**IN THE HIGH COURT OF UTTARAKHAND**

**AT NAINITAL**

**Income Tax Appeal No. 2 of 2016**

**COMMISSIONER OF INCOME TAX, DEHRADUN**

**Vs**

**M/s WINDLASS STEEL CRAFT**

**K M Joseph, CJ & Sharad Kumar Sharma, J**

**Dated: February 22, 2018**

**Appellant Rep. by:** Mr. Hari Mohan Bhatia, Adv
**Respondent Rep. by:** Mr. Pulak Raj Mullick, Adv

**Income Tax - Sections 10B(6), 10(8), 80IB(4), 80IC(5), 80IC(6) & 80HHC - Circular No. 01 of 2005 dated 06.01.2005**

**Keywords - Date of manufacture - Export Oriented Unit**

**THE** assessee-company filed returns claiming an amount as deduction u/s 10B of the Act. The AO noted that the assessee had submitted its audit report in Form 3CD and a report in Form 10CCB in respect of deduction u/s 80IC. The AO further noted that the assessee claimed exemption u/s 10B and did not claim deduction u/s 80IC of the Act. Considering the assessee's submissions, the AO disallowed the deduction u/s 10B.

Subsequently, the CIT(A) allowed the assessee's appeal, and such findings were upheld by the Tribunal. Hence the present appeal by the Revenue, claiming that the Tribunal ignored specific provisions of Section 10B, that the deduction u/s 10B is to be allowed for a period of 10 consecutive AYs beginning with the AY relevant to the previous years in which the undertaking begins to manufacture articles or things. The Revenue also pointed out that the assessee was claiming deduction u/s 80HHC from AY 1992-93 to 2003-04 and also claiming deduction u/s 80IC from AY 2004-05 to 2008-09 and from the AY 2009-10 the assessee started claiming deduction u/s 10B.

**On hearing the matter, the High Court held that,**

**Whether Section 10B benefits are available from the year in which the undertaking begins to manufacture, and not from the year of approval as 100% EoU - YES: HC**

**Whether merely getting the 100% EoU status approval from authorities clothes the assessee with right to claim Sec 10B benefits beyond 10 years - NO: HC**

++ the actual question to be considered is, on a true construction of the Section w.r.t. the facts which are not in dispute, whether, having regard to the express provisions of the Act u/s 10B that the deduction can be claimed for a period of 10 consecutive years beginning with the previous year in which the assessee begins manufacture of the products, the assessee could in this case claim the right to enjoy the benefit of Section 10B for a period of 10 years from 20.06.2007 when it was approved as a 100% EoU.

++ one way, no doubt, to look at the matter is to construe the words in Section 10B, namely, *"in which the undertaking begins to manufacture or produce articles"* as meaning, in a case, where the unit was in the domestic tariff area (as is admitted in this case) and it becomes a 100% export oriented undertaking by virtue of the approval given, the commencement of manufacture should be treated as having happened from the point of time when it became a 100% export oriented undertaking and, therefore, it would become entitled to the benefit of Section 10B from the said date. In other words, though it may have been manufacturing and exporting all its production abroad since much prior to the date of approval as a 100% EoU, since in law it could claim the benefit of Section 10B only upon it satisfying the requirement that it was approved as a 100% EoU in 2007, the production and the export which is carried out prior to it is to be obliterated and the Court must interpret this Section as meaning that it is a case of a 100% EoU beginning its production only when it became a 100% export oriented undertaking;

++ the other way to look at it, as is contended by the Revenue, is that, having regard to the employment of the words *"begins to manufacture"*, since, admittedly, the assessee has began manufacture beyond 10 years from the date 20.06.2007, this provision does not leave room for any interpretation, as contended. Considered the effect of the **Circular dated 06.01.2005**. This court proceeds on the basis that it is a Circular, which is issued u/s 119 of the Act. It may be true that it was open to the authorities to issue a circular under the said Act, which may be beneficial to the interest of the assessee;

++ considered the provisions of Section 10B itself. Thereupon, the conclusion is inescapable that the intent of the law-giver was to confer benefit of deduction of the profits and gains of a 100% EoU from the total income, no doubt, subject to the manner in which it has been understood by the Supreme Court in*Commissioner of Income Tax & others vs. Yokogawa India Ltd.,* but limited to 10 consecutive years, the starting point of which was the beginning of production of the goods in question. In this regard, considered provisions of Section 10B, as it is now found in the statute book. It is a substitution of a provision, which was brought into the statute book as early as on 01.04.1989. Indeed, its ingredients were different, but the concept of 100% EoU is the same as it is found in the present version of Section 10B, namely, there had to be an approval under the

Industries (Development and Regulation) Act, 1951 as a 100% EoU. There is no warrant in the provision of Section 10B to bring in an intendment to the Legislation bearing in mind, particularly, that there is no room for intendment in a taxing statute. No doubt, a taxing statute like any other statute must be interpreted fairly and even the object of the Legislature may not leave it untouched. But, having regard to the setting of the statute, the purport was only to give the benefit for a period of 10 years from the date on which the undertaking commenced production. The words are clear and there is no room for any interpretation, as contended for by the counsel for the assessee. Merely getting the status of a 100% EoU in the year 2007 would not result in a change in the date of beginning of production by the said unit. In fact, the Circular, to the extent it proceeds to extend the period, appears to be beneficial to the assessee and it could possibly be a case of being a clarification, which is beneficial to the assessee. On an interpretation of the Section, which is a task which is unavoidable for the Court, even if there is a Circular, in which matter the court agrees with the assessee, the assessee, which becomes a 100% EoU by virtue of the approval, could claim the benefit. But, in no case, can it can go beyond 10 years from the date on which it originally started producing the goods;

++ the arguments of the assessee's counsel that, if such interpretation is accepted, it would render the obtaining of the status of a 100% EoU redundant and a futile exercise, fails to impress. The mere fact that the assessee (it may be noticed, who had in fact enjoyed the benefit of deduction u/s 80HHC from 1992-1993 and, thereafter, took further benefit u/s 80IC from 2004-2005 for a period of 5 years) thought it fit to apply and get the approval within the meaning of Section 10B cannot bind the income tax authorities to take a view contrary to the one, which we have taken, as merely obtaining the status of a 100% EoU cannot clothe the assessee with the right to claim benefit of deduction beyond 10 years, as we have explained. May be, it has impact for other purposes but the court is only concerned in this case with the question whether the assessee is entitled to the benefit u/s 10B and in the view of this court, the assessee is not entitled for the same. Therefore, that the assessee had embarked upon an exercise, which is turned out to be futile, cannot be an argument which will advance the case of the assessee;

++ therefore, the result is that the question of law must be answered in favour of the Revenue and against the assessee. The order of the Tribunal would stand set aside in regard to the claim u/s 10B of the Act. Considering that the assessee was not entitled to the benefit u/s 10B and also having regard to the fact that the assessment order reflects that documents were produced in support of the claim u/s 80IC, but, in view of the impossibility to claim the both together, the claim u/s 80IC had been given up, it would be in the fitness of things to remit the matter back to the AO for consideration of the case of the assessee under Section 80IC of the Act for the assessment year in question.

**Revenue's Appeal Allowed**

**Cases followed:**

***Commissioner of Income Tax & others vs. Yokogawa India Ltd. 2016-TIOL-228-SC-IT***

***Frick India Ltd. vs. Union of India and others (1990) 1 SCC 400***

***Kalyani Packaging Industry vs. Union of India and another 2004-TIOL-82-SC-CX***

**JUDGEMENT**

**Per: K M Joseph:**

The respondent / assessee filed a return for the Assessment Year 2009-2010, with previous year as 2008-2009, claiming exemption of Rs. 4,96,94,074/- under Section 10B of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The Assessing Officer disallowed the claim under Section 10B. The assessment order would show that the assessee had submitted its audit report in Form 3CD and a report in Form 10CCB in respect of deduction as per the provisions of Section 80IC. No doubt, the assessment order further bears out the following statement, namely, assessee is claiming exemption under Section 10B of the Act and, hence, deduction under Section 80IC is not being claimed.

2. The first appellate authority allowed the appeal. In further appeal filed by the appellant, the appellant was unsuccessful. Hence, the present appeal.

3. Notice was issued on the following substantial question of law:

*"1. Whether the Hon'ble ITAT, Delhi 'H' Bench, New Delhi was justified in allowing claim of the assessee made u/s 10B ignoring specific provisions of Section 10B of the Act which specifies that the deduction u/s 10B is to be allowed for a period of 10 consecutive assessment years beginning with the assessment year relevant to the previous years in which the undertaking begins to manufacture articles or things keeping in view the fact that the assessee had been claiming deduction u/s 80HHC from A.Y. 1992-93 to 2003-04 and u/s 80IC from A.Y. 2004-05 to 2008-09 and from this A.Y.2009-10 the assessee started claiming deduction u/s 10B?"*

4. We have heard Mr. Hari Mohan Bhatia, learned counsel for the appellant and Mr. Pulak Raj Mullick, learned counsel appearing for the respondent / assessee.

5. Mr. Hari Mohan Bhatia, learned counsel for the appellant would point out that the unit of the respondent / assessee was set-up long time back (it is not in dispute that it was set-up in the year 1950). It is engaged in the manufacture of handicrafts like artificial swords, artificial helmets, artificial armours, etc. He would point out that the assessee started claiming the benefit of deduction

provided under Section 80HHC from the year 1992. In the year 2003-2004, the assessee started claiming and was granted the benefit of 100 per cent deduction of its profits and gains from export under Section 80IC of the Act. The assessee was given the benefit of 100 per cent deduction in terms of Section 80IC for a period of five years. According to the learned counsel for the appellant, in terms of Section 80IC, the percentage of deduction suffers a reduction after a period of five years and it is, thereupon, that the assessee has switched over to Section 10B of the Act. Sub-section (1) of Section 10B of the Act reads as follows:

***"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 Finance Act, 2000, the undertaking shall be entitled to the deduction referred to in this subsection only for the unexpired period of aforesaid ten consecutive assessment years:*

*Provided further 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:*

*Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2012 and subsequent years:*

*Provided also that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of section 139."*

6. The present form is the result of a substitution, which was carried out in the year 2000 w.e.f. 01.04.2001. He would submit that the Tribunal has overlooked the vital requirement to be fulfilled under Section 10B, namely, that deduction, as provided therein, could be claimed only for a period of 10 years from the date of commencement of production. In this case, it is not in dispute that the unit, being established in the year 1950, had commenced production long time ago far beyond 10 years and was, in fact, claiming the benefit initially under Section 80HHC and, thereafter, under Section 80IC. The present claim is sought to be

supported on the basis of the grant of approval as a 100 per cent export oriented undertaking, apparently, under Section 14 of the Industries (Development and Regulation) Act, 1951. He would submit that even if it became a 100 per cent export oriented undertaking in terms of the approval given, it would not clothe the assessee with the right to claim deduction under Section 10B having regard to the fact that it is not a new unit, which has commenced production and further the fact that it is, in fact, a unit, which is already existent for a long period. Both these take it outside the scope of Section 10B. He would also submit that the Court may place proper emphasis on the heading of the Section. In other words, he highlights the fact that the intention of the Legislature could be gathered from the heading and even if there is no specific reference to the words "new industrial undertaking" in the body of the Section, reference should be made to the heading to resolve the ambiguity, which may arise from the actual wording of the Section.

7. Per contra, Mr. Pulak Raj Mullick, learned counsel for the respondent / assessee would seek to support the order of the Tribunal, which upheld the order of the first appellate authority. He would submit that, having regard to the scheme of the Act and having regard to the fact that Section 10B figures in Chapter III of the Act and, what is more, further having reference to the judgment of the Apex Court in *Commissioner of Income Tax & others vs. Yokogawa India Ltd., reported in (2017) 391 ITR 274* ***= 2016-TIOL-228-SC-IT***, the Court may consider the impact of the same and grant relief to the assessee. He would submit that assessment is to be carried out year-wise. The unit was, no doubt, existent; but that is irrelevant for the purpose of claiming benefit under Section 10B. The relevant date to claim benefit under Section 10B is the date on which the undertaking is treated as a 100 per cent export oriented undertaking. It became a 100 per cent export oriented undertaking on 20.06.2007 on the basis of the approval granted under the Industries (Development and Regulation) Act, 1951. About this, there is no dispute. The fact that the assessee was claiming and getting the benefit of deduction under Section 80HHC from 1992-1993 onwards or the fact that it was getting the benefit under Section 80IC from 2004-2005 will not detract from the entitlement of the assessee to claim benefit under Section 10B. The matter is to be decided with reference to the express language used in Section 10B. The assessee satisfies all the requirements of Section 10B. In short, the case can be summarized as follows:

Irrespective of the fact that the production was commenced much earlier, the assessee must be treated as entitled to the benefit under Section 10B of the Act with reference to the date on which it became a 100 per cent export oriented undertaking and, therefore, production must also be treated as having commenced from the date on which it became a 100 per cent export oriented undertaking. Learned counsel for the assessee would submit that it is a time consuming affair and the requirements, as provided, have to be complied with. The respondent / assessee was pursuing the matter and it was only on

20.06.2007 that it was conferred with the status of a 100 per cent export oriented undertaking. There is nothing in the provisions under Section 80IC or Section 80HHC, which would rob it of its entitlement under Section 10B the moment it fulfilled its requirements. Moreover, as in fact held by the Tribunal also, it is not a case where the assessee has claimed the benefit under Section 80IC. In fact, on the basis that it was entitled to the benefit under Section 10B, it had given up its claim even though, of course, it had complied with the requirements in relation to production of the audit report and the Forms. He would, in fact, submit that, having regard to the provisions of Sub-section (8) of Section 10B, it was mandatory for the assessee to claim the benefit of Section 10B, which it did.

8. Learned counsel for the assessee further sought to draw support from Circular No. 1 of 2005 dated 06.01.2005. As it may be relevant for the purpose of resolving the dispute, we refer to it and extract the same as under:

*"Circular No.1/2005, dated 06.01.2005*

*CIRCULAR*

*INCOME-TAX ACT*

*Certain clarification regarding Tax holiday under section 10B of the Income-Tax Act to 100% Export Oriented Undertaking.*

*CIRCULAR NO. 1/2005, DATED 6-1-2005*

*1. Section 10B of the Income-Tax Act provides for 100% deduction of profits derived by a hundred per cent Export Oriented Undertaking, from export of articles or things or computer software manufactured or produced by it. The deduction is available 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. However, no deduction under section 10B is available after assessment year 2009-10.*

*2. The deduction under section 10B is available to an undertaking which fulfils all the following conditions:-*

*(i) it manufactures or produces any article or thing or computer software;*

*(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence except in the circumstances specified under section 33B of the IT Act.*

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

*3. Representations have been received from various quarters as to whether an undertaking set up in Domestic Tariff Area, which is subsequently approved as*

*100% EOU by the Board appointed by the Central Government in exercise of powers conferred under section 14 of the Industries (Development and Regulation) Act, 1951, is eligible for deduction under section 10B of the Income-tax Act.*

*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 a EOU, shall be eligible for deduction under section 10B of the IT Act, on getting approval as 100% export oriented undertaking. In such a case, the deduction shall be available only from the year in which it has got the approval as 100% 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% EOU. Moreover, the deduction to such units in any case will not be available after assessment year 2009- 10.*

*5. To clarify the above position, certain illustrations are given as under:-*

*(i) Undertaking 'A' is set up in Domestic Tariff Area and starts manufacture or production of computer software in Financial Year 1999-2000 relevant to assessment year 2000-01. It gets approval as 100% EOU on 10th September, 2004 in the financial year 2004-05 relevant to assessment year 2005-06. Accordingly, it shall be eligible for deduction under section 10B from assessment year 2005-06 i.e., the year in which it fulfils the basic condition of being a 100% EOU. Further, the deduction shall be available only for the remaining period of ten years i.e. from assessment year 2005-06 to assessment year 2009-10. This deduction under section 10B for assessment year 2005-06 shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100% EOU.*

*(ii) Undertaking 'B' set up in Domestic Tariff Area, begins to manufacture or produce computer software in financial year 1996-97 relevant to assessment year 1997-98. It gets approval as 100% EOU in financial year 2007-08 relevant to assessment year 2008-09. No deduction under section 10B shall be admissible to undertaking B as the period of 10 years expires in financial year 2005-06 relevant to assessment year 2006-07, prior to its approval as 100% EOU.*

*(iii) Undertaking 'C' is set up in Domestic Tariff Area in the financial year 2000-01 relevant to assessment year 2001-02 and engaged in the business of providing computer related services, other than those notified by the Board for the*

*purposes of section 10B. In financial year 2002-03, it acquires more than 20% of old plant and machinery and starts manufacturing computer software. It also gets approval as 100% EOU in financial year 2002-03. Undertaking 'C' shall not be eligible for deduction under section 10B, as there has been transfer of old plant and machinery.*

*(iv) Undertaking 'D' is set up and starts producing computer software in financial year 2003-04 relevant to assessment year 2004-05. It gets approval as 100% EOU in financial year 2006-07 relevant to assessment year 2007-08. It shall be eligible for deduction under section 10B from assessment year 2007-08. However, the deduction shall not be available after assessment year 2009-10.*

*(v) Undertaking 'E' is set up and starts producing computer software prior to 31.3.1994. It gets approval as 100% EOU in financial year 2004-05 relevant to assessment year 2005- 06. Undertaking 'E' shall not be eligible for deduction under section 10B as the period of deduction of 10 years expires prior to assessment year 2005-06."*

9. Learned counsel for the assessee would further seek to draw support from the judgment of the Apex Court in the case of *Frick India Ltd. vs. Union of India and others, reported in (1990) 1 SCC 400.* He also relied upon a decision of the Division Bench of the Delhi High Court in the case of *Intercontinental Consultants and Technorats Pvt. Ltd. vs. Union of India and another passed in WP(C) 6370 of 2008* ***= 2012-TIOL-966-HC-DEL-ST*** and also a judgment of the Apex Court in the case of *Commissioner of Central Excise, Bolpur vs. M/s Ratan Melting & Wire Industries passed in Civil Appeal No. 4022 of 1999* ***= 2005-TIOL-41-SC-CX-LB.***

10. In other words, learned counsel for the assessee would submit that, if there is any part in the Circular, which has been produced by him, which goes against the Section, then the Section would necessarily override the terms of the Circular. He would submit that, upon a proper interpretation of Section 10B, the assessee is entitled to claim the benefit under Section 10B. He also made reference to Sub-section (6) of Section 10B, as also the provisions of Sub-sections (5) & (6) of Section 80IC, which we will advert to.

11. Learned counsel for the assessee would further submit that, even if the Court does not accept the case of the assessee in regard to Section 10B, the assessee would be entitled to the benefit of Section 80IC, insofar as the assessee had produced the requisite documents.

12. Section 10B was inserted for the first time by the Finance Act, 1988 (26 of 1988) w.e.f. 01.04.1989. The Section, as it is contained in the Act today, was the result of a substitution by the Finance Act, 2000 and it came into force w.e.f. 01.04.2001. Prior to its substitution, Section 10B provided, inter alia, as follows:

*"10B. Special provision in respect of newly established hundred per cent export oriented undertakings.- (1) Subject to the provisions of this section, any profits*

*and gains derived by an assessee from a hundred per cent export-oriented undertaking (hereafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the assessee.*

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

*(i) it manufacturers or produces any article or thing;*

*(ia) in relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1st day of April, 1994, its exports of such articles and things are not less than seventy-five per cent of the total sales thereof during the previous year;*

*(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 reestablishment, 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;*

*(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 Explanation I and Explanation 2 to sub-section (2) of section 80-I 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.*
*(3) The profits and gains referred to in sub-section (1) shall not be included in the total income of the assessee in respect of any 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.*

*(7) …..*

*Explanation. – For the purposes of this section, -*

*(i) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act;"*

13. It is to be noted that Section 10B figures in Chapter III of the Act. Chapter III of the Act has a chapter heading, which declares that it deals with incomes, which do not form part of the total income. In fact, a perusal of Section 10B, as it was originally inserted, shows that it did justice to its inclusion in Chapter III, as what was provided was that the profits and gains derived from a 100 per cent

export oriented undertaking, to which the Section applied, was not to be included in the total income of the assessee. However, as we have noted, w.e.f. 01.04.2001, after the substitution, what the Legislature has provided is not that it will not form part of the total income; but that the profits and gains derived by a 100 per cent export oriented undertaking will be deducted from the total income of the assessee as provided therein. In fact, Section 10A and Section 10AA of the Act also have a similar legislative history, namely, originally when they were inserted, they provided for non-inclusion in the total income and, later on, they became the provisions by which the Legislature provided for deduction from the total income.

14. It is apposite at this juncture to refer to the judgment of the Apex Court in *Commissioner of Income Tax & others vs. Yokogawa India Ltd., reported in (2017) 391 ITR 274* ***= 2016-TIOL-228-SC-IT***. In the said case, no doubt, the court was dealing with Section 10A and the correct meaning and interpretation of Section 10A was the principal issue. We notice the following questions, which were formulated by the court in para 3 of the judgment:

*"3. The broad question indicated above may be conveniently dissected into the following specific questions arising in the cases under consideration.*

*(i) Whether Section 10A of the Act is beyond the purview of the computation mechanism of total income as defined under the Act. Consequently, is the income of a Section 10A unit required to be excluded before arriving at the gross total income of the Assessee?*

*(ii) Whether the phrase "total income" in Section 10A of the Act is akin and pari materia with the said expression as appearing in Section 2(45) of the Act?*

*(iii) Whether even after the amendment made with effect from 1.04.2001, Section 10A of the Act continues to remain an exemption Section and not a deduction section?*

*(iv) Whether losses of other 10A Units or non 10A Units can be set off against the profits of 10A Units before deductions Under Section 10A are effected?*

*(v) Whether brought forward business losses and unabsorbed depreciation of 10A Units or non 10A Units can be set off against the profits of another 10A Units of the Assessee."*

After a discussion of the matter, the court inter alia found as follows:

*"13. The retention of Section 10A in Chapter III of the Act after the amendment made by the Finance Act, 2000 would be merely suggestive and not determinative of what is provided by the Section as amended, in contrast to what was provided by the unamended Section. The true and correct purport and effect of the amended Section will have to be construed from the language used and not merely from the fact that it has been retained in Chapter III. The introduction*

*of the word 'deduction' in Section 10A by the amendment, in the absence of any contrary material, and in view of the scope of the deductions contemplated by Section 10A as already discussed, it has to be understood that the Section embodies a clear enunciation of the legislative decision to alter its nature from one providing for exemption to one providing for deductions."*
Thereafter, the court, on further discussion, held as follows:

*"18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly."*
Therefore, this judgment may not assist the assessee in advancing the submissions, which he has made, as the issue was what would be the stage of deduction.

15. In this case, learned counsel for the assessee has made available written submissions also. We may refer to and extract from the written submissions the following para:

*"2. M/s Windlass Steel Craft was established in 1950 & is engaged in manufacture of Handicrafts like artificial swords, artificial helmets, body covers etc. & exporting such Handicrafts overseas. Deduction u/s 80 HHC was being claimed from assessment year 1992-93, whereafter deduction u/s 80 IC was claimed from Assessment year 2004-05 to Assessment Year 2008-09, by carrying out Substantial Expansion of the existing unit, as provided u/s 80 IC of Income Tax Act."*
16. Therefore, we may take it that it is beyond the pale of dispute that the assessee was established in the year 1950. It was engaged in the manufacture of handicrafts, which included artificial swords, artificial helmets, etc. There is a specific statement that the assessee was exporting such handicrafts overseas. This is probablised by the claim, which was successfully made under Section 80HHC of the Act from the year 1992- 1993. From Assessment Year 2004-2005, there is also no dispute that the assessee was claiming benefit under Section 80IC. Section 80IC, inter alia, reads as follows:

***"80-IC. Special provisions in respect of certain undertakings or enterprises in certain special category States. -***

*(5) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee, no deduction shall be allowed under any other section contained in Chapter VIA or in section 10A or section 10B, in relation to the profits and gains of the undertaking or enterprise.*

*(6) Notwithstanding anything contained in this Act, no deduction shall be allowed to any undertaking or enterprise under this section, where the total period of deduction inclusive of the period of deduction under this section, or under the second proviso to sub-section (4) of section 80-IB or under section 10C, as the case may be, exceeds ten assessment years."*

17. Section 80IC figures in Chapter VIA of the Act. It also provides for deductions and it is essentially meant for encouragement for setting-up of industries in backward areas in certain States.

18. We may, at once, notice Sub-section (5) of Section 80IC of the Act. It provides that, in computing the total income of the assessee, no deduction is to be allowed under any other Section or Section 10B inter alia in relation to the profits and gains of the undertaking. Therefore, it is clear that simultaneously claiming the benefit of deduction under Section 80IC and Section 10B is not permitted. Therefore, the assessee would rely on this provision and would contend that this is not a case, where the assessee has claimed simultaneously the benefit of deduction under Section 80IC and the benefit of deduction under Section 10B. As already noted from the assessment order, though, according to the assessee, it has complied with the requirements for claiming the benefit under Section 80IC, as, according to it, it fulfilled the requirement for claiming the benefit under Section 10B, it claimed the benefit under Section 10B. It has not given the declaration, which is contemplated under Sub-section (8) of Section 10B and, therefore, nothing stood in the way of it claiming the benefit under Section 10B.

19. The appellant has also relied on Sub-section (6) of Section 80IC, which proclaims that notwithstanding anything contained in the Act, no deduction will be given under Section 80IC, where the total period of deduction, inclusive of the period of deduction under Section 80IC or under the second proviso to Sub-section (4) of Section 80IB or under Section 10C, as the case may be, exceeds 10 assessment years. Learned counsel for the assessee would submit that the absence of such a provision in Section 10B would militate against the contention of the department that, having regard to the fact that the assessee had enjoyed the benefit of deduction under Section 80HHC and Section 80IC together from the year 1992 onwards, it would not stand in the way of the assessee claiming the benefit even if it makes available period of deduction beyond a period of 10 years. Reference also made to Sub-section (6)(iii) of Section 10B, which according to the assessee, would militate against the contention of the Department, as there is no reference to Section 80IC. Sub-section (6)(iii) of Section 10B, inter alia, provides that no deduction shall be allowed under Section 80HH or Section 80HHA or Section 80I or Section 80IA or Section 80IB, in respect of profits and gains; but, there is no reference to Section 80IC. As far as this aspect is concerned, we may, at once, discountenance such a plea for the reason that, under Section 80IC itself, we have noted that under Sub-section (5)

it is provided that simultaneous deduction under Section 80IC and Section 10B is prohibited. We would be attributing superfluity to the Legislation, as it is unnecessary to replicate what was already provided under Section 80IC.

20. Now, we must consider the Circular, which has been produced by the learned counsel for the assessee. The Circular is dated 06.01.2005. It, apparently, was on the basis of necessity for a clarification that it came to be issued. As is evident from the contents of para 3 of the Circular, representations were received as to whether the undertakings set-up in domestic tariff area, which were subsequently approved as 100 per cent export oriented undertakings by the Board, would be entitled to the benefit of deduction under Section 10B of the Act. It is, thereupon, that the authority has clarified that the undertaking, though set-up in the domestic tariff area and was deriving profit from the export of articles or things produced by it, but subsequently converted as export oriented undertaking, shall be eligible for deduction under Section 10B of the Act on getting approval; but it was specifically clarified that it will be available only for the remaining period of 10 consecutive assessment years, beginning with the assessment year relevant to the previous year in which manufacture was commenced. Further, we may notice that, among the illustrations, illustration no. 2 is the closest to the facts of the instant case. It provides as follows:

*"(ii) Undertaking 'B' set up in Domestic Tariff Area, begins to manufacture or produce computer software in financial year 1996-97 relevant to assessment year 1997-98. It gets approval as 100% EOU in financial year 2007-08 relevant to assessment year 2008-09. No deduction under section 10B shall be admissible to undertaking B as the period of 10 years expires in financial year 2005-06 relevant to assessment year 2006-07, prior to its approval as 100% EOU."*

21. If this illustration is to cover the destiny of this case, then there can be no doubt that the question of law must be answered against the assessee and in favour of the department. It is here that the learned counsel for the assessee would submit that, having regard to the Section, the Court may not rely on the Circular. He would, for instance, point out the proviso to Section 10B, which declares that the benefit of deduction will not be available beyond 2012-2013; but the Circular provides that, in a case, where there is a subsequent emergence of a 100 per cent export oriented undertaking, the benefit will not extend beyond 2009-2010. He would, therefore, submit that there is a direct conflict between the Circular and the statutory provision and, therefore, the statutory provision will prevail over the Circular. He would also, no doubt, submit that Circulars are not binding on the court and it is for the court to undertake the task of construing the statutory provision.

22. The fact that the assessee has not claimed the benefit, though entitled as it alleges under Section 80IC, has been relied upon by the Tribunal. We must, first,

examine whether this will be finally determinative of the issue to be considered and answered. The fact that there is a legal embargo against simultaneously claiming the benefit of deduction under Section 10B and Section 80IC and the fact further that the assessee, in a particular case, has not claimed the benefit under Section 80IC, would not be determinative of the issue as to whether the assessee is entitled to the benefit under Section 10B. The issue to be decided is whether, in the facts, which are not in dispute, the assessee is entitled to the benefit under Section 10B of the Act. Therefore, the reliance placed on the fact that the assessee has not claimed the benefit under Section 80IC would, in our view, amount to posing the wrong test.

23. The actual question to be considered is, on a true construction of the Section with reference to the facts which are not in dispute, whether, having regard to the express provisions of the Act under Section 10B that the deduction, as provided therein, can be claimed for a period of 10 consecutive years beginning with the previous year in which the assessee begins manufacture of the products, the assessee could in this case claim the right to enjoy the benefit of Section 10B for a period of 10 years from 20.06.2007 when it was approved as a 100 per cent export oriented undertaking.

24. One way, no doubt, to look at the matter is to construe the words in Section 10B, namely, “in which the undertaking begins to manufacture or produce articles” as meaning, in a case, where the unit was in the domestic tariff area (as is admitted in this case) and it becomes a 100 per cent export oriented undertaking by virtue of the approval given, the commencement of manufacture should be treated as having happened from the point of time when it became a 100 per cent export oriented undertaking and, therefore, it would become entitled to the benefit of Section 10B from the said date. In other words, though it may have been manufacturing and exporting all its production abroad since much prior to the date of approval as a 100 per cent export oriented undertaking, since in law it could claim the benefit of Section 10B only upon it satisfying the requirement that it was approved as a 100 per cent export oriented undertaking in 2007, the production and the export which is carried out prior to it is to be obliterated and the Court must interpret this Section as meaning that it is a case of a 100 per cent export oriented undertaking beginning its production only when it became a 100 per cent export oriented undertaking.

25. The other way to look at it, as is contended by the Revenue, is that, having regard to the employment of the words “begins to manufacture”, since, admittedly, the respondent / assessee has began manufacture beyond 10 years from the date 20.06.2007, this provision does not leave room for any interpretation, as contended.

26. We must, now, consider the effect of the Circular dated 06.01.2005. We proceed on the basis that it is a Circular, which is issued under Section 119 of

the Act. It may be true that it was open to the authorities to issue a circular under the said Act, which may be beneficial to the interest of the assessee. Before we dissect the Circular, it is only proper that we refer to some case-law, which is referred to us by the learned counsel for the assessee.

27. In *Commissioner of Central Excise, Bolpur vs. M/s Ratan Melting & Wire Industries (Civil Appeal No. 4022 of 1999)* ***= 2005-TIOL-41-SC-CX-LB***, the matter came up before a Constitution Bench having regard to certain observations made by a Constitution Bench in *Collector of Central Excise vs. Dhiren Chemical Industries, reported in (2002) 2 SCC 127* ***= 2002-TIOL-83-SC-CX-CB.*** The question was finally decided, as we notice, in the following manner:

*"6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.*

*7. As noted in the order of reference the correct position vis-à-vis the observations in para 11 of Dhiren Chemical's case (supra) has been stated in Kalyani's case (supra). If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed vis-à-vis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution."*

Therefore, it becomes necessary also to refer to para 2 of the said judgment, wherein the decision in *Kalyani Packaging Industry vs. Union of India and another, reported in (2004) 6 SCC 719 =* ***2004-TIOL-82-SC-CX*** was referred to:

*"2. It was noted by the three-Judge Bench that the effect of the aforesaid observations was noted in several decisions. In Kalyani Packaging Industry v. Union of India and Anr. (2004 (6) SCC 719) =* ***2004-TIOL-82-SC-CX****, it was noted as follows:*

*"We have noticed that para 9 (para 11 in SCC) of Dhiren Chemical case (2002) 2 SCC 127* ***= 2002-TIOL-83-SC-CX-CB*** *is being misunderstood. It, therefore, becomes necessary to clarify para 9 (para 11 in SCC) of Dhiren Chemical case (2002) 2 SCC 127* ***= 2002-TIOL-83-SC-CX-CB****. One of us (Variava, J.) was a party to the judgment of Dhiren Chemical case and knows what was the intention in incorporating para 9 (para 11 in SCC). It must be remembered that law laid down by this Court is law of the land. The law so laid down is binding on all courts/tribunals and bodies. It is clear that circulars of the Board cannot prevail over the law laid down by this Court. However, it was pointed out that during hearing of Dhiren Chemical case because of the circulars of the Board in many cases the Department had granted benefits of exemption notifications. It was submitted that on the interpretation now given by this Court in Dhiren Chemical case the Revenue was likely to reopen cases. Thus para 9 (para 11 in SCC) was incorporated to ensure that in cases where benefits of exemption notification had already been granted, the Revenue would remain bound. The purpose was to see that such cases were not reopened. However, this did not mean that even in cases where the Revenue/Department had already contended that the benefit of an exemption notification was not available, and the matter was sub judice before a court or a tribunal, the court or tribunal would also give effect to circulars of the Board in preference to a decision of the Constitution Bench of this Court. Where as a result of dispute the matter is sub judice, a court/tribunal is, after Dhiren Chemical case, bound to interpret as set out in that judgment. To hold otherwise and to interpret in the manner suggested would mean that courts/tribunals have to ignore a judgment of this Court and follow circulars of the Board. That was not what was meant by para 9 of Dhiren Chemical case."*

28. Here, we are not faced with any decision of the Apex Court as such, as there is no ruling on the point in issue. The further decision, which is relied on by the learned counsel for the assessee, is the unreported judgment of the Delhi High Court in *Intercontinental Consultants and Technorats Pvt. Ltd. vs. Union of India and another passed in WP(C) 6370 of 2008* ***= 2012-TIOL-966-HC-DEL-ST****.* It is contended by Mr. Pulak Raj Mullick that a rule, which is contradictory to a statute, cannot stand side-by-side and yet survive. We notice that the said case involved the petitioner challenging the constitutional validity of a statutory rule on the ground that it was ultra vires the parent legislation. We do not see how the said decision can, at all, be pressed into service in the facts of this case. This is not a writ petition, where there is any challenge to any provision. Hence, we need not be detained by the said judgment.

29. As far as the issue relating to how a Section is to be interpreted, when there is a heading, which may not be borne out as such in the body of the Section, we may only advert to the judgment of the Apex Court in*Frick India Ltd. vs. Union of India and others, reported in (1990) 1 SCC 400*. It was inter alia laid down as follows:

*"It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt, the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision."*
It appears to have been followed in *Forage & Company (of Lushala) vs. Municipal Corporation of Greater Bombay & others, reported in 1999 Supp. (4) SCR 184*.

30. Now, we may pass on to the consideration of the Circular. The Circular is issued in the form of a clarification in response to queries, which were raised about the fate of the applicants, who were doing business in the domestic tariff area, ("Domestic Tariff Area" is defined in the Special Economic Zones Act, 2005 as follows:

*"(i) 'Domestic Tariff Area' means the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones")*

*and who were not having the status of a 100 per cent export oriented undertaking, but obtained such status later on, and the question was whether they could get the benefit. We have already referred to illustration no. 2. If the illustration is applied, it is clear that the order of the Tribunal becomes unsustainable. Therefore, we would have to examine whether this part of the Circular is in accord with the statutory provision. We say so because the respondent / assessee points out the provision in the Circular, which says that the benefit would not be available beyond 2009-2010, as being ultra vires to Section 10B of the Act, insofar as Section 10B purports to limit the right to claim the benefit under Section 10B up to the year 2012. It is to be noticed that the Circular must be appreciated in the context of the question, which fell for consideration, namely, whether in a case, where a unit was already in existence and it acquires the status of a 100 per cent export oriented undertaking later on, it could get the benefit of deduction beyond 10 years from the time when it initially commenced production. In the example, which was illustration no. 2, it is because the assessee would have commenced production in 1995-1996 that on expiry after 2005-2006, he would not be entitled to get the benefit irrespective of the fact that the assessee acquired the status of a 100 per cent export oriented undertaking in the year 2007. In fact, it is closest to the facts of this case also, as in this case also, the assessee, which was an existing manufacture of goods and, what is more, which was doing export, had commenced production long ago, in fact, in 1950, going by the statement contained in the submissions made to us,*

*and it obtained the status of a 100 per cent export oriented undertaking in 2007, which is as in the illustration which was given.*

31. We would think that we should now focus our attention on the provision of Section 10B itself. We would think that, on a consideration of Section 10B, as also the other provisions, which we have noted, the conclusion is inescapable that the intent of the law-giver was to confer benefit of deduction of the profits and gains of a 100 per cent export oriented undertaking from the total income, no doubt, subject to the manner in which it has been understood by the Supreme Court in *Commissioner of Income Tax & others vs. Yokogawa India Ltd., reported in (2017) 391 ITR 274* ***= 2016-TIOL-228-SC-IT***, but limited to 10 consecutive years, the starting point of which was the beginning of production of the goods in question. In this regard, we must notice Section 10B, as it is now found in the statute book. It is a substitution of a provision, which was brought into the statute book as early as on 01.04.1989. Indeed, its ingredients were different, as we have already noticed; but the concept of 100 per cent export oriented undertaking is the same as it is found in the present version of Section 10B, namely, there had to be an approval under the Industries (Development and Regulation) Act, 1951 as a 100 per cent export oriented undertaking. If that is so, unless we do violence to Section 10B and take the view that beginning of production, which is a reality in this case from since much before the date on which it was given approval, is to be totally ignored. We see no warrant in the provision of Section 10B to bring in an intendment to the Legislation bearing in mind, particularly, that there is no room for intendment in a taxing statute. No doubt, a taxing statute like any other statute must be interpreted fairly and even the object of the Legislature may not leave it untouched. But, we would think that, having regard to the setting of the statute, the purport was only to give the benefit for a period of 10 years from the date on which the undertaking commenced production. The words are clear and there is no room for any interpretation, as contended for by the learned counsel for the assessee. Merely getting the status of a 100 per cent export oriented undertaking in the year 2007, in our view, in other words, would not result in a change in the date of beginning of production by the said unit. In fact, the Circular, to the extent it proceeds to extend the period, appears to be beneficial to the assessee and it could possibly be a case of being a clarification, which is beneficial to the assessee. On an interpretation of the Section, which is a task which is unavoidable for the Court, even if there is a Circular, in which matter we agree with the assessee, the assessee, which becomes a 100 per cent export oriented undertaking by virtue of the approval, could claim the benefit; but, in no case, can it go beyond 10 years from the date on which it originally started producing the goods.

32. Thus, in fact, we would think that the Circular, insofar as illustration no. 2 is concerned, which we have referred to, cannot, but be held to be in accord with Section 10B on an interpretation of the same.

33. Learned counsel for the respondent / assessee points out Subsection (8) of Section 10B and would contend that it was compulsory on the part of the respondent to claim the benefit. We have already referred to Sub-section (8) of Section 10B. Under Sub-section (8) of Section 10B, it is open to the assessee to give a declaration and Sub-section (8) of Section 10B cannot dilute the requirement of Sub-section (1) of Section 10B. In other words, Sub-section (8) of Section 10B is conditioned upon the assessee being entitled to the deduction under Section 10B and also it is subject to the right of the assessee to give a declaration and he can always opt out of the benefit of Section 10B.

34. There remains the argument of Mr. Pulak Raj Mullick that, if this interpretation is accepted, it would render the obtaining of the status of a 100 per cent export oriented undertaking redundant and a futile exercise. We are not impressed by the said argument. The mere fact that the assessee (it may be noticed, who had in fact enjoyed the benefit of deduction under Section 80HHC from 1992-1993 and, thereafter, took further benefit under Section 80IC from 2004-2005 for a period of 5 years) thought it fit to apply and get the approval within the meaning of Section 10B cannot bind the income tax authorities to take a view contrary to the one, which we have taken, as merely obtaining the status of a 100 per cent export oriented undertaking cannot clothe the assessee with the right to claim benefit of deduction beyond 10 years, as we have explained. May be, it has impact for other purposes and on which we do not wish to pronounce; but, we are only concerned in this case with the question whether the assessee is entitled to the benefit under Section 10B and, in our view, the assessee is not entitled. Therefore, that the assessee had embarked upon an exercise, which is turned out to be futile, cannot be an argument, which will advance the case of the assessee.

35. Therefore, the result is that we must answer the question of law in favour of the appellant / revenue and against the respondent / assessee. We do so. The order of the Tribunal will stand set aside in regard to the claim under Section 10B of the Act.

36. Having regard to the fact that we have found that the respondent / assessee was not entitled to the benefit under Section 10B and also having regard to the fact that the assessment order reflects that documents were produced in support of the claim under Section 80IC, but, in view of the impossibility to claim the both together, the claim under Section 80IC had been given up, we would think that it will be in the fitness of things that we remit the matter back to the Assessing Officer for consideration of the case of the assessee under Section 80IC of the Act for the assessment year in question. We do so.

37. The appeal is allowed in the above terms.