interpreted liberally the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it. But that turned out to be the, unintended, consequence of construing the clause literally, as was done by the High Court for which it cannot be blamed, as the provision is susceptible of such construction if the purpose behind its enactment, the objective it sought to achieve and the mischief it intended to control is lost sight of. One way of reading it is that the clause excludes any undertaking formed by transfer to it of any building, plant or machinery used previously in any other business. No objection could have been taken to such reading but when the result of reading in such place and simple manner is analysed

A then it appears that literal construction would not be proper. Taking facts of this case as illustration the inherent fallacy surfaces. The Income Tax Officer found that tools and implements worth Rs.3,500 used in earlier business were transferred to it. They comprised of machines which were of very minor nature. But for one spotwelling machine the cost of which
B was Rs.1500, the other 13 items were of value of Rs.100, Rs.200, Rs.300 or at most Rs.400. On plain reading the effect of such transfer was operation of the clause and denial of benefit to the assessee. But that would be denial of very purpose for which the provision was enacted. The Legislature by clause (1) of sub-section (2) of Section 15C inteded to control an attempt or effort to abuse the benefit intended for new undertaking by change of
C label. The intention was not to deny benefit to genuine new industrial undertaking but to control the mischief which might have otherwise taken place. The result was however just the contrary. Any use of building or plant or machinery howsoever nominal either because of compulsion or inadvertence or sheer necessity fell in the mischief and the departmental
D authorities, bound as they were with the provision of the section, refused to grant exemption. High Courts also differed in their approach. Various decisions which were placed before us leave no room. Some related to transfer of machinery to the new business and others to the building. In respect of machinery the High Courts appear to be nearly unanimous that where the value of transferred machinery was low or meagre the assessee
E should not be denied the benefit. For instance the Calcutta High Court in *Commissioner of Income Tax, West Bengal- II* v. *Sainthia Rice and Oil Mills,* 82 ITR [1971] 778 (Cal.) did not find any reason to deny the benefit to the assessee where the undertaking was formed by acquisition of part of machinery in second hand from open market. But the decision which
F became the leading decision on transfer of machinery was rendered by *Delhi High Court in Commisioner of Income Tax* v. *Ganga Sugar Corporation Ltd.,* 92 ITR [1973] 173 (Delhi.) It has been follwed in nearly all the decisions, given subsequently as it was approved by this Court. It was held that use of scrap and material of the old unit of the value of a small fraction of the expenditure involved in the setting up of the new unit did not attract
G the concluding words of clause (i) of Section 15(2). The Calcutta High Court in *Commissioner of Income Tax, West Bengal-I* v. *Electric Construction and Equipment Company Ltd. (Cal.),* 104 ITR [1976] 101, was of view that where machinery previously used was 'very small compared to the value of the machinery installed' the assessee was well within sub-section

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(1) of Section 15C. Same view was taken by the Bombay High Court in *Commissioner of Income Tax, Bombay City-I* v. *Asbsestos, Magnesia & Friction Materials Ltd.,* 106 ITR [1977] 286 and it was observed, that the important aspect to be 'considered must be the monetary value of the old assets transferred to and utilised in the new undertaking'. In *Commissioner of Income Tax, Bombay City- I,* v. *Kopran Chemical Co. Ltd.,* 112 ITR [1978] 893 the Court answered the question in favour of assessee as the machinery transferred to the new business was of 'insignificant value'. In another decision the Bombay High Court in *Commissioner of Income Tax, Bombay City-II* v. *Sawyer's Asia Ltd.,* 122 ITR [1980] 259 while construing analogous provision, Section 84(2) of 1961 Act, opined that where machinery taken on hire formed 'insignificant part of the total value' the assessee could not be denied the benefit. In the case of *L.G. Balakrishnan & Bros. Ltd.* v. *Commissioner of Income-Tax, Mardras,* 151 ITR [1985] 270 the Madras High Court decided against the assessee not on proportion or value of the machinery transferred but because lease of machinery amounted to transfer.

On transfer of building the decision of the Bombay High Court on which reliance was placed by the High Court for deciding the case against assessee shall be adverted to later. But this was relied by the same High Court in *Commissioner of Income Tax, Bombay City-II* v. *Fordham Pressing (India) Pvt.Ltd.,* 121 ITR 462 in a case where the assessee took land with superstructure on lease, removed the tin roofing extended the height of wall and covered the ceiling with new roof. It was held that since the new structure used by the assessee was not a totally new structure the undertaking was formed by transfer of the building used previously for business. In *Commissioner of Income Tax, Gujarat-IV* v. *Suessin Textile Bearing Ltd,* 135 ITR [1982] 443, Gujarat High Court while deciding claim of assessee under 1961 Act struck a dissenting note and observed, 'Practical commonsense and commercial expediency would necessitate the conclusion that in so far as a new undertaking is being carried on in a building which was previously being used by someone else or which was rented by someone else other than the assessee and the new undertaking being started for the first time by the assessee in the newly rented premises, then, the third negative condition cannot be said to be violated.'

Thus so far transfer of machinery is concerned the High Courts have consistently taken the view that if the value of transferred machinery was

A nominal it could not result in denial of benefit to the assessee. This conclusion was reached by construing the provision either on principle of commercial expediency or practical common sense or to avoid unjust hardship to the assessee. This was legislatively recognised by Explanation (2) to sub-section (4) of Section 80J of 1961 Act. Similarly the ineligibility due to transfer of building was toned down in the first instance by amending the provision in 1967 and providing that any building used previously for business purposes taken on lease by the new company would not be covered in the mischief of clause (ii) of sub-section (4) of Section 80J of 1961 Act. Later in 1976 it was deleted, altogether, thus the restriction of the new undertaking not being formed by transfer to a new business of building used previously for any order business did not disentitle an assessee from claiming the benefit for partial exemption.

Sri Ramamurthy the learned counsel for the department urged that even though from analogous provision in Section 80J (4)(ii) in the Act of 1961 the restriction of transfer of new business to the building used previously for business has been omitted but that would not reflect favourably for assessee in 1960-61. Rather it would show that the legislature which is the best Judge of need of people, manifests its intention from time to time through amendment, substitution and omission considering the social and economic conditions in view. Since during operation of 1921 Act it intended that an undertaking established in building used earlier for business could not claim the benefit the Court should restrain its hands and may not interpret the provision by 1967 amendment in the 1961 Act, when the restriction was lifted from leased or rented building or 1976 or when the transfer of business to building used previously for business no more remained one of the conditions for disentitling the assessee from claiming benefit. Subsequently amendments in 1961 Act may or may not be taken as clarificatory but if a provison for checking abuse is found to have resulted in nullifying the very purpose of its enactment and Legislature intervenes then it can be assumed that the Legislature having been satisfied of failure of the purpose for which the provisions was inserted proceeded to cure the defect by suitably amending the provision or removing it. But for purposes of construing the proviso in Section 15C it is not necessary to go that far as there can be no doubt that literal construction of clause (1) of sub-section (2) was amenable to denial of benefit to the assessee even in genuine cases. For instance an undertaking otherwise entitled to benefit would fall within mischief of the sub-clause if it was

established in a building which was used for business purposes at any time in the remote past. Or it might have been established in part of building, earlier used for business purposes due to paucity of accommodation. Denying benefit to such undertaking could not have been intended when the very purpose of Section 15C was to encourage industrialisaion. It was for this reason that various High Courts evolved the test of commercial expediency or substantial involvement valued in terms of money etc. to interpret this clause. Adopting literal construction in such cases would have resulted in defeating the very purpose of Section 15C. Therefore it becomes necessary to resort to a construction which is reasonable and purposive to make the provision meaningful.

Initial exercise, therefore, should be to find out if the undertaking was new. Once this test is satisfied then clause (1) should be applied reasonably and liberally in keeping with 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. That is 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 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. The difficulty arises in such cases. For instance a new company may be formed, as was in this case a fact which could not be disputed, even by the Income Tax Officer. But tools and implements worth Rs.3,500 were transferred to it of previous firm. Technically speaking it was transfer of material used in previous business. One could say as that vehemently urged by the learned counsel for the department that where the language of statute was clear there was no scope for interpretation. If the submission of the 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 inquiry and the assessee was precluded from claiming any benefit. 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 the 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. In *Textile Machinery Corporation Ltd.* v. *Commissioner of Income Tax, West Bengal,* 107 [1977] 195 SC this Court while interpreting Section 15C observed:

> "The true test, is not whether the new industrial undertaking connoted expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business. No particular decision in one case can lay down an inexorable test to determine whether a given case comes under section 15C or not. In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit. An undertaking is formed out of the existing business if the physical identity with the old unit is preserved."

Even though this decision was concerned with the clause dealing with reconstruction of existing business but the expression 'not formed' was construed to mean that the undertaking should not be a continuation of the old but emergence of a new unit. Therefore even if the undertaking is established by transfer of building, plant or machinery but it is not formed as a result of such transfer the assessee could not be denied the benefit.

Reverting to the Bombay decision on which the High Court relied for answering the question against the assessee we would assume for purposes of this case that lease of the building amounted to transfer. Yet what is significant is that the High Court did not examine the impact of word 'formed'. It proceeded on basis that once lease amounted to transfer the assessee became ineligible from claiming any exemption. The Court further repelled the contention advanced on behalf of assessee on strength of Caluctta decision in *Commissioner of Income Tax, West Bengal-II* v. *Sainthia Rice & Oil Mills,* 82 ITR [1971] 778 Cal. that transfer of building to the new business to disentitle the undertaking should have been of the assessee himself. In our opinion this aspect of the Bombay decision was

correctly decided and the tribunal was not justified in deciding in favour of assessee on this ground. We therefore endorse the view of Bombay High Court and Punjab and Haryana High Court in *Phagoo Mal Sant Ram* v. *Commissioner of Income Tax, Patiala,* 74 ITR [1969] 734 of this extent that, 'previously used in any other business' cannot be construed so narrowly as to confine it to building of the assessee only. But we do not approve of the Bombay view that if a new undertaking is established in a premises taken on lease then it, always, amounts to formation of the undertaking by transfer of the building previously used as the decision was given without examining the scope of the word 'formed' which as we have indicated above, was construed by this Court in Textile Machinery Corporation Ltd which approved a decision of Delhi High Court in *Commissioner of Income Tax* v. *Ganga Sugar Corporation Ltd.* 'Form' according to the dictionary has different meanings. In the context in which it has been used it was intended to connote that the body of the company or its shape did not come up in consequence of transfer of building, machinery or plant used previously for business purpose. Use of the negative before 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 out the new undertaking out of purview of sub-section (1) must be such that but for transfer the new undertaking could not have come into being. In our opinion, on facts found by the tribunal, the part played by taking the building on lease was not dominant in formation of the company. The High Court was therefore not justified in answering the question in favour of the revenue.

The appeals accordingly succeed and are allowed. The order of the High Court is set aside. The question of law raised by the department in the High Court is answered against it and it is held that in the facts and circumstances of the case the assessee was entitled to partial exemption under Section 15C of the Act. Reference before the High Court shall accordingly stand answered in favour of the assessee and against the revenue.

The assessee shall be entitled to its costs.

N.P.V. Appeals allowed.