**Restriction on the transfer of technical man-power under Circular Nos.14 and 12 of 2014**

By S.K.Tyagi

The Central Board of Direct Taxes (CBDT) had issued a Circular No.12 of 2014, dt.18.7.2014, by way of clarification regarding allowability of deduction under section 10A / 10AA, on transfer of technical man-power in the case of software industry [*366 ITR (St) 1 : 106 DTR (St) 28*]. Vide paragraph (4) of the aforesaid Circular No.12 / 2014, it has been clarified that mere transfer or redeployment of technical man-power from an existing unit to a new SEZ unit in the first year of commencement of business will not be construed as splitting up or reconstruction of an existing business, **provided** the number of technical man-power so transferred does not exceed 20 per cent of the total technical man-power actually engaged in developing software at any point of time in the given year in the new unit.

As per paragraph (5) of the aforesaid Circular No.12 / 2014, this Circular shall be applicable only in case of assessees engaged in the development of software or in providing IT Enabled Services in SEZ units eligible for deduction under section 10A or under section 10AA of the Act.

Afterwards, the aforesaid Circular No.12 / 2014, has been superseded by Circular No.14 / 2014, dt.8.10.2014. As per the later Circular No.14 / 2014, the limit of redeployment of technical man-power from existing unit(s) to a new unit located in SEZ has been enhanced from 20 per cent to 50 per cent of the total technical man-power. Besides, the aforesaid Circular No.14 / 2014 has also provided another alternative in this regard, vide paragraph (4) thereof, wherein also the limit on redeployment of technical man-power has been retained at 50 per cent of the total man-power of the new SEZ unit. As the aforesaid Circular No.12 / 2014 has been superseded by the later Circular No.14 / 2014, we shall deal in this regard only with the later Circular No.14 / 2014, dt.8.10.2014.

At the outset, it must be stated that like the earlier Circular No.12 / 2014, even the later Circular No. 14 / 2014, dt.8.10.2014, is adverse or prejudicial to the interests of the assesses / tax-payers and accordingly, the same is *ultra vires* the scope of section 119(2) of the Income-Tax Act, 1961 (the Act). Therefore, the aforesaid Circular is not, at all, binding on the assesses / tax-payers, as well as the appellate authorities, particularly in view of the well-settled legal position that there cannot be any overriding instructions or guidelines issued by the CBDT, which would go against the interests of the assesses / tax-payers.

In the present context, it may also be stated that though the aforesaid Circular No.14 / 2014, has been purportedly issued in order to reduce the inconvenience to the tax-payers, by way of clarification therein, yet the same has resulted in creating more difficulties / inconvenience to the assessees engaged in the business of development of software.

For the sake of ready reference, the aforesaid Circular No. 14 / 2014, dt.8.10.2014, issued by the CBDT, is reproduced as follows :

"***F.No.178 / 84 / 2012-ITA.I***
***Government of India***
***Ministry of Finance***
***Department of Revenue***
***Central Board of Direct Taxes***

***New Delhi, the 8th October, 2014***

***CIRCULAR NO. 14/2014***

*Subject :* ***Clarification regarding allowability of deduction under section 10A / 10AA on transfer of Technical Man-power in the case of software industry.***

*CBDT had issued Circular No.12 / 2014 dated 18th July, 2014 to clarify that mere transfer or re-deployment of existing technical manpower from an existing unit to a new SEZ unit in the first year of commencement of business will not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred does not exceed 20 per cent of the total technical manpower actually engaged in developing software at any point of time in the given year in the new unit.*

*2. Representations have been received stating that the aforesaid limit of 20% is inadequate and restrictive since it impacts the competitiveness of Indian Software Industry in global market in terms of quality of product and delivery time-lines. Global competitiveness can be ensured only when highly skilled and experienced manpower is deployed for software development. Requests have, therefore, been made seeking enhancement of the limit of 20% in line with the recommendation of Rangachary Committee, which was set up to review the taxation of IT Sector and Development Centers.*

*3. The matter has been re-examined by the Board. In supersession of the Circular No.12 / 2014 dated 18th July, 2014, it has now been decided that the transfer or re-deployment of technical manpower from existing unit(s) to a new unit located in SEZ, in the first year of commencement of business, shall not be construed as splitting up or reconstruction of an existing business, provided the number of*

*technical manpower so transferred as at the end of the financial year does not exceed 50 per cent of the total technical manpower actually engaged in development of software or IT enabled products in the new unit.*

*4. Further, in the alternative, if the assessee (enterprise) is able to demonstrate that the net addition of the new technical manpower in all units of the assessee (enterprise) is at least equal to the number that represents 50% of the total technical manpower of the new SEZ unit during such previous year, deduction under section 10A / 10AA would not be denied provided the other prescribed conditions are also satisfied.*

*5. For the sake of clarity, it is stated that the assessee will have a choice of complying with any one of the two alternatives given in Paras 3 and 4 above.*

*6. It is also clarified that this Circular shall be applicable only in the case of assesses engaged in the development of software or in providing IT Enabled Service s in SEZ units eligible for deduction u/s 10A or u/s 10AA of the Act.*

*7. This Circular shall not apply to the assessments which have already been completed. Further, no appeal shall be filed by the Department in cases where the issue is decided by an appellate authority in consonance with this Circular.*

*(Deepshikha Sharma)*

*Deputy Secretary to the Government of India"*

As per paragraph (1) of the aforesaid Circular, it has been clarified that the earlier Circular No.12 / 2014 was issued to clarify that mere transfer or redeployment of existing technical man-power from an existing unit to a new SEZ unit in the first year of commencement of business will not be construed as splitting up or reconstruction of an existing business, provided the number of technical man-power so transferred does not exceed 20 per cent of the total technical man-power, actually engaged in developing software at any point of time in the given year in the new unit.

Vide paragraph (3) of the aforesaid Circular, in supersession of the earlier Circular No.12 / 2014, it has been clarified that the transfer or redeployment of technical man-power from the existing unit(s) to a new unit located in SEZ, in the first year of commencement of business, shall not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred as at the end of the financial year does not exceed 50 per cent of the total technical manpower actually engaged in development of software or IT enabled products in the new unit.

Further, vide paragraph (4) of the aforesaid Circular No.14 / 2014, it has been clarified that in the alternative, if the assessee (enterprise) is able to demonstrate that the net addition of the new technical manpower in all units of the assessee (enterprise) is at least equal to the number that represents 50 per cent of the total technical manpower of the new SEZ unit during such previous year, deduction under section 10A / 10AA would not be denied provided the other prescribed conditions are also satisfied.

In the present context, it will be relevant to state that as per paragraph (2) of the earlier Circular No.12 / 2014, at times transfer / redeployment of technical man-power from the existing units of an assessee engaged in computer software development to its new SEZ unit is considered **as splitting up or reconstruction of existing business**, by some of the Assessing Officers (AOs), resulting in denial of benefit under section 10AA of the Act to the assessee. Thus, the crucial issue dealt with in the aforesaid Circular is whether the transfer of technical man-power from an existing unit to a new SEZ unit, could lead to a conclusion that the new unit is formed by splitting up or reconstruction of a business already in existence. Besides, in paragraph (3) of the earlier Circular No.12 / 2014, it has been clearly stated that as per Instruction No.70, dt.9.11.2010, issued by the Ministry of Commerce, there is no bar on transfer of man-power to SEZ units. It has also been stated therein that while there is a specific provision on transfer of plant or machinery from an existing unit to a new SEZ unit under section 10AA(4)(iii), subject to a ceiling of 20 per cent, no such bar on transfer or redeployment of man-power has been explicitly laid down in section 10AA of the Act.

In spite of the aforesaid legal position, in paragraph (3) of the aforesaid Circular No.14 / 2014, it has been clarified that transfer or redeployment of technical man-power from existing unit(s) to a new unit located in SEZ in the first year of commencement of business shall not be construed as splitting up or reconstruction of an existing business, provided the number of technical man-power so transferred as at the end of the financial year does not exceed 50 per cent of the total technical manpower actually engaged in development of software or IT enabled products in the new unit. It is, thus, clearly established that the CBDT, even vide the aforesaid Circular No.14 / 2014, has laid down a restriction which is not there in the relevant provisions of the Act for the deduction under section 10AA of the Act. Therefore, the aforesaid Circular No.14 / 2014 is *ultra vires* the provisions of section 119(2) of the Act, because as per section 119(2) of the Act, the CBDT may, if it considers it necessary, issue general or such orders setting forth directions or instructions, **not being prejudicial to the assesses.**

*In the present context, it will be appropriate to examine the relevant aspects relating to the impact of the aforesaid Circular on the claim of deduction under section 10A / 10AA*

*of the Act. For the aforesaid purpose, it will be necessary to examine and discuss the following issues :*

(i) As per the relevant provisions of section 10A(2) or section 10AA(4) of the Act, there is no prohibition on transfer or redeployment of man-power from the existing unit to a new unit.

(ii) Regarding the interpretation of splitting up or reconstruction of a business already in existence, the legal precedents applicable to erstwhile section 80J and section 10A or 10B will be equally applicable to section 10AA of the Act.

(iii) In view of the relevant legal precedents, the mere fact that some members of the staff of the existing unit and new unit are common, does not lead to a conclusion of splitting up or reconstruction of a business already in existence.

(iv) Therefore, the aforesaid Circular, being adverse or prejudicial to the interests of the assesses, will be *ultra vires* the scope of section 119(2) of the Act and accordingly, not binding on the assesses or the appellate authorities.

*All the aforesaid issues / aspects are discussed in detail as follows :*

**I. As per the relevant provisions of section 10A(2) or section 10AA(4) of the Act, there is no prohibition on transfer or redeployment of man-power from the existing unit to a new unit.**

As per the relevant provisions of section 10A(2) or section 10AA(4) of the Act, there is no prohibition on transfer or redeployment of man-power from the existing unit to a new unit.

In support of the aforesaid stand, it will be necessary to refer to the relevant provisions of sections 10A(2) and 10AA(4) of the Act, which are reproduced as follows :

***1. Section 10A(2)***

"***10A. Special provision in respect of newly established undertakings in free trade zone, etc.***

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

*(i) it has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year—*

*(a) commencing on or after the 1st day of April, 1981, in any free trade zone; or*

*(b) commencing on or after the 1st day of April, 1994, in any electronic hardware technology park, or, as the case may be, software technology park;*

*(c) commencing on or after the 1st day of April, 2001 in any special economic zone;*

*(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 re-establishment, reconstruction or revival by the assessee of the business of any such undertakings 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 1 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."*

***2. Section 10AA(4)***

"***10AA. Special provisions in respect of newly established Units in Special Economic Zones.***

*(4) This section applies to any undertaking, being the Unit, which fulfils all the following conditions, namely:—*

*(i) it has begun or begins to manufacture or produce articles or things or provide services during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone;*

*(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, being the Unit, which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such 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 Explanations 1 and 2 to sub-section (3) of sec-tion 80-IA 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."*

From the aforesaid provisions of sections 10A(2) and 10AA(4), it may be clearly seen that there is no bar on the transfer or redeployment of man-power from an existing unit to a new unit, though there is a specific prohibition on transfer of plant or machinery from an existing unit to a new undertaking or a new SEZ unit, as per sections 10A(2)(iii) and 10AA(4)(iii), subject to a ceiling of 20 per cent.

In view of the aforesaid reasons, it is quite clear that the aforesaid Circular No.14 / 2014, has prescribed a restriction on the transfer of technical man-power, subject to a ceiling of 50 per cent thereof, though there is no such restriction / bar under the relevant provisions of sections 10A(2) or 10AA(4) of the Act.

**II. Regarding the interpretation of splitting up or reconstruction of a business already in existence, the legal precedents applicable to erstwhile section 80J and section 10A or 10B will be equally applicable to section 10AA of the Act.**

In the first place, it may be stated that provisions similar to those in sections 10A(2)(iii) and 10AA(4)(iii), were also present under the erstwhile section 80J of the Act. The relevant part of the erstwhile section 80J is reproduced as follows :

"***80J Deduction in respect of profits and gains from newly established industrial undertakings or ships or hotel business in certain cases.***

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

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

*(ii) it is not formed by the transfer to a new business of a building (not being a building taken on rent or lease), machinery or plant previously used for any purpose"*

In the present context, a reference may also be made to similar provisions in section 10B of the Act. The same are reproduced as follows :

***"10B. Special provisions in respect of newly established hundred per cent export-oriented undertakings.***

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

*(i) it manufactures or produces any articles or things or computer software;*

*(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 re-establishment, reconstruction or revival by the assessee of the business of any such 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 1 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."*

After examination of the relevant provisions of the erstwhile section 80J and sections 10A, 10AA and 10B, it is clear that there are exactly same provisions therein, relating to the condition of splitting up or the reconstruction of a business already in existence.

In view of the aforesaid reasons, the relevant legal precedents applicable to erstwhile section 80J and sections 10A and 10B will equally apply to section 10AA of the Act.

**III. In view of the relevant legal precedents, the mere fact that some members of the staff of the existing unit and new unit are common, does not lead to a conclusion of splitting up or reconstruction of a business already in existence.**

In view of the relevant legal precedents, the mere fact that some members of the staff of the existing unit and new unit are common, does not lead to a conclusion of splitting up or reconstruction of a business already in existence.

In support of the aforesaid stand, reliance is placed on the following legal precedents :

*1. CIT Vs Hindustan General Industries Ltd [1982] 137 ITR 851 (Del)*

The aforesaid case relates to the interpretation of the expression "*splitting up or reconstruction of the business already in existence*", as used in erstwhile section 84 of the Act, which was replaced by section 80J of the Act.

It was held in this case that –

(i) The expression "*splitting up of the business already in existence*" in section 84 of the I.T.Act, 1961, indicates a case where the integrity of a business earlier in existence is broken up and different sections of the activities previously conducted are carried on independently.

(ii) It is not every alteration in the mode, method or scope of the activities of a business and it is not every transfer of assets from one unit to another that will involve "*reconstruction*". The expression is no doubt very wide but it does not take in a case of a company setting up or establishing a totally independent and viable industrial unit for carrying on the same or similar business even though it might be so set up by way of expanding the already existing business. The emphasis in section 84 is not on business but on undertaking. The exemption is granted to new undertakings and the essence of the exemption is that it is a new industrial unit that is established and that it is not merely a rehash of an already existing unit.

After going through the aforesaid judgement of the Delhi High Court, it is clearly established that as regards the condition relating to "*the splitting up or the reconstruction of business already in existence",* there is not even a whisper in regard to the transfer or redeployment of the existing technical man-power from an existing unit to a new unit.

2. *ITO Vs Servion Global Solutions Ltd [2008] 117 TTJ 380 (Chennai)*

It was held in this case that the assessee STPI unit having been established by acquiring assets worth Rs.1.43 crores and fulfilling other conditions could not be denied exemption under section 10A on the ground that it was established by splitting up old unit only because it also dealt in the same products as that of the old unit and **there were some old unit's employees and customers.**

In this case, the AO denied exemption under section 10A, holding that the STPI unit is not a new unit and there is a splitting or reconstruction of earlier business. One of the reasons for the above conclusion was that employees of STPI unit were employed by the company even before the formation of new STPI unit and **there was rotation of employees between STPI unit and non-STPI unit.**

In para 5.8, on page 391 of the Report, it has been, *inter alia,* held that the fact that new unit also deals in the same products as that of old unit **or that there are some old unit employees or customers, cannot be taken as a ground for denying the benefit under section 10A.**

In this case, reliance has also been placed on the judgement of Bombay High Court, in the case of *CIT Vs Metropolitan Springs P.Ltd [1991] 191 ITR 288 (Bom).*

3. *CIT Vs Metropolitan Springs P.Ltd [1991] 191 ITR 288 (Bom).*

This judgement relates to the provisions of the erstwhile section 80J of the Act. It was held in this case that the fact that a part of the premises used by the old undertaking was used for the new industrial undertaking or **that some members of the staff were common would not make any material difference to that situation. The assessee was entitled to the said deduction under section 80J of the Act.**

In this context, the observations of the High Court, on page 290 of the Report are relevant, which are reproduced as follows :

"*The Appellate Assistant Commissioner primarily relied on his findings given in the appellate order for the assessment year 1967-68. He observed that whether a new industrial undertaking was or was not set up was essentially a question of fact. An industrial undertaking was conceptually different from a business. In view of the meaning ascribed to the expression "new industrial undertaking" in the circular issued by the Central Board of Revenue on April 1, 1960*

*(which was produced) the facts according to the Appellate Assistant Commissioner clearly indicated that a new industrial undertaking was set up. Accordingly, the Appellate Assistant Commissioner held that the assessee was entitled to deduction under section 80J.* ***The objections such as that the same personnel and office premises were used for the new unit, it may be stated, were not considered of any consequence by the Appellate Assistant Commissioner. The Tribunal agreed with the Appellate Assistant Commissioner and dismissed the Departmental appeal.***

*We have been taken through the statement of case, paragraph 10 of the appellate order of the Appellate Assistant Commissioner for the assessment year 1967-68, which is the basis of the Appellate Assistant Commissioner 's order for the year and the Tribunal's order for the year under reference. From the facts stated in the order of the Appellate Assistant Commissioner and found by the Tribunal, we are satisfied that the assessee had set up a new industrial undertaking which is a finding of fact. Once we agree with the Tribunal that the particular unit constitutes an industrial undertaking within the meaning of section 80J of the Income-Tax Act, the result must follow that the assessee is entitled to deduction under section 80J.* ***The mere fact that a part of the premises used by the old undertaking was used for the new industrial undertaking or that some members of the staff were common does not, in our opinion, make any material difference in the situation.***

*In the above view of the matter, we answer the question in the affirmative and in favour of the assessee."* [Emphasis added]

In the light of the aforesaid legal precedents, the impugned Circular No.14 / 2014, dt.8.10.2014, is prejudicial to the interests of the assesses / tax-payers, because it has prescribed uncalled for restriction regarding the movement of employees from the old unit to the new unit, which is not, at all, contemplated under sections 10A(2) and 10AA(4) of the Act. In other words, it adversely affects the interests of the assesses.

**IV. Therefore, the aforesaid Circular No.14 / 2014, being adverse or prejudicial to the interests of the assesses, will be *ultra vires* the scope of section 119(2) of the Act and accordingly, not binding on the assessees or the appellate authorities.**

In the present context, a reference may be made to section 119(2) of the Act, wherein it is clearly laid down that the CBDT may not issue any guidelines, instructions, circulars, which are

prejudicial to the assesses. Therefore, the aforesaid Circular is *ultra vires* the scope of section 119(2) of the Act.

*It may also be very emphatically stated here that a Circular issued by the CBDT which is adverse to the interests of the assesses will not be binding on the appellate authority or the Tribunal or the Court or even the assessee, because the same is ultra vires the scope of section 119(2) of the Act. The aforesaid stand is supported by the following legal precedents :*

1. *Kerala Financial Corporation Vs CIT [1994] 210 ITR 129 (SC)*

   It was held in this case that what section 119 has empowered is to issue orders, instructions or directions for the "*proper administration*" of the Act, or for such other purposes specified in section 119(2) of the Act. **Such an order, instruction or direction cannot override the provisions of the Act.** That would be destructive of all the known principles of law, as the same would really amount to giving power to a delegated authority to even amend the provisions of law enacted by the Parliament.

2. *UCO Bank Vs CIT [1999] 237 ITR 889 (SC)*

   It was, *inter alia,* held in this case that the CBDT under section 119 of the Act, has power to tone down the rigour of law and ensure a fair enforcement of its provisions by issuing circulars in exercise of its statutory powers under section 119 of the Act, which are binding on the authorities in the administration of the Act. **Under section 119(2)(a), however, the circulars as contemplated therein cannot be adverse to the assessee.**

3. *J.K.Synthetics Ltd Vs CBDT [1972] 83 ITR 335 (SC)*

   It was, *inter alia*, held in this case that the Central Board is not competent to give directions regarding the exercise of any judicial power by its subordinate authorities. In other words, the CBDT is not competent to direct the ITO or any other Income-Tax Authority to make a particular assessment or to dispose of a particular case in a particular manner.

4. *Keshavji Ravji and Co. Vs CIT [1990] 183 ITR 1 (SC)*

   It was, *inter alia*, held in this case that the Board cannot pre-empt a judicial interpretation on the scope and ambit of a provision of the Act, by issuing circulars on the subject.

It was also held in this case that a circular cannot even impose on the tax-payer a burden higher than what the Act itself, on a true interpretation envisages. The task of interpretation of the laws is the exclusive domain of the Courts.

5. *CIT Vs Hero Cycles (P) Ltd [1997] 228 ITR 463 (SC)*

It was, *inter alia*, held in this case that circulars can bind the Income-Tax Officer but will not bind the appellate authority or the Tribunal or the Court or even the assessee.

It is, thus, clearly established that a circular of the CBDT, particularly a circular which is adverse to the interests of the assessee, cannot be binding on the assessee.

6. *Madura Coats Vs Dy.CIT [2005] 273 ITR 32 (Mad)*

In this connection, it may be stated that the CBDT issued Circular FNO.200 / 79 / 2000 – ITA-1, dt.23.1.2001, directing the assessing authorities to treat *ex-gratia* payment made by the assesses to their employees under schemes like Voluntary Retirement Scheme as capital expenditure.

It was held that the aforesaid Circular was *ultra vires* section 119(2) of the Act, since it was adverse to the assesses and section 119(2) does not permit the issuance of such a positive direction to the AOs. It was also held that the assessing authorities exercise their functions which are quasi-judicial in nature and they should be free to apply their mind based on the provisions of the Act. There cannot be any overriding instructions or guidelines by the Board which would go against the interests of the assessee.

7. *East India Hotels Ltd Vs C.R.Shekhar Reddy [1998] 230 ITR 622 (Karn)*

It was held in this case that **any instruction which may even pertain to interpretation of a statutory provision under the Act, cannot bind the tax-payers** requiring to seek any remedy against the said instructions / clarifications, either statutory or constitutional.

*8. Union of India Vs Azadi Bachao Andolan [2003] 263 ITR 706 (SC)*

It was, *inter alia*, held in this case that the powers of the CBDT are wide enough to enable it to grant relaxation from the provisions of several sections of the Act. Such orders may be published in the Official Gazette in the prescribed manner, if the CBDT is of the opinion that it is so necessary. **The only bar on the exercise of power is that it is not prejudicial to the assessee.**

*9. Dedicated Health Care Services TPA (India) Pvt.Ltd. Vs ACIT [2010] 324 ITR 345 (Bom)*

In this case, the CBDT had issued a Circular stating that failure to deduct tax at source under section 194J would necessarily attract penalty.

It was held that besides interfering with the quasi-judicial discretion of the AO or as the case may be, the appellate authority, the direction which had been issued by the CBDT would foreclose the defence which was open to the assessee under section 273B. By foreclosing a recourse to the defence statutorily available to the assessee under section 273B, the CBDT had, by issuing such a direction, acted in violation of the restraints imposed upon it by the provisions of section 119(1) of the Act. **To that extent, the Circular though was issued by the CBDT, would have to be set aside.**

*10. Bhartia Industries Ltd Vs CIT [2013] 353 ITR 486 (Cal) : [2011] 60 DTR 121 (Cal).*

It was held in this case that the Circular issued by the Central Board of Direct Taxes under section 119 of the Income-Tax Act, 1961, is meant for guiding the officers of the Revenue for administrative purpose of enforcing the provisions of the Act. But when an authority under the Act is required to perform quasi-judicial functions, such authorities should be guided by the law of the land as enunciated on the questions involved by various judicial authorities which have binding effect. **If an existing Circular is in conflict with the law of the land laid down by the High Courts or the Supreme Court, the Revenue authorities while acting quasi-judicially, should ignore such Circulars in discharge of their quasi-judicial functions.**

In the light of the aforesaid legal precedents laid down by the Supreme Court and the High Courts, it is clearly established that the CBDT is not competent to issue orders, instructions or directions which override the provisions of the Act. In other words, the CBDT cannot pre-empt a judicial interpretation on the scope and ambit of the provisions of the Act by issuing Circulars on the subject. Besides, it is also clearly established that Circulars can bind only the ITO, but will not bind the appellate authorities or the Tribunal or the Court or even the assessees.

It may also be stated here that if a Circular is in conflict with the law of the land laid down by the High Courts or the Supreme Court, the Revenue authorities while acting quasi-judicially should ignore such circulars in discharge of their quasi-judicial functions. It clearly implies that the aforesaid Circular No.14 / 2014, being in conflict with the law of the land has got to be ignored even by the AOs.

In the light of the aforesaid reasons, the impugned Circular No.14 / 2014, dt.18.7.2014, deserves to be ignored by the assesses and in case the same is followed by the AOs, such a decision on the part of the AOs must be challenged before the appellate authorities.

## V. Conclusion:

In the light of the discussion in the preceding paragraphs, it is clearly established that -

1. As per the relevant provisions of section 10A(2) or section 10AA(4) of the Act, there is no prohibition on transfer or redeployment of man-power from the existing unit to a new unit.

2. Regarding the interpretation of splitting up or reconstruction of a business already in existence, the legal precedents applicable to erstwhile section 80J and section 10A or 10B will be equally applicable to section 10AA of the Act.

3. In view of the relevant legal precedents, the mere fact that some members of the staff of the existing unit and new unit are common, does not lead to a conclusion of splitting up or reconstruction of a business already in existence.

4. Therefore, the aforesaid Circular No.14 / 2014, being adverse or prejudicial to the interests of the assesses, will be *ultra vires* the scope of section 119(2) of the Act and accordingly, not binding on the assesses or the appellate authorities.

The aforesaid judgement of Calcutta High Court, in the case of *Bhartia Industries Ltd* has even gone to the extent of laying down that **if a circular is in conflict with the law of the land, the Revenue authorities while acting quasi-judicially should ignore such circular.**

In the light of the aforesaid reasons, the impugned Circular No.14 / 2014, is required to be ignored and besides, the same will not be binding on the assessees, the appellate authorities or even the Assessing Officers.

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