IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH; AMRITSAR.

BEFORE SH. A.D.JAIN, JUDICIAL MEMBER
AND SH. B.P.JAIN, ACCOUNTANT MEMBER

I.T.A. No.	Assessment year
345(Asr)/2009	2006-07
55(Asr)/2011	2006-07
410(Asr)/2010	2007-08
238(Asr)/2011	2008-09
284(Asr)/2012	2009-10

Shri Rohit Tandon Prop. M/s. Prajna (India) Limited. Jalandhar. PAN :AAFPT3362Q	Vs.	Income Tax Officer, Ward 1(3), Jalandhar.
(Appellant)		(Respondent)

Appellant by:Sh.Y.K.Sud, CA
Respondent by:Sh.Tarsem Lal, DR

Date of hearing:03/02/2015
Date of pronouncement:05/03/2015

ORDER

PER A.D. JAIN, AM:

These five appeals relate to the same assessee for the assessment years 2006-07, 2006-07, 2007-08, 2008-2009 and 2009-10, respectively.

2. Since the same issues are involved therein, all these appeals are being disposed of by this common order.

3. For convenience, the facts are being taken from ITA No.345(Asr)/2009.

4. As per the findings of the AO in the assessment order, as taken note of by the ld. CIT(A) from page 2, para-2.1 to page 5, para 2.5 of the impugned order, the AO refused to allow to the assessee the deduction claimed u/s 10B of the Income Tax Act ('the Act', for short).

5. The Ld. CIT(A), by virtue of his findings contained at page 24, para 6 to page 43 of the impugned order, partly allowed the appeal of the assessee.

6. The Tribunal, vide order dated 31.08.2009 dismissed the assessee's appeal against the aforesaid order passed by the ld. CIT(A).

7. The assessee filed M.A. No.98(Asr)/2009 before the Tribunal, pointing out various alleged mistakes apparent from the record in the aforesaid Tribunal order dated 31.08.2009.

8. Vide order dated 04.03.2010, the Tribunal allowed the Miscellaneous Application filed by the assessee, observing as follows:

> "*10. Having considered the rival submissions, we find the grievances of the assessee to be correct. A perusal of the order shows that the case laws cited on behalf of the assessee have not been considered. The aforesaid various arguments, stated to have been made before the Tribunal at the time of hearing of the appeal, have also not been disposed of in their right perspective, as pointed out in the application and argued during the hearing of the appeal. This, in our considered opinion, indeed constitutes a rectifiable mistake apparent from record. Therefore, our order dated 31.8.2009 (supra) is hereby recalled. The matter is refixed for hearing on merits afresh under notice to the parties on 8.4.2010.*"

9. As a result, the appeal is now before us this second time round.

10. The Ld. counsel for the assessee filed written submissions dated 02.01.2005. The contentions contained therein will be discussed in the succeeding portion of this order. The Ld. DR raised an objection, contending that the Tribunal can rectify only those mistakes, as were pointed out in the Miscellaneous Application of the assessee; that new judgments can neither be cited, nor considered at this stage; and that other than the issues mentioned in the Miscellaneous Application and the order passed thereon by the Tribunal, no new arguments can now be advanced. It was contended that the assessee cannot now rely on any judgment other than those taken note of by the Tribunal while allowing the Miscellaneous Application.

11. On our asking, the ld. Counsel for the assessee filed written submissions dated 12.01.2015 apropos the above objections raised by the Ld DR, contending therein to the effect that vide its order dated 04.03.2010, the Tribunal had recalled its order dated 31.09.2009 in toto. It was also submitted therein that the Tribunal had power to order a total recall of its earlier order, if the mistakes pointed out in the Misc. Application were found to be so patent from the record, that a total recall was called for. In support of this contention, numerous decisions were relied on.

12. As a counter to the written submissions dated 12.01.2015, the Ld. DR filed written submissions dated 27.01.2015. Therein, it was contended that

by passing the order dated 04.03.2010, the Tribunal has caused immense prejudice to the interests of the revenue and such prejudice was required to be done away with in the first instance. Reliance was placed on 'Honda Siel Power Products Ltd. vs. CIT', reported in (2007) 295 ITR 466 (SC). It was contended that the Tribunal erred in holding that nine judgments cited on behalf of the assessee were not considered by the Tribunal while passing its earlier order dated 31.08.2009; that the Tribunal further erred in holding that various arguments advanced on behalf of the assessee at the time of hearing of the appeal had not been disposed of in their right perspective; that in case it were so, such non-consideration of the arguments "in their right perspective" amounted to perversity, which could not be reviewed by the Tribunal; that the order could have been recalled by invoking the provisions of section 254(2) of the Act only in case the arguments had not been considered at all; that the recalling of the Tribunal's earlier order be treated as vacated; and that thus, there remained nothing to be taken afresh in the appeal, as "when the Tribunal will atone for its wrong, it will only result in restoration of its order dated 31.08.2009 which is humbly prayed for". Further, a para-wise discussion of the order dated 04.03.2010 was made, challenging the observations made therein and it was reiterated that the Tribunal had caused prejudice to the interests of the revenue by recalling its

earlier order. Apropos the issue regarding the power of the Tribunal to recall an order in toto, it was contended that the Tribunal does not have any such power. The case laws relied on by the assessee in this behalf were stated to be not applicable.

13. The Ld. DR filed further written submissions dated 03.02.2015, reiterating the request that the prejudice caused to the interests of the revenue be done away with and the issue as to whether the order of the Tribunal allowing the application of the assessee had not caused such prejudice by decided first.

14. We have considered this aspect of the matter in the light of the rival contentions and the material placed on record. There is no requirement under the law, while deciding an appeal, to separately decide the question as to whether the Tribunal, while allowing a Miscellaneous Application filed by the assessee, had caused any prejudice to the interests of the revenue. All material issues arisen are to be decided in the appeal order itself. Moreover, in the present case, the Tribunal order allowing the Misc. Application of the assessee was passed on 04.03.2010. If the Department was aggrieved there against, it was well entitled to take recourse to an appropriate remedy under the law, if so as advised. This was not done at any stage, accepting the order of the Tribunal. It does not, therefore, in our considered opinion, lie in the

mouth of the Department to rake up such a challenge at this stage. The reliance by the Department on the decision in 'Honda Siel Power Products Ltd. vs. CIT', (supra) is found to be misplaced. Therein, the question presently under consideration was not at all in issue. Thus, this matter requires no further deliberation and it need not detain us any longer. However, the objection having been raised and pressed whole hog, we are going into it at length, fully alive to the fact that we are not sitting in appeal over the Tribunal order whereby the Miscellaneous Application of the assessee was allowed.

14. So far as regards the power of the Tribunal to recall its order in its entirety in 'Lachman Dass Bhatia Hingwala (P) Ltd. vs. ACIT', 237 CTR (Del) (FB) 117, it has been observed that the Tribunal, while exercising the power of rectification u/s 254(2) of the Act, can recall its order in its entirety, if it is satisfied that prejudice has resulted to the party, which is attributable to the Tribunal's mistake, error or omission and which error is a manifest error and it has nothing to do with the doctrine or concept of inherent power of review. In the present case, the Tribunal found the decisions cited by the assessee and the arguments made by the assessee to have been not considered in its earlier order. It was on this basis that the Tribunal recalled its earlier order in toto.

15. In 'Commissioner of Income Tax vs. S.K.Gupta', reported in (2010) 327 ITR 267 (All), it was observed that if the mistakes apparent from the record go to the root of the matter, it is the discretion of the Tribunal to correct the mistakes in the facts of the order, or the operative portion of the order, or to hear the appeal denovo.

16. In 'Champa Lal Chopra vs. State of Rajasthan', reported in (2002) 257 ITR 74 (Raj.), it was held that in a given case, where the factual mistake is so apparent that it becomes necessary to correct the same, the Tribunal would be justified in not only correcting the said mistake by way of rectification, but if the judgment has proceeded on the basis of facts, it would be justified in recalling such order.

17. In 'Commissioner of Income Tax vs. Ramesh Chand Modi', 249 ITR 323 (Raj), it was held that where the Tribunal fails to decide some of the questions raised before it, inadvertently or by oversight, the only appropriate method of correcting such mistake is to recall the order and make a fresh order after affording an opportunity of hearing to such party, and that in all such cases, ordinarily, the Tribunal acts *ex-debito justitiae* to prevent abuse of process, even in the absence of any power.

18. In 'Gehna vs Income Tax Officer', reported in (2011) 137 TTJ (JP)(UO) 17, relying on 'Honda Siel Power Products Ltd.', (supra), it was

held that where there was no whisper in respect of the decisions relied upon by the ld. Counsel of the assessee during the hearing of the appeal before the Tribunal, the order of the Tribunal is liable to be recalled in toto to decide the same afresh.

18-A. Two Third Member decisions of the Tribunal are also to the same effect: 'B. Karam Chand Pyare Lal vs. ITO' 91 ITD 398 (All.) (TM); and 'Mohan Meakins Ltd. vs. ITO,' 89 ITD 179 (Del) (TM).

19. Adverting to the order dated 04.03.2010 passed by the Tribunal allowing the Misc. Application of the assessee, in the application filed by the assessee, it had been contended that despite the assessee having filed nine judgments and despite the attention of the Bench having been drawn towards all of them by reading the highlighted parts thereof, none of these judgments had been considered by the Tribunal. On this basis, the earlier order of the Tribunal was requested to be recalled. To support such a recall, the assessee sought to place reliance on nine decisions, which were quoted in the application itself. In the order allowing the application, mistakenly, the Tribunal observed that these latter nine judgments had not been considered by the Tribunal while passing its earlier order. This, evidently, was a typographical error, since a perusal of the earlier order of the Tribunal shows that the other set of nine judgments relied on by the assessee during the

appeal proceedings had not been considered. Therefore, the objection of the department in this regard is not justified.

20. Coming to the objection of the Department that the Tribunal went wrong in observing that various arguments on behalf of the assessee were not considered "in their right perspective", this objection is also found to be mis-conceived. This is so, because in para 3 of the order dated 04.03.2010, it was observed by the Tribunal that it had been contended on behalf of the assessee that the decision in 'Textile Machinery Corporation Ltd. vs. CIT', 107 ITR 195 (SC) had wrongly been observed by the Tribunal to have been relied on both by the assessee and the department; that this was not so; that the ld. CIT(A) had held this decision to be going in favour of the assessee; and that this contention of the assessee had not been considered. Likewise, in para 4, the Tribunal has observed that though the assessee had distinguished 'Chembra Peak Estate Limited vs. CIT', 85 ITR 401 (Kerala), this distinction had neither been discussed, nor disposed of by the Tribunal.

21. Further, in para 5, it was observed that the decision of the Mumbai Bench of the Tribunal in 'Chenab Information Technologies (P.) Ltd. vs Income-tax Officer', 25 SOT 432 (Mum.), though never relied on by the assessee, was cited by the Tribunal to have been so relied on. In para 6, it was observed that though the decision in 'Income Tax Officer vs. Servion

Global Solutions Ltd.', reported in 117 TTJ (Chennai) 380 and that reported in 115 TTJ 469 were distinguishable on facts, but no reason was recorded to arrive at such a finding. In para 7, it has been observed that it was submitted on behalf of the assessee that though the arguments addressed on behalf of the assessee at the time of hearing of the appeal were recorded, they were not either fully recorded, or disposed of. In para 8, it was observed that it had been asserted on behalf of the assessee that though it was brought to the notice of the Tribunal that the ld. CIT(A) had given a finding in para 8 of his order that the argument of the AO was that it was a case of reconstruction and that the AO had wrongly made it to be a case of splitting of the business, these facts had not been considered by the Tribunal.

22. It was having considered the above, that in para 10 of the order allowing the application of the assessee, the Tribunal observed, inter-alia, that the arguments on behalf of the assessee had not been disposed of in their right perspective. To quote the relevant portion of the Tribunal order (see para 8 above):

> "…. The aforesaid various arguments, stated to have been made before the Tribunal at the time of hearing of the appeal, have also not been disposed of in their right perspective, as pointed out in the application and argued during the hearing of the appeal.."(emphasis supplied)

As such, there is no force in the objection of the department that it was not within the purview of the Tribunal to recall its earlier order on the basis that arguments had not been considered in their right perspective. Accordingly, this objection is also rejected.

23. Supporting the proposition that the Tribunal does not have any power to recall its earlier order in its entirety, the Ld. DR has sought to place reliance on the following decisions:

i) 'Commissioner of Income tax vs. Gokul Chand Agarwal', 202 ITR 14 (Cal.)
ii) 'Commissioner of Income Tax vs. Earnest Exports Ltd.', 323 ITR 577 (Bom.)
iii) 'Shaw Wallace And Co. Ltd. vs. Income-Tax Appellate Tribunal And Others', 240 ITR 577 (Cal.)
iv) 'Commissioner of Income tax vs. Income Tax Appellate Tribunal And Others', 293 IT 118 (Del.)
v) 'Commissioner of Income Tax vs. Kedia Leather And Liquor Ltd.', 293 ITR 95 (MP)

24. 'Commissioner of Income tax vs. Gokul Chand Agarwal', (supra) is distinguishable on facts. Therein, the Tribunal had recalled its earlier order without pointing out that the same suffered from any mistake apparent from the record, which was liable to be rectified.

25. 'Commissioner of Income Tax vs. Earnest Exports Ltd.' (supra) also does not further the cause of the department. In that case, in its original order, the Tribunal specifically dealt with two Tribunal decisions cited by

the assessee and distinguished the same. The issue concerning deduction u/s 80HHC of the Act, was decided on merits by dealing with the said two decisions. The appeal of the assessee was not dismissed only on technical grounds. However, while dealing with the application u/s 254(2) of the Act the Tribunal virtually reconsidered the entire matter and came to the conclusion that deduction u/s 80HHC of the Act was allowable in view of these decisions. The Hon'ble Bombay High Court held that this amounted to re-appreciation of the correctness of the earlier decision on merits, which was not permissible. It was held that power u/s 254(2) of the Act is confined to rectification of mistakes apparent from the record and that section 254(2) is not a carte blanche for the Tribunal to change its own view by substituting a view which it believes should have been taken in the first instance. Now, again, these are not facts in pari-materia with those of the present case. In the present case, the earlier order was recalled since mistakes apparent from the record, calling for rectification, were found to exist in the earlier order of the Tribunal and it was as such that the entire earlier order was ordered to be recalled. It is not a case of substitution of an earlier view with a fresh one thought ought to have been taken earlier.

26. In 'Shaw Wallace And Co. Ltd. vs ITAT', (supra), it was held that a mistake in the reasoning portion of the order cannot be rectified u/s 254(2)

of the Act by the Tribunal by totally recalling its order. It was held that the Tribunal was not entitled u/s 254(2) of the Act to rectify or amend any reasoning of it which did not affect the correctness of its final order. Here too, the facts are at variance. In the present case, no mistake in the reasoning of the earlier order, not effecting the correctness of the order has been sought to be rectified by recalling the entire order. As discussed hereinabove, non-consideration of the judgments cited on behalf of the assessee and the arguments addressed were found to be the mistakes apparent from the record, which were sought to be rectified by recalling the entire order. It was not the reasoning, but the said omissions, which affected the order of the Tribunal and therefore, the mistakes apparent from the record were subjected to rectification.

27. In 'Commissioner of Income tax vs. Income Tax Appellate Tribunal And Others', (supra), it was held that the fact that the Tribunal, while disposing of the appeal, failed to take note of a decision may not constitute a mistake apparent from the record within the meaning of section 254(2) of the Act. It was further held that the fact that the issue decided by the Tribunal was debatable, could not be a justification for recalling the order to hear the appeal denovo. In the present case, it is not only that the Tribunal failed to take note of decisions cited, rather, as deliberated upon

hereinabove, there also existed numerous other mistakes apparent from the record also, which required rectification. It was thus that the Tribunal recalled its earlier order in its entirety. Too, while ordering such recall, it was nowhere held that any issued decided by the Tribunal was a debatable one. As such, this decision is also distinguishable.

28. In 'Commissioner of Income Tax vs. Kedia Leather And Liquor Ltd.', (supra), it has been held that u/s 254(2) of the Act, the Tribunal can rectify a mistake, but it cannot review its order. This, undeniably is the settled position of law. In the present case, however, it has not been shown as to how, particularly when the Tribunal recalled its earlier order to rectify numerous mistakes apparent from the record, it amounted to a review. Thus, this decision is of no aid to the Department.

29. Besides the above, it has already been discussed that since the department never felt aggrieved of the rectification order of the Tribunal and did not ever agitate this issue, it is precluded from doing so at this stage. Accordingly, the objections of the Department in this regard are hereby rejected.

30. The assessee has filed an application for additional evidence before us, seeking to produce on record, as additional evidence, a letter dated

14.12.2009 of Mitusuvhishi Heavy Industries Limited, Japan. It has been contended that this letter is crucial for a just disposal of the dispute at hand; that this letter was not available at the time of hearing, either before the AO, or before the ld. CIT(A) and it was received by the assessee subsequently, after the order of the ld. CIT(A) was passed; and that as such, the assessee had no opportunity to produce this evidence before the taxing authorities.

31. The Ld. DR, on the other hand, has contended that this evidence cannot be allowed to be produced on record at this belated stage.

32. Having heard the rival contentions on this issue, it is seen that it remains undisputed that the letter sought to be produced by the assessee by way of additional evidence is essential for a just disposal of the main dispute. It also remains unchallenged that the letter was not available with the assessee till the time of the passing of the ld. CIT(A)'s order, which is dated 14.07.2009.

33. In 'CIT vs. Mukta Metal Works', (2011) 336 ITR 555 (P&H), it has been held to the effect that where the additional evidence sought to be produced has a direct bearing on the issue, the Tribunal is not justified in declining to consider the same.

34. Therefore, the request for additional evidence is accepted.

35. Now coming to the merits of the case. At the outset, it is pertinent to mention here, that, to reiterate, the department requested that the issue as to whether the Tribunal order allowing the application filed by the assessee has or has not caused prejudice to the interests of the revenue, be decided first. This request is also contained in the department's written submission dated 27.01.2015 (supra) and that dated 03.02.2015 (supra). Despite the department having been apprised of the legal position, as per the considered opinion of this Bench, that the matter requires to be heard in its entirety, including the merits thereof and no such segregation, as sought by the department, is envisaged under the law, the department chose not to respond to the arguments on merits, both oral as well as written, on behalf of the assessee. Therefore, we are proceeding to decide the merits of the case on the basis of the impugned order, and the material available on record. The CIT(A) has noted the objections of the AO thus:

> *"2.1 The AO noted that the assessee and his wife Mrs. Mala Tandon were running a partnership concern under the name and style of M/s Dynamech since 1998. M/s Dynamech was engaged in the manufacture of component parts right from 1998. And was exporting its products to M/s Mitsubishi Corporation,Japan. The firm was availing deduction u/s 80IB in respect of its profits. The AO noted that after the set up of new concern M/s Prajna (India) the old business of M/s Dynamech was diverted systematically to the new concern. Similar items have been supplied to the same customer M/s Mitsubishi Corpn. Japan for its Offset Printing Press.*

The manufacturing process employed by the both the concerns were same. The AO noted that the assessee Sh. Rohit Tandon had been Associated with M/s Mitsubishi Corpn as partner in M/s Dynamech and M/s Asutecs Alloys and row as prop. Of M/s Prajna (India) and that he was involved in running of the business of both M/s Dynamech and M/s Prajna (India). He analyzed the turnover of M/s Dynamech and M/s Prajna (India) and noticed that the business of M/s Prajna (India) had gained solely at the cost of M/s Dyanemech and that, in fact the business of M/s Dynamech from Mitsubishi Corpn had shifted to Prajna (India). The AO was of the opinion that this had been done since deduction u/s 10B of 100% profits was available to Prajna (India) and such deduction was no longer available to M/s dynamech.

2.2 The AO further noted that source of the assessee's capital in Prajna (India) was a gift of Rs. 95 lacs from his Mrs Mala Tandon who had made this gift after withdrawing from her capital amount with M/s Dynamech. The assessee had also withdraw Rs. 96.70 lac from M/s Dynamech. Almost the entire capital balance of the two partners, without considering the current year's profit, was withdrawn and invested in M/s Prajna (India). Thus, the AP concluded, capital had been withdrawn from M/s Dynamech and shifted to M/s Prajna (India). He concluded that Prajna (India) had substituted the firm dynamech in all the aspects of the business, i.e. sales, capital and profits. The AO noted that since the order earlier booked by M/s Dynamech where diverted to M/s Prajna (India), the business of M/s Prajna (India) was continuation or extension of the business of M/s Dyanamech and was not a new business. He further noted that the dueduction u/s 80IB available to M/s Dynamech was only 25% now, which was the reason for the business being shifted from one family concern to another to avoid the tax liability.

2.3 The AO further noted that M/s Prajna (India) had purchased machinery only in Feb and March, 2006. He was of the opinion that machinery had been purchased after the production had started and that the production of the assessee firm was being carried out with the machinery of M/s Dynamech. The AO noted that production had been started by the AO on 2-1-2006 without sufficient machinery, which was not possible. He compared the value of the machinery purchased later on by the assessee to the value of the machinery with M/s Dynamech – which were found to be similar – and came to the conclusion that Prajna (India) could not be expected to make the production with lesser machinery.

2.4 The AO gave a show cause notice to the assessee based on above data and interpretation proposing to withdraw the deduction u/s 10B on grounds which have been summarized in para 4.6 of AO's order. The AO, therefore, examined the objections of the assessee to his proposal. In respect of the building constructed by the assessee for the new production unit, the AO was of the opinion that the investment shown by the assessee to his proposal. In respect of the building constructed by the assessee for the new production unit, the AO was of the opinion that the investment shown by the assessee in the building at Rs. 47,83,487/- upto 31.3.2006 and further Rs. 3,49,482/- in the next financial year was insufficient to construct the building whose ground floor self had covered area of 10400 sq.ft. In the AO's opinion, since he ground floor, 1st floor and IInd floor were all needed for different stages of production process as per assesses submissions, the assessee could not have done export of Rs. 3 crores even during the next financial year from this building with fractional construction.

2.4.1. In respect of machinery purchased, the AO noted that the assessee has purchased machinery of value of only Rs. 14,36,128/- upto 6th Feb. 2006. The CNC machines were imported and received in India and 22-2-2006 and received at Noida on 2.3.2006. On the other hand, the assessee had issued sales invoices of substantial value right from 10-2-2006. The AO was of the opinion that in the absence of CNC Machine, the assessee could not have carried out its production since these machines were vital to the production process for making precision parts. The AO was of the opinion that the actual manufacturing was done by M/s Dynamech, in this period.

2.4.2. The AO also noted that the assessee had purchased milling machines for Rs. 9,14,600/- in the last week of March, 2006. He was also of the opinion that sinceh the assessee's production work was of sophisticated nature, the number of skilled and semi skilled workers employed was not sufficient to use the CNC machines the assessee could, therefore, have used the workers of M/s Dynamech. The AO noted that the fire protection system has been purchased on 24.3.2006 and 29.3.2006. Furniture and fixture purchased was only Rs. 68240/- which was considered by the AO as insufficient for carrying out business from the new premises. The computer was purchased only on 25.3.2006. Office equipment of only 18,130/- was purchased. Electrical items were purchased only in March, 2006. Polishing machine had been purchased that the assessee could not have carried out production and sale on its own during the year and it was sustaining itself with the help of M/s Dynamech. In respect of consumption of consumable store also, the AO up to Feb 2006 indicated that the production was not done by the assessee himself.

2.4.3. In respect of the transfer of capital from M/s Dynamech to M/s Prajna (India) the AO held that the capital had been shifted along with the shifting of the business in the from of orders to the new concern. The AO, thus, concluded that M/s Prajna (India) was sharing all the assets and other infrastructure of M/s Dynamech i.e. building, machinery, capital, workers and even goodwill, The AO was of the opinion that while the assessee was free to establish new unit as per the volition but when the same person running good business for years, chooses to create a new concern for doing exactly that very business by diverting the total sales and also claims 100% deduction of tax. It was a matter of concern. He expressed the view that the claim of exemption of Income from taxation has to be proven by the assessee. He noted that the assessee had only 8 skilled and semiskilled workers effectively, The semi skilled workers were considered by the AO to be not fit for the purposes of such processing manufacturing The AO noted that the assessee was the controller, manager and beneficiary of business of both M/s Dynamech and Prajna (India) and that only for the purpose of claiming exemption u/s 10B, a new business had been erected by transfer of capital from the old firm. The AO compared the turnover and profits of the two concerns as under :

Assessment year	*Turnover (Rs. Lacs)*		*Net Profit (Rs. Lacs)*	
	M/s Dynamech	*Ms/ Prajna (India)*	*M/s Dynamech*	*Ms/ Prajna (India)*
2002-03	*137.29*	*-*	*56.68*	*-*
2003-04	*166.17*	*-*	*62.94*	*-*
2004-05	*212.09*	*-*	*77.00*	*-*
2005-06	*268.72*	*-*	*108.80*	*-*
2006-07-	*221.09*	*54.67*	*87.60*	*24.59*
2007-08	*8.14*	*317.16*	*????*	*177.93*

He, based on the above analysis came to the conclusions that new concern was made up or constructed by splitting up the old concern, by diversification of sales of the old firm to the new concern.

2.4.4. The AO, based on his aforesaid analysis held that the new firm ciated manufactured the same items made by the earlier firm, utilized the capital that lay in the earlier firm, made sales to the same buyer as in the old firms and that this was a calculated and conscious act to earn profits and avail deduction u/s 10B to escape levy of tax. The AO relied on the judgment of Hon'ble Supreme Court in the case of Textile Machinery Corpn Ltd 107 1TR 195 for this proposition. As per the AO, in this

decision, the Apex Court have held that if substantially the same person were doing the same business it amounted to reconstruction and this portion of the judgment of Apex Court was squarely applicable to the case of the assess, The AO also held that the new business was physically not an independent business, since it was doing the same business as was being done by him along with his wife, the only buyer of the old concern had been taken over and the capital of old concern had been taken over and even the building of old concern have been used. The AO therefore, held that Prajna (India) was intrinsically not a newly establish undertaking even though new machinery had been purchased.

2.4.5. The AO also referred to the decision of Hon'ble Kerala High Court in the case of M/s Chembra Peak Estate Ltd Vs CIT 85 ITR 401 (ker). In this case the assessee established a New factory for manufacturer of new type of tea. The question before the Hon'ble Kerala High Court was to decide whether the new factory could be considered to be formed by splitting up of business already in existence. The Hon'ble High Court held that this was a case of splitting up of business already in existence. The Hon'ble High Court held as disputed between the old and new factories. The AO relied on this decision for the proposition that the business of M/s Dynamech has been split and had been transfeered in M/s Prajna (India).

2.5. Bases on this discussion , the AO that Prajna (India) was not physically an independent business. He was of the opinion that obtaining tax incentives by colourable device not permitted in law. He was of the opinion that this sort of scheming, through which payment of tax to the exchequer could be avoided, was not permissible. Hence, the deduction a/s 10B was not allowed to the assessee.

36. It was in this manner that the AO refused to allow deduction u/s 10B of the Act to the assessee.

37. The Ld. CIT(A), in the impugned order, has observed (this lengthy operative portion of the impugned order is being reproduced here for the facility of ready reference) as follows:

"*6. I have considered the rival submission carefully Before considering the AO's contention regarding splitting up or reconstruction of an existing business, I will first deal with the AO's contentions regarding the building, plant and machinery and production made by the appellant.*

6.1 During the course of the appellate proceedings, the Id. AR was requested to produce stock register, electricity bills, note on goods manufactured and raw material required for the same, approval for starting production from statutory authorities monthly electricity consumption figures. The appellant was also requested so submit the total cost of used and new machinery, to state whether CNC machines were required to production of separate category of finished goods, whether any personal employed by M/s. Dynamech had been shifted to assessee's unit, whether any machinery used by M/s Dynamech had been transferred to assessee's unit directly or indirectly, whether same goods as were sold by Dynamech has also sold by the assessee reason for starting new unit, whether any machinery of Dynamech had been sold in this or subsequent year and month wise production of Dynamech and the assessee's unit. The assessee of the submitted replies to the queries which have also been forwarded to the AO. Most of the hearings were held in the presence of the AO' who has also taken note and commented on some of the observations.

6.2. The assessee, in respect of aforesaid queries, has submitted that the total amount invested in plant and machinery during the year was Rs. 91, 17, 949/-, Which included used machines of Rs. 8,79,318/-. Our of the used machines, Rs. 3, 92, 068/- was stated to be an imported machine on which no depreciation had been claimed in India and certificate in this regard was submitted. The production process was stated to consists of machining done by variety of machines like turning, milling, drilling etc. It was submitted that these operations could be done on manually operated machines or by CNC [computer and numerically controlled] machines. It was submitted that CNC machines gave higher productivity and better repeatability. Other processes like heat treatment, surface treatment, deburring etc. were also done to produce the finished parts. It was informed that no employees of Dynamech were shifted during the year to the assessee, though it was admitted that some employees of Dynamech has been employed by the assessee in the subsequent year. It was also submitted that no goods were sold from Dynamech to Prajna (India) during the year, though in the subsequent year, Dynamech is stated to have been done some job work for Prajna (India). It was submitted that no machinery has been sold by Dynamech in this or subsequent year to Prajna (India) or to any other concern. The reasons for staring the new unit were stated to

be to install modern and productive equipment, to set up of proprietorship concern in which Sh. Rohit Tandon was the sole owner and to avail the incentives offered by the Govt. to new units set up as 100% EOU. It was submitted that both Dynamech and Prajna (India) manufactured machined parts as per designs / drawings and specifications of the customers. The raw material used in the manufacturing process were stated to be in the shape of rods, bright bars, angles, pipes, plants, etc. as per the requirement of the finished Govt. of India, Department of Industrial Policy and Promotion, Ministry of Commerce and Industries acknowledging the assessee's memorandum intimating the commencement of commercial production at the assessee's unit from 02.01.2006, A copy of assessee's letter dated 19.01.2006 to the Develop[ment Commissioner, Noida, Special Economic Zone, intimating the start of production on 02.01.2006 and acknowledged by the office of the Development Commissioner has also been submitted by the appellant.

6.3. The appellant also placed on record copies of bills for purchase of machinery. These were also given to the AO. All the invoices for machinery are drawn in the name of M/S Prajna I(India) at B 130-Secto 63, Noida which is the assessee's address. Invoice dated 23.12.2005 is for supply of MS sheet fabricated electric furnace. Subsequent invoices are for cutting machine, welding machine, vertical milling machine, milling machine and grinder. The also much machine has been received by the assessee on 21-1.2006. Other machines including CNC machines have been received by the assessee in Feb., 2006. The transport receipt for delivery of CNC shows that they were dispatched on 3.2.2006 from the port and reached the assessee's promise on 7.2.06 and 8.2.06 respectively. A milling machine was received by the appellant on 24.3.2006 used generating set was received by the assessee on 28.3.2006.

6.4. The power and fuel account of the assessee shows payment of rent for generator set from the month of Dec. 2005 to March, 2006, as well as payment of fuel for the generator set. In addition the assessee had paid electricity charges in the month of March, 2006. The copy of electricity bill shows that date of connection as 13.1.2006. Two bills have been raised, as per which the electricity meter have not been read but charges on the basis of installed capacity have apparently been levied on provisional basis.

6.5. The details of receipt of the machinery show that the assessee had in hand manually operated machines in the month of Jan. 2006 and CNC Machines in the month of Feb. 2006. The wages register also shows payment to some workers. The assessee had obtained electricity connection

at its new unit. It ahs also obtained a generator set for generating electricity in the absence of electric power. These evidences, in my opinion, do establish that the assessee was in a position to manufacture goods at its new factory. Even if there was no manufacture with the manually controlled machines, as alleged by the AO, the assessee could have started manufacture using CNC machines in the month of Feb. 2006.

6.6. As regards the factory building of M/S Prajna (India)\, as noted above, the plot area is 1000sq mt which is equal to 10,764 sqft. The total constructed area of ground floor, mezzanine floor is stated to 10,245 sq ft as per approved building plan. Thus, The AO's observation that area of ground floor itself was 14000 sq ft is incorrect since that total area of all floors is 10.245 sq ft. The appellant had invested a sum of RS. 47,83,487/- in the construction upto 31-12-2005 and he submitted that the ground floor production are had been completed by this date, based on which the Central Excise Authorities gave them license to function as the bonding of the premises as a Bonded Warehouse was done on 27-12-20085. Further work was carried out in the last quarter of FY and a small portion of the work was done in the next year. These facts indicate that the building of the appellant was substantially ready of use during the relevant previous year.

6.7 The facts discussed above show that the building of the appellant was substantially ready on 31.12.2005 and some more work was done in the subsequent months during the year. Electricity connection was available, and was ready to use in view of the bills raised. The assessee had backup generator systems in place. Most of the machines required for production were also in place by February, 2006. I therefore, do not accept the AC's contention that the assessee could not have manufactured goods at its own premises during the year using its own machines.

6.8 The AO has referred to low consumption of consumables till Feb., 2006. The appellant has not commented on this contention of the AO. The AO has also referred to the very low wages in Prajna (India) in his remand report (3.5% of sales\) as compared to the wages of Dynamech (87.5% of sales). In the rejoinder the appellant has stated that the cost was low since most of the work was being done on CNC machines. This explanation does not appear to be convincing since Dynamech has also used CNC machines. The appellant has harped on the fact that sales worth RS. 51,15,550/- were made during March, 2006 after all the machines were in place. The average monthly sales of Dynamech during FY 20-04-05 is Rs. 22.39 lacs. And and in FY 2005-06 is Rs. 18.42 lacs. The average sales of Prajna (India) during FY 2006-07 (the first full year of operation) is Rs. 26.43

lacs. Hence, the high sales of Rs. 51.15 lacs made by a newly set up unit in its first full month of operation does appear to be on the high side.

6.9. It is noted that the appellant was manufacturing machines components for Mitsubishi Corpn., an engineering company of Japan. The components are manufactured as per the given designs and drawings. The relevant designs need to be fed into the CNC machines, if done through them. CNC machines, besides giving repeatable outputs-as contended by the appellant also give higher precision than manually operated machine since the movements of the CNC machine can be controlled to a very fine degree by computers. The details of machines used by Dynamech and Prajna (India) submitted by the appellant show that the concerns have CNC machines, though the machines of Prajna (India) are newer and possibly has more advanced features. Since both the concerns were manufacturing similar products and for the same customer, the low usage of consumables and the low wages incurred in Prajna (India) leads one to suspect as to whether all the products sold the Prajna (India) during the year was actually made by this concern or some help was also taken from Dynamech. The very high production and sales by Prajna (India) in March, 2006 noted above also leads one to doubts on this score. However, there is not enough evidence to support this doubt as has been rightly contended by the appellant. The production records and sales recorded s of the appellant support its contention that the production and sales shown in its books are of its own. Nevertheless, it is borne in mind that some workers of Dynamech did officially join Prajna (India) in the subsequent year and that Dynamech did do job-work for Prajna (India) in the subsequent years.

7. The next question is whether, in the circumstances when almost the entire existing business of M/S Dynamech has closed and Prajna (India) has taken up the work of manufacturing components for the same customer; that this unit has been set up with the Dynamech with his wife, he new unit can be said to be formed by splitting up or reconstruction of the existing business.

7.1 The relevant provision of section 10B are as under :

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

(1) Subject to the provisions of this section, deduction of such profits and gains as are derived by a hundred percent. 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 of produce articles or things or computer, software, as the case may be, shall be allowed from the total income of the assessee :

(2) This section applies to any undertaking which fulfils all the following conditions, namely.
(1) It manufactures or produces any articles or things or computer software
(2) 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.

7.2. In the assessment order the AO has contended that the manufacturing unit of Prajna (India) was formed by splitting up of the business of Dynamech. During the appellate proceedings the AO has contended that the new unit was formed by the reconstruction of business already in existence. The rival contentions have been noted above in this regard. Since the terms 'splitting up' or 'reconstruction' have not been defined in the I.T. Act, it may be useful to refer to the authorities relied upon by the two parties.
7.3 The AO has first relied on the decision of the Hon'ble Supreme Court in the case of Textile Machinery Corporation 107 ITS 195 (SC) and has stated that the Hon'ble Apex Court have held that if the substantially the same persons are doing the same business, it amounted to reconstruction. Incidentally, the appellant has also placed reliance on this judgment for the proposition that this judgment requires machinery to be transferred form the existing unit to the new unit for a reconstruction to take palace. It would , therefore, be worthwhile to go through this decision to understand if it supports the appellant or the AO.

7.4. The facts in this case are that the assessee had in the earlier years bought from outside the castings manufactured in the steel foundry division which was started in the Assessment year 1958-59. In the year 1959-60 the

assessee started the jute mill division where the parts made out of the raw material supplied by the boiler division by monitoring and forging them were given to the boiler division of the assessee. It was found that out of total sale of Rs. 28,23,127 of steel casting goods worth Rs. 18,39,433 were used in connection with the various divisions of the company. In respect of the jute mill division, the Income-Tax officer found that out of the total sales of Rs. 13,03,509, sales to the boiler division totaled Rs. 11,89,812 and sales to outside the jute mill division totaled only a sum of Rs. 1,13,697. The Income-Tax Officer, on the above facts, held the undertakings as expansion and reconstruction of the business already existing and hence the assessee was not entitled to exemption under section 15C of the 1922 Act. The Hon'ble Apex Court examined the matter in light of the provisions of clause (i) of sub-section (2) of section 15C [akin to 10B(2) (ii) and 10B (2) (iii) of the 1961 Act] and that also only with one part of it, namely, whether the industrial undertakings, steel foundry and the jute mills division, were not formed by the reconstruction of the business already in existence. The Hon'ble Apex Cort held that even if a new business was carried on, but by piercing the veil of the new business it was found that there was employment of the assets of the old business, the benefit would not be available. It was held that substantial investment of new capital was imperative and the words "the capital employed" in the principal clause of section 15C were significant, for fresh capital must be employed in the new undertaking claiming exemption.

7.5 It was further noted that the assessee continued to be the same for the purpose of assessment. It had its existing business already liable to tax. It produced in the two concerned undertakings commodities different from those which it has been manufacturing or producing in its existing business. Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit was the heart of the matter, to earn benefit from the exemption of tax liability under section 15C. The Hon'ble Apex Court noted :

"The answer, in every particular case, depends upon the peculiar facts and conditions of the new industrial undertaking on account of which the assessee claims exemption under section 15C. No hard and fast rule can be laid down. Trade and industry do not run in earmarked channels and particularly so in view of manifold scientific and technological developments. There is great scope for expansi0on of trade and industry. The fact that an assessee by establishment of a new industrial undertaking expands his existing business, which he certain, does would not, on that score, deprive him of the benefit under section 15C. Every new creation in

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

The Hon'ble Apex Court, thereafter, held that the mere fact that the new unit manufactured items which were consumed internally was not important as long as the new unit could exist independently and make marketable commodities. It was further held as under :

"The cases which give rise to controversy are those where the old business is being carried on by the assessee and a new activity is launched by him by establishing new plants and machinery by investing substantial funds. The new activity may produce the same commodities of the old business or it may produce some other distinct marketable products, even commodities which may feed the old business. There products may be consumed by the as essee in his old business or may be sold in the open market one thins is certain that the new undertaking must be an integrated unit by itself wherein articles are produced and at least a minimum of ten persons with the aid of power and a minimum of twenty persons without the aid of power have been employed. Such a new industrially recognizable unit of an assessee cannot be said to be reconstruction of his of business since there is so transfer of any assets of the old business to the new undertaking which takes place when there is reconstruction of the old business (emphasis supplied). For the purpose of section 15C the industrial units set up must be new in the sense that new plants and machinery are erected for producing either the same commodities or same distinct commodities. In order to deny the benefit of section 15C the new undertaking must be formed by reconstruction of the old business.

7.6 The Hon'ble Apex Court hen explained the meaning of the term "reconstruction" as under :

The word "reconstruction" is not defined in the act but has received judicial interpretation. In In re South African Supply and Cold Storage Co. (1904) 2 Ch 268 (Ch D) Buckley J., dealing with the meaning of the world "reconstruction" in a company matter, observed as follows :
"What does 'reconstruction' means ? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking , but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on –that would be a mere sale –but in come altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on, it involves, I think, the substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company of resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same."

7.7 The AO has used to aforesaid definition of the term "reconstruction" for relying on this decision since the same person, the appellant, was carrying on the same business, i.e. supply of machined components to the same customer. However, in my opinion, in view of the categorical assertion of the Hon'ble Apex Court that there should be transfer of assets of the old unit to the new unit in establishing the new unit-which is absent in this case except for transfer of capital, this decision goes to favour the appellant. However, it must be noted that this case dealt with "reconstruction" rather than "splitting up" of business.

7.8. The AO has also relied on the decision of the Kerala High Court in the case of M/S Chembra Peak Estates Ltd. 85 ITS 401 (Ker). In this case the facts were that the assessee owning tea and coffee plantations in Wynad District claimed rebate under section 84 (1) of the Income-tax Act, 1961, on a sum of Rs. 48,044 being the profits form the manufacture of tea in his newly established factory in Elstone division. ITO disallowed the claim on the ground that the new factory in the Elstone division was formed by the splitting up or reconstruction of a business already in existence with in meaning of section 84(1), read with section 84 (2) (i) of the Income-tax Act. Prior to the accounting year ending with 31st March, 1964 the assessee was having the factory for the manufacture of tea and only in the Chembra Peak

division. During the previous year ending with 31st March, 1964, the assessee established a new factory in Elstone division employing a new process known as C.T.C. process (crushing, tearing and curling) to manufacture a new type of tea. Before the establishment of the factory in the Elstone division all the tea leaves from the tea estates in Elstone division were being taken to the factory in the Chembra Peak division for the manufacture of tea. After the establishment of the factory in Elstone division the factory in Chembra Peak division continued to manufacture tea from the green leaves brought from divisions other than Elstone division and the factory in the Elstone division was being fed only by the tea estates in what division. The Hon'ble High Court held as under :

"It is enough for the purpose of this case to hold that in view of the facts admitted the new factory in the Elstone division was formed by the splitting up of the business which was already in existence. If so, the assessee will not be entitled to the exemption under section 84(1) read with section 84 (2) (i) of the act. We, therefore, answer the question in the affirmative, that is, against the assessee and in favour of the department.

In this case it has been held that even if a new manufacturing unit was set up to carry out the work done earlier by another division of the assessee, it would amount to "splitting up" of the existing business of the assessee. Interestingly, the appellant had not commented on this decision in this original submission. In the rejoinder the ld. AR has stated that the decision was not applicable since new unit had been set up by installing new machinery in a new building at a new place.

7.9. let us examine the decisions relied upon by the appellant. The decision in 107 ITS 95 (SC) has already been discussed above. In 108 ITR 367 (SC) in the case of Indian Aluminium Company Limited, the facts as noted in the judgment are as under :

"The Indian aluminium Company Ltd. (hereinafter to be referred to as the respondent") was a manufacturer of aluminium ingots form ore. In the years prior to the assessment year 1960-61 in question the respondent had four manufacturing centres at Belur, Kalwa, Alupuram and Hirakud. In the accounting year relevant to the assessment year in question one more centre was established at Muri and there were also extensions to the existing factories at Belur and Alupuram. In the assessment year 1960-61, the respondent claimed reller under section 15C of the Indian Income-tax act, 1922 (briefly "the Act"), in respect of the fresh capital outlay at Muri as well as of the additional investments in the form of extensions to the existing factory premises, installation of new plant and machinery etc. at Belur and Alupuram. The Income-tax officer refused to allow the relief and the

Appellate Assistant Commissioner dismissed the respondent's appeal. On appeal to the Appellate Tribunal it held that during the previous year, the production of aluminium ingots went up the double, that the additional units set up by the respondent cost over Rs. 50 lakhs at Belur and about the same figure or a little more at Alupuram, that in view \of the nature of the substantial investments, it could not be said that the units were not new industrial units by themselves. It further held that these units have been set up side by side with the old ones and had added to the respondent's total output of aluminium ingots. The Tribunal held that the respondent was entitled to the relief under section 15C.

The Hon'ble High Court answered the reference filed by the Department in favour of the assessee. The Hon'ble Supreme Court, replying on the decision in the case of Textile Machinery Corporation (supra), also held in favour of the appellant. No new proposition in law was laid down in this case./ The fact of substantial investment in the new units and the substantial increase in production have been noted in this case while allowing the assessee's claim.

In Ridhkeran Someni 121 ITR 668 (Pat) the Hon'ble High Court held that the construction of thee saw mill which came to the share of the assessee partner on dissolution of the firm and been completed after the firm was dissolved and was not working on the date of dissolution. Under the circumstances, it was held that there could be no splitting up an existing business since an entirely new business unconnected with the earlier business or of the bus ness being carried on by the other partners was newly set up.

7.9 In the case of T. Satish U.Pai 119 ITR 877 (Kar), assessee, partner of the firm M/S Manipal Power press, Manipal started his own book-binding business in the Name and style of "Compack" at Udupi. Firm was carrying on the business of printing and also carrying on business in book-binding. The Hon'ble High Court held as under:

"In order to hold that there it a splitting up of a business already in existence, there must be some material to hold that either some asset of an existing business is divided and another business is set up from such splitting up of assets, or that the two business are the same and one formed was an integral part of the earlier one and it was only question of breaking up of the same business. It implies a unity of control in regard to two business, i.e, earlier one in existence and a new one which is brought into existence. While cl. (ii) of sub-s. (4) of s. 80j may comprehend transfer of machinery or plant previously used for any purpose and which may belong to an outsider also, cl (i) implies such a transfer and setting up of another business by splitting up of the assets of the earlier one in existence in a case, where the same person carries on business and brings into existence another business of the same nature by the user of the assets belonging to the earlier business, it may be

said that the unity of control continues and the business brought into existence is a part of the earlier existing business. There being no tangible evidence of transfer of any assets from an earlier business to the new business, a conclusion cannot be reached that a new business is formed by the splitting up of the business already in existence.

In the instance case, the Manipal Pawer Press is a firm and the assessee is carrying on the business under the name and style of "Compack" as an individual. There is no unity of control in regard to the two business. There is no transfer of either capital or machinery or any other asset from (emphasis supplied) Manipal Power Press to the assessee's business. The labour employed in the new business were different and not taken our from the staff of Manipal Power Press. It was no the case of the department that the business carried on by the assessee was benami for Manipal Power Press. These are circumstances which militante against any conclusion that the business carried on by the assessee was formed by the splitting up of a business which was already in existence. The mere fact that some work of binding is entrusted to the assessee by Manipal Power Press does not lead to the inference that there is splitting up of the business. The assessee is an independent contractor and the Manipal Power Press is as much a customer as any other of the assessee."

It is seen that the fact that there was no unity of control between the firm and the assesee and that there was no transfer of any assets, including capital, from the firm to the assesee were held as decisive factors for holding that there was no splitting up of the earlier business.

7.10 In the case of Cit vs Orient Paper Mills Ltd. 176 ITR 110 (SC) the assessee owing a paper mill set up a plant for manufacturing caustic soda. The Hon'ble Apex Court held in favour of the assessee by relying on their decisions I the cases of Textiles Machinery Corporation Ltd. V CUT 107 ITR 195 and CIT v Indian Aluminnium Co. Ltd 108 ITR 367. In this case a new factory for producing a new product was formed.

7.11 In the case of CIT vs Dandeli Ferro Alloys Pvt Ltd. 212 ITR 1 (Bob) the matter was with reference to amalgamation and the issue was transfer of machinery from the old concern to the new concern. The facts and the issues are quits different than the present case.

7.12 In the case of ITO vs DSM software (p) Ltd 115 TTJ (Chennai) 469, the Hon'ble ITAT noted that it was not the case of the Revenue that the new business involved diversion of assets from the old unit. Though the new unit

tool some employees of the old unit, there was substantial expansion during the relevant year which led to almost three fold increase in the number of employees. New unit was established by procuring machinery worth more than 50 lacs. There was also substantial addition to the nature and type of services rendered to clients in the volume of business , and there was a good increase of the number of customers. The Hon'ble ITATA held that to hold that a new business was formed by the splitting up or reconstruction of a business already in existence there must be material to show that either some assets of the exiting business had been diverted or that the two business were the same and the one formed an integral part of the other earlier. On the fact of the case the Hon'ble ITAT held that this was not a case of splitting up or reconstruction of business already in existence. In this case it was noted that new business and clients were procured and new services were offered.

7.13 In the case of Oswall Woollen Mills Ltd. 138 ITR 338 (P&H) the issue was whether the assessee's newly set up export unit was formed by the reconstruction of the existing business of hosiery manufacture. The Ho'ble High Court took note of the decision of the Hon'ble Supremme Court in the case of Textiles Machinery Corp. (Supra(and held that unless there was transfer of assets from the existing unit to the new unit which was absent in this case, there could be no "reconstruction" of an existing business.

8. Having examined the authorities relied upon by the rival parties, it can safely be inferred that for attracting the charges of "reconstruction" of an existing business there must be transfer of assets, including machinery, from the existing undertaking to the new undertaking. This has been held in the case of Textile Machinery Corp. (Supra) Indian Aluminum Com. (Supra) Oswall Woollen Mills Ltd (Supra) and a host of other decisions. There is noting to suggest that in the case of the present appellant any machinery has been transferred from the existing unit of Dynamech to the new unit of Prajna (India) . The Contention regaring this being a case of "reconstruction" raised by The AO in the written submission in response to the appellant's submission must therefore, fail.

8.1 The issue is whether to attract the charge of "splitting up" of an existing business, the same test of transfer of assets including machinery from the existing business to the new business should apply. None of the decisions of the Hon'ble Supreme Court relied upon by the appellant pertain to "Splitting up" of business. They all pertain to "reconstruction" of business. "Splitting up" and "reconstruction" obviously do not mean the same thing since the same thing since the Legislature has used both the words in section 10B(2)(ii) and other analogous provisions of the 1922 Act as well as well as

the 1961 Act and there is the use of "or" between the two terms implying that they operate in different realms. It is well accepted that the decisions of the Courts have to be read in the context of the question before them, and in view of this the decisions with reference to "reconstruction" cannot be held to apply directly to the issues relating to "Splitting up" of business. In light of this conclusion, out of the decisions discussed above, those relating to "splitting up" are held to be relevant to deciding the issue at hand.

8.2. To recapitulate, the facts are that the assessee is a partner in the firm M/s Dynamech. This firm manufactures machine components for M/s Mitsubishi Corporation. The assessee set up a new unit at a new place. New building was constructed and new machinery was installed therein. Capital for setting up the new unit was obtained by withdrawing the assessee's capital in this firm. The capital of the other partner, who is the wife of the assessee, was also obtained by way of gift from the other partner by the assessee. The firm had a single customer. After the new unit of the assesee was set up, the firm stopped supplying to Mitsubishi Corporation and All orders of Mitsubishi Corporation were executed by the assessee's concern Prajna (India). M/s Dynamech's business slowed down considerably in the subsequent year and it manufactured few items for the local India market and did job work for the appellant. Many workers of Dynamech shifted to prajna (India) in the subsequent year . The sales and profit of the two concern, noted earlier, are again extracted below:--

Assesment Year	***Turnover (Rs. Lacs)***		***Net Profit (Rs. Lacs)***	
	M/s Dynamech	***M/s Prajna (India)***	***M/s Dynamech***	***M/s Prajna (India)***
2002-03	*137.29*	*--*	*56.68*	*--*
2003-04	*166.17*	*--*	*62.94*	*--*
2004-05	*212.09*	*--*	*77.00*	*--*
2005-06	*268.72*	*--*	*108.80*	*--*
2006-07	*221.09*	*54.67*	*87.62*	*24.59*
2007-08	*8.14*	*317.16*	*(-)21.29*	*177.93*

8.3 while the appellant may claim that there is no evidence that any of the orders of dynamech were executed by prajna (India), the facts and the table above shows that the work earlier being done by dynamech has shifted to prajna(India).thus, the business of m/s dynamech, in as much as they pertain to the only customer of the firm, has spliut and went partly to

pranjna(India) in the beginning before being eclipsed by the latter. Both tha concerns are being managed by the appellant who is stated to be an engineer and has technical knowledge and skills for the job to be executed. There is, unity of control. This is also evident from the fact that apart from the capital of the appellant in the firm, that of his wife was also transferred to him to enable the new unit to be set up. Many of the workers of the firm have also been admittedly shifted to the appellants concern in the next year. As far as this year is concerned, tit is claimed that all the manufacturing was done by different workers, but as noted earlier, the large volume of production in a short time does raise doubts on this score. Even discounting these doubts , it is clear that the capital and sales business of dynamech has shifted to Prajna(India) has this shifting resulted in creation of additional capacities or sales or new products? Evidently not, since the customer remains the same, there is no evidence or even claim of higher capacity, dynamech's business has almost slowed down to a crawl and no new types of products are shown to be manufactured.

8.4 in the case of chembra peak estates ltd.(supra), the Hon'ble High Court held it to be a case of splitting up because the work of processing the tea leaves of the Elstone Division, being earlier done by the unite at Wynad district, was done by the newly set unit at Elstone. This was new unit with new machines at anew location. The Hon'ble High court, on appreciation of the fact that the new unit did the work being already done at an existing unit and the work had only shifted to the new unit , held it to be case of splitting up of business. In the case of Ridhkeran Seoni(supra), there was no business with the earlier unit. In fact there was no earlier unit since the unit under construction had come to the assessee's share. This decision does not help the case of the appellant since the facts are quite different. In the case of T.Satish U.Pai(supra), the Hon'ble High Court, for holding that there was no splitting up of the earlier business, noted that there was no unity of control in regards to the two business of the firm and that of the proprietorship concern of the assessee partner. It was also noted that there was no transfer of capital or machinery or of any other asset. This decision implies that unity of control between the existing and the new business , even without transfer of machinery or other assets from the through the new business , even without transfer of machinery or other assets from the existing business to the new business are relevant considerations for treating the new business as having been split from the existing business. In case of DSM software(p) Ltd (supra) , the Hon'ble ITAT noted that there was substantial addition to the nature and type of services rendered to clients , to the volume of the business and also that there was increase in number of customers , while holding that the new business was not split

from the existing business. In the present case , the nature and type of products supplied in the
New business is the same as in the exiting business, there is no change in the customers which remains the same as in the earlier business and there is no increase in volume of business on account of setting up of new unit other than the normal growth. This decision also in my opinion does not help the same of the appellant.

8.5 A moot question is whether they can be "splitting up" of business without the transfer of any asset being plant and machinery form the existing business to the new undertaking. In this connection, it is worth noting that section 10B (2) (ii) talks about splitting up of Business rather than of an "industrial undertaking" Transfer of used machinery or plant to a new business as a negative condition u/s 10B is covered by clause (iii) of section 10B (2). Business is more than the mere building or plant and machinery This is a reason that the Hon'ble ITAT in the case of DSM software (P) ltd (Supra) have held that splitting up would involve the fact that either some assets of the existing business had been diverted or that the two business were same and the one formed the integral part of the other earlier. Now if there is no transfer of asset form the existing business is shifted to the new unit. In the present case the sole customer Mitsubishi Corp. to whom all the sales of the existing firm M/s Dynamech were made was an integral part and the raison detre for the business of M/s Dynamech. This integral part of the business of M/s Dynamech was shifted to M/s Prajna (India) when this new unit was settled. Hence in my opinion even without the transfer of machinery or plant from M/s Dynamech to M/s Prajna (India) by virtue of the shifting of the sole business of M/s Dynamech to M/s Prajna(India) a split up of the business of M/s Dynamech so as to from a new business of M/s Prajna(India) took place. This is also fortified by the fact that almost the entire capital of M/s Dynamech was used in setting up M/s Prajna(India) The control had the management of existing and new unit remained with the appellant. The workers of Ms/ Dynamech shifted to M/s Prajna(India) at least paper in the subsequent year, and were possibly used in the present year also due to the circumstances discussed earlier. In my opinion M/s Prajna(India) has been formed by shifting up of the existing business of M/s Dynamech.

8.6 in the case of M/s Chenab information Technology (p) Ltd. 25 SOT 432 (Mum)
The Hon'ble ITAT held that it will bea case of splitting up of Business if either the assets of old unit have been transferred to new unit or in case assets have not been transferred the business itself has been diverted to the

new unit and the business of both units remain the same. In this case the assesse had an existing unit which was not entitled to exemption u/s 10A . The assessee has set up anew unit in the STP and calimed exemption u/s 10A . The hin'ble ITAT noted that the business of the assessee continued to be the same that work was done onsite at customers premises that very little new investment was made and the employees in the new unit were also the same . though some of the fact in this case are different from the case of the present appellant the principal of this case will Apply to the present case also. That is, there need not be transfer of assist for splitting up to be effective. What may trigger solitting up can be diversion of business of the existing unit to the unit. In the present case , even though the assessee has set up a new unit by making substantial investment in plant and machinery, the business continues to be that of the existing unit. There is no business necessity for setting up of new unit. The reason for setting up of new unit is not far to seek , i.e. to claim deduction u\s 10b of the act. This has also been admitted by the appellant.

8.7 the appellant has raised a pertinent issue that where the provisions of the act provide for deduction \exemption, the AO cannot decide the course of business actions of the assessee. There can be no quarrel over this proposition which has been well settled by several judicial decisions. However , the legislature has made certain negative conditions for availing certain exemptions/ deductions, and if these negative conditions are attracted, benefit could not be available to the assessee. For claiming deduction u/s 10b, the negative conditions are that the new unit should not be formed by transfer of used machinery in excess of 20% of the total plant and machinery, that the new unit should not be found by reconstruction of an existing business, or the new unit should not be found by splitting up of an existing business. the reasons for these negative conditions are also quite clear. The legislature, while giving incentives to promote exports, have also stipulated that these exports come from new undertakings . both the conditions are important, i.e. there should be a new unit involving fresh investments in plant and machinery leading to additional capacities in the national economy , as well as enhancement in the exports. If only one condition is satisfied, I.e. a new unit is set up, but there is no additional export or business generated or expansion, the objectives are not likely to be served. It appears that is the reason that the prohibition on the new unit being formed by splitting up of business of an existing unit has been incorporated in section 10b and several other deduction/exemption provisions in the I.T.Act. in the case of appellant , while new investment has been made, it has merely resulted in diverting business from an old unit to the new unit without leading to enhancement in business of export.

8.8 Based on the discussion above, I agree with the AO's conclusion in the assessment order that the new unit of Prajna (India) have been formed by splitting up of the existing business of M/s Dynamech. Deduction u/s 10B is therefore no allowable in respect of the income of this new unit. These grounds of appeals are therefore rejected.

37. As available from the above orders and as also contended on behalf of the assessee, the AO observed that since the building of the assessee did not stand completed and since it was not sufficient to house the machinery in order to produce the machined parts which were required for manufacture by the assessee, as per the requirements of Mitsubishi, Japan, the production had not been carried out by the assessee in his new unit, namely, M/s. Prajna (India), but in the factory of M/s. Dynamech, wherein, the assessee was a partner and which was also supplying machined parts to Mitsubishi, Japan. The Ld. CIT(A), having considered the submissions on behalf of the assessee, held that the assessee's building was substantially ready for use during the year under consideration.

38. The AO further held that the assessee's machinery was not sufficient for the required production and so, the production was, in fact, done by M/s. Dynamech and not the assessee. This finding of the AO was also over-ruled by the ld. CIT(A).

39. The AO also held that considering the expenses on consumable stores, i.e., @ 7.19% till the end of February and @ 11.78% overall, the production was not justified and that such production was carried out by M/s. Dynamech. This finding of the AO was also not accepted by the ld. CIT(A).

40. The exemption claimed by the assessee u/s 10B of the Act was disallowed by the AO by holding that Prajna (India) was formed by a splitting up of the business of M/s. Dynamech. For this, the AO relied on the followed case laws:

i) 'M/s. Textile Machinery Corpn. Ltd. vs. CIT', 107 ITR 195 (SC)
ii) 'Chembra Peak Estate Ltd. vs. CIT', 85 ITR 401 (Ker.)

During the appeal before the ld. CIT(A), however, the AO, vide written comments dated 2/3.7.2009, changed her stance from that of splitting up to reconstruction. The ld. CIT(A) held it to be a case of splitting up of the business of M/s. Dynamech.

41. The grievance of the assessee is that despite not agreeing with the AO on the above counts, the ld. CIT(A) has erroneously still held it to be a case of splitting up of the business of M/s. Dynamech. This, according to the assessee, is neither correct, nor sustainable in law. The assessee maintains that M/s. Prajna (India) is an independent entity, totally separate from M/s.

Dynamech; that it has been set up at a new place, in a new building, by installing new machinery; that though the sole customer of M/s. Prajna (India) and M/s. Dynamech is the same, i.e., Mitsubishi, Japan, the products manufactured by both are different, even though they come under the general category of machined parts; and that, therefore, it cannot at all be said that the new unit, i.e., Prajna (India) has been set up by a splitting up of the business of M/s. Dynamech.

42. As mentioned, the AO had relied on 'Textile Machinery Corpn. Ltd. vs. CIT', (supra) and 'Chembra Peak Estate Ltd. vs. CIT', (supra). The ld,. CIT(A) held 'Textile Machinery Corpn. Ltd.', (supra) to go in favour of the assessee. However, 'Chembra Peak Estate Ltd.', (supra) was relied on by the ld. CIT(A) to hold against the assessee.

43. The Ld. CIT(A) has held that the capital for setting up the new unit was obtained by withdrawing the assessee's capital in M/s. Dynamech; and that the capital of the other partner of M/s. Dynamech, i.e., the wife of the assessee, was obtained by way of gift from her by the assessee. The ld. CIT(A) thus held that the capital was transferred from the existing business to the new unit and it was this capital which was used in the setting up of the new unit, i.e., Prajna (India). Objecting to this, the assessee contends that

this finding of the ld. CIT(A) is ill founded, in asmuchas there is no material whatsoever on record to arrive at such a finding.

44. In this regard, it is seen that the partners capital at the end of the first year of operation of M/s. Dynamech was Rs.20.45 lacs. The assessee and his wife had made withdrawals from time to time out of the profits earned in M/s. Dynamech and the amounts withdrawn were deposited in their personal bank account. A profit of Rs. 4.37 crores stood earned in M/s. Dynamech in the six years from AY 2001-02 to AY 2006-07. Out of this, an amount of Rs.4.20 crores was withdrawn by the partners of M/s. Dynamech, i.e., the assessee and his wife. The capital account of the partners in M/s. Dynamech, as has been filed before us, and as also stated to have been filed before the ld. CIT(A), is as follows:

PERIOD	AY	DEPOSITS During the period		WITHDRAWALS During the period		PROFIT For the period	Balance in Partner's account As on 31.3. of that period		Difference (Profits-Withdrawals)
		MALA	ROHIT	MALA	ROHIT		MALA	ROHIT	
01.04.00 to 31.03.01	2001-02	5,75,000.00	7,41,767.00	6,00,000.00	10,63,493.00	44,73,679.66	38.80.225.05	52,01,715.04	28,10,186.66
01.04.01 to 31.03.02	2002-03	--	25,010.00	21,75,000.00	22,34,816.00	56,68,846.76	45,39,648.43	58,26,332.42	12,59,030.76
01.04.02	2003-	2,00,0	2,28,73	21,00,0	33,11,8	62,94,1	57,86,	58,90,	8,82,329.44

to 31.03.03	04	00.00	8.00	00.00	31.00	60.44	728.65	319.64	
01.04.03 to 31.03.04	2004-05	8,00,000.00	7,86,885.00	26,36,760.00	36,18,890.00	77,00,082.90	78,00,010.10	69,08,356.09	14,44,432.90
01.04.04 to 31.03.05	2005-06	--	82,310.00	9,47,608.50	23,13,041.50	1,08,80,376.20	1,22,92,589.70	1,01,17,812.69	76,19,726.20
01.04.05 to 31.03.06	2006-07	--	4,49,353.00	1,13,60,124.70	96,70,480.69	87,62,024.82	53,13,477.41	52,77,697.41	(1,22,68,580.57)
15,75,000.00	**23,14,063.00**		**1,98,19,493.20**	**2,22,12,552.19**		**4,37,79,170.78**		**17,47,125.39**	

45. The above clearly shows that no capital was withdrawn from M/s. Dynamech. The capital of M/s. Dynamech was left intact. Further, a chart showing the amount invested in Prajna (India) during the assessment year 2006-07, i.e., the year under consideration, has also been filed before us. This chart is also stated to have been filed before the ld. CIT(A). The amount invested in Prajna (India) by the assessee during the year under consideration was Rs.1.61 crore, besides a plot of land, purchased earlier, for Rs.0.22 crores. An amount of Rs.1.05 crores is further shown to have been invested during the assessment years 2007-08 & 2008-09.

46. The observation of the ld. CIT(A) that any such capital was withdrawn for setting up the new unit and that the capital of the wife of the assessee was obtained by way of gift, also for setting up of the new unit is,

thus, merely a bald observation, without any support from the record. There is, ergo, no basis for the ld. CIT(A) to arrive at the finding that the capital of M/s. Dynamech was transferred to M/s. Prajna (India). This finding is but a result of mere conjectures and surmises.

47. The ld. CIT(A) further observed that the orders were shifted from M/s. Dynamech to M/s. Prajna (India), thus amounting to a splitting up of the business. It has also been observed that M/s. Dynamech had a single customer, i.e., Mitsubishi, Japan, that after the new unit, Prajna (India) was set up, M/s. Dynamech stopped supplying the orders of Mitsubishi and all orders of Mitsubishi were executed by Prajna (India); and that the business of Dynamech slowed down considerably in the subsequent year and it manufactured a few items for the local market and did job work for the assessee. Referring to the table depicting the turnover and net profit of M/s. Dynamech vis-à-vis those of Prajna (India) for AYs 2002-03 to 2007-08, the ld. CIT(A) has observed that the work earlier being done by M/s. Dynamech was shifted to Prajna (India). In this regard, the assessee contends that again, this finding is not based on any material on record.

48. We find this objection of the assessee to be correct. The ld. CIT(A) has not referred to any material showing that M/s. Dynamech had any orders from M/s. Mitsubishi, Japan, which remained unsupplied. No material

has also been referred to to show that any orders placed by Mitsubishi, Japan with M/s. Dynamech were, in fact, supplied by M/s. Prajna (India) and not by M/s. Dynamech. The observation of the ld. CIT(A) that after Prajna (India) was set up, M/s. Dynamech stopped supplying the orders of Mitsubishi cannot be taken to go against the assessee sans any material to show that any order of Mitsubishi placed with M/s. Dynamech remained uncomplied, or that any orders of Mitsubishi with M/s. Dynamech were supplied by Prajna (India). Further, in order to prove the splitting up nothing turns on the observation that the business of M/s. Dynamech slowed down considerably in the succeeding years and it manufactured items for the local market and did job work for the assessee.

49. The Ld. CIT(A) has further observed that both M/s. Dynamech and Prajna (India) were being managed by the assessee, which showed that there was unity of control. This observation of the ld. CIT(A) has also been objected to by the assessee, as being a result of mere presumptions and assumptions, without there being any material on record to support the same.

50. The assessee, undisputedly, is an Engineer, having technical knowledge and skill required for the jobs to be executed. This, combined with the observation of the ld. CIT(A) (dealt with above) that the capital of

the assessee and his wife was transferred to enable the setting up of the new unit and as seen from para 8.3 of the impugned order, has led to the finding of unity of control. However, this finding too, is found to be without any basis. M/s. Dynamech was having two partners, i.e., the assessee and his wife. The ld. CIT(A), referring to the decision of 'T. Satish U. Pai vs. CIT', 119 ITR 877 (Kar.), has observed that this decision implies that the unity of control between the existing and the new businesses as well as transfer of capital from the existing business to the new business, even without the transfer of the machinery or assets from the existing business to the new business, are relevant considerations for treating the new business as having been split from the existing business. However, as seen above, in the present case, there is no transfer of capital and the finding of unity of control is also not based on any material on record. Further, as pointed out on behalf of the assessee, in this decision, it has been held that unity of control may be said to continue in a case where the same person carries on business and brings into existence another business of the same nature, by the use of the assets belonging to the earlier business. Herein, however, as also taken into consideration by the ld. CIT(A), no assets of the earlier business were shifted to the new unit. Therefore also, even as per 'T. Satish U. Pai' (supra), unity of control does not stand established.

51. The ld. CIT(A) has further observed that many workers of M/s. Dynamech admittedly shifted to Prajna (India) in the subsequent year, at least on paper. The ld. CIT(A) observed that these workers were *possibly* used in the year under consideration, thereby indicating a splitting up of the business. Again, the assessee contends that this finding of the ld. CIT(A) is without any basis.

52. Again, this finding of the ld. CIT(A) does not accompany any basis thereof. In para 8.5 of the order, the ld. CIT(A) observed that "workers of M/s. Dynamech shifted to Prajna (India) at least on paper in the subsequent year, and were possibly used in the present year also due to the circumstances discussed earlier." This, despite the fact that the assessee claimed that during the year under consideration, all the manufacturing was done by different workers. The ld. CIT(A) has based his finding on the observation (para 8.3 of the impugned order) that "the large volume of the production in a short time does raise doubt on this score."

53. Now, the order under appeal does not evince any material to show that any worker was shifted or transferred. Rather, the CIT(A) is himself evidently not sure of any worker of Dynamech having actually shifted to Prajna (India), in the absence of any material on record to this effect, when he employes the expression 'possibly' in his finding. It goes without saying

that in the case of transfer of a worker, there is continuity of service, which is absent here.

54. The ld. CIT(A) has observed to the effect that the reason for setting up of the new unit Prajna (India) was but to claim deduction 10B of the Act and thereby to evade tax. This observation/finding of the ld. CIT(A) has also been objected to by the assessee as being baseless.

55. This observation of the ld. CIT(A) accompanies an observation that this has been admitted by the assessee. However, the admission is that the new unit was set up to claim deduction u/s 10B of the Act, which by itself does not lead to the conclusion that the purpose of setting up a new unit was tax evasion.

56. The assessee has all through maintained that Mitsubishi, Japan came up with requirement of parts with greater precision and cost effectiveness. Mitsubishi, Japan is the only customer of M/s. Dynamech and Prajna (India). It was on the arising of this requirement, that the assessee sought to set up a new industrial undertaking. The new industrial undertaking was set up with advanced modern machinery at a new place, in a new building, to meet the fresh requirements of Mitsubishi, Japan. The operation improved, as is also evident from page 3 of the assessment order. The profitability of Prajna (India) went up to 56% in the assessment year 2007-08 from that of

45% in assessment year 2006-07, the year under consideration. This, juxtaposed with the profitability of M/s. Dynamech, which had remained constant over a period of five years, i.e., between 30% and 41%. This is available at page 17 of assessee's written submission dated 2.1.2015.

57. M/s. Prajna (India) produced 112 new parts upto assessment year 2007-08, 156 new parts upto assessment year 2008-9 and 236 new parts upto assessment year 2009-10 (as is available at page 18 of the assessee's written submission dated 02.01.2015). These figures are also stated to have been placed before the ld. CIT(A). However, they have not been taken into consideration.

58. Further, it stands depicted at page 19 of assessee's written submission dated 02.01.2015 that the rate of increase of annual sales of M/s. Dynamech, which was between 21% to 28% for each of the three preceding years, fell to 3% in the year under consideration. This also stands noted at page 3 of the assessment order. As against this, during assessment year 2007-08, the annual sales of Prajna (India), in its first full year of operations, was 15%. These figures also remained oblivious to the ld. CIT(A).

59. To wit, exemption u/s 10B of the Act was available only upto 31.03.2009. That being so, the investment of over Rs.2.6 crores in land,

building and machinery would not make any business sense. This fact has also gone unnoticed by the ld. CIT(A).

60. Thus, it can be seen that none of the reasons for which the ld. CIT(A) has held that Prajna (India) was formed by splitting up of the business of M/s. Dynamech holds good. In 'CIT vs. Hindustan General Industries Ltd.', 137 ITR 851 (Delhi), it has been held that the expression "split up" 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. In the present case, neither of these factors is present. Neither has the integrity of the business of M/s. Dynamech been shown to have been broken up, nor any activities previously conducted by M/s. Dynamech have been established to have been carried on independently by Prajna (India). Prajna (India) has not been proved to be a rehash of M/s. Dynamech.

61. M/s. Dynamech has not been shown to have been either split up, or divided. It continued to independently produce and supply parts. No machinery or firm or section of M/s. Dynamech was transferred or shifted to Prajna (India), as accepted by the ld. CIT(A) also. Rather, the observations of the ld. CIT(A) in para 8.3 of the order under appeal, are mutually contradictory. It was first stated that the work earlier done in M/s.

Dynamech was shifted to Prajna (India). Immediately thereafter, it was observed that the business had split and had gone partly to Prajna (India).

62. There is also no rebuttal to the stand maintained by the assessee that though the parts supplied by both M/s.Dynamech and Prajna (India) were machined parts, this was only a general classification and whereas those supplied by M/s. Dynamech were simply parts, Prajna (India) was set up to produce high precision parts, as was the fresh requirement of Mitsubishi, Japan.

63. Apropos reliance by the assessee on judicial decisions, the following case laws have been cited:

i) Textile Machinery Corpn. Ltd. vs. CIT 107 ITR 195 (SC)

ii) CIT vs. Orient Paper Mills Ltd. 108 ITR 367 (SC)

iii) CIT vs. Orient Paper Mills Ltd.176 ITR 110 (SC)

iv) Oswal Wollen Mills Vs. CIT 138 ITR 338 (P&H)

vi) CIT vs. Dandeli Ferro Alloys (P) Ltd. 212 ITR 18 (Bom.)

vii) ITO vs. Western Outdoor Interactive (p) Ltd. (2009) TIOL -631 ITAT- MUM.

viii) ITO vs. Computer Force 136 TTJ (Ahd.) 221

ix) Abbas Nabi Sheikh vs. ACIT 8 Taxman 72 (Ahd-ITAT)

x) Quality Steel Tubes (P) Ltd. vs. ITO Allahabd Bench (ITA Nos.730 & 99 (All) of 1985 dated 30.10.1985)

xi) ITO vs. Servion Global Solutions Ltd. 117 TTJ Chennai 380.

xii) ITO vs. DSM Soft (P) Ltd. 307 ITR (AT) 156 (Chennai).

xiii) CIT vs. Sagun Gems (P) Ltd. 256 CTR (Raj.) 614

xiv) Taurus Merchandising (P) Ltd. vs. ITO 143 TTJ (Del)

xv) CIT vs. Delhi Press Patra Parkashan Ltd. 260 CTR 253

64. In 'Textile Machinery Corpn. Ltd.', (supra), it has been held by the Hon'ble Supreme Court that "A new activity launched by the assessee, by establishing new plants and machinery by investing substantial funds may produce the same commodities of the old business, or it may produce some other distinct marketable products, even commodities which may feed the old business. These products may be consumed by the assessee in his old business or may be sold in the open market. One thing is certain that the new undertaking must be an integrated unit by itself wherein articles are produced and at least a minimum of ten persons with the aid of power and a minimum of twenty persons without the aid of power have been employed. Such a new industrially recognizable unit of an assessee cannot be said to be reconstruction of his old business since there is no transfer of any assets of the old business in the new undertaking which takes place when there is reconstruction of the old business. For the purpose of section 15C the

industrial units set up must be new in the sense that new plants and machinery are erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of section 15C the new undertaking must be formed by reconstruction of the old business."

65. This decision has been held by the ld. CIT(A) to go in favour of the assessee, except for transfer of capital, noting that this decision dealt with 're-construction' and not with 'splitting up' of business. Apropos the transfer of capital, we have held above that this is not a case of transfer of capital.

66. In 'Indian Alluminium Co. Ltd.', (supra) the Hon'ble Supreme Court decided the matter on the submission of the counsel for both the parties, that the matter was governed by 'Textile Machinery Corpn. Ltd..', (supra).

67. In 'Orient Paper Mills Ltd.', (supra), 'Textile Machinery Corpn. Ltd.', (supra) and ' Indian Alluminium Co. Ltd.', (supra) were followed.

68. In 'Oswal Woollen Mills Ltd.', (supra), the assessee was manufacturing hosiery goods. A separate export wing was established for manufacture to export, using different raw-material and having separate accounts. Large amounts were spent for construction of new building and purchase of new machinery during previous and subsequent years. A part of the new building was utilized for installing machinery for production of knitwears. The export wing was separately registered under the Factories

Act and also with the Export Promotion Council. It was held by the Hon'ble High Court that the export wing was an independent entity not formed by reconstruction of the business already in existence and was entitled to deduction. 'Textile Machinery Corpn. Ltd.' (supra), was followed.

69. Even though this decision dealt with the 'reconstruction' and not with 'splitting up' of business, the ld. CIT(A) has himself held 'Textile Machinery Corpn. Ltd.' (supra), to go in favour of the assessee, except for transfer of capital. 'Textile Mchinery Corpn. Ltd.', (supra) as noted, has been followed in 'Indian Allumim Co. Ltd.', (supra), Orient Paper Mills Ltd.,' (supra) and Oswal Woollen Mills Ltd.,' (supra). Now, 'reconstruction' and 'splitting up' are expressions used in the same section, i.e., section 10B(2)(iii) of the Act. The parameters applicable to 'reconstruction' are equally applicable to 'splitting up' also. There is no denial to this, even though the ld. CIT(A) has made it to be a 'splitting up' rather than that of 'reconstruction', as ultimately held by the AO (having initially held it to be a case of 'splitting up'). This, despite the fact that the ld. CIT(A) has observed in para 8 of the impugned order that to attract the charge of 'reconstruction' of an existing business, there must be transfer of assets, including machinery, from the existing undertaking to the new undertaking, following 'Textile Machinery Corpn. Ltd.' (supra), 'Indian

Alluminium Co. Ltd.,' (supra) and 'Oswal Woollen Mills Ltd.,'(supra). The distinction sought to be made out by the ld. CIT(A), in our considered opinion, is non-existent. It was held in 'CIT vs. Hindustan General Industries Pvt. Ltd.', 137 ITR 185 (Delhi) that the expression 'splitting up' 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 out independently.

70. In 'T.Satish U. Pai' (supra), it has been observed that in order to hold that there is a splitting up of a business already in existence, there must be some material to hold that either some asset of the existing business is divided and another business is set up from such splitting up of assets, or that the two businesses are the same and the one formed was an integral part of the earlier one and that it was only a question of breaking up of the same business. It was, thus, held that transfer of assets, inter-alia, was a decisive factor for holding that there was a splitting up of the earlier business. This has also been noted by the ld. CIT(A) in para 7.7 of his order.

71. It is note-worthy that in the present case, the ld. CIT(A) has held capital to have been transferred for setting up of the new unit. To reiterate, we have disagreed with this observation of the ld. CIT(A). 'Textile Machinery Corpn. Ltd.' (supra), as will be seen in the succeeding pargraphs,

has been referred to and followed in numerous cases involving splitting up and reconstruction of existing business. Therefore, 'Textile Machinery Corpn. Ltd.', 'Indian Alluminium Co. Ltd.,' (supra) and 'Oswal Woollen Mills Ltd.,'(supra), are held to be squarely applicable to the facts at hand.

72. In 'Dandeli Ferro Allows Pvt. Ltd.', (supra), while considering the scheme of section 80J of the Act, it was held that the said scheme is to encourage new Industrial Undertakings, provided they fulfil the conditions mentioned therein; that the scheme of the section indicates that what is being aimed at is to prevent exemption to those Industrial Undertakings, which are formed by the splitting up or reconstruction, or by transfer of a new business, or plant and machinery of the old business; and that 'transfer', in this context, must mean a transfer of plant and machinery, which is essential for the formation of the new industrial undertaking and that must again mean a transfer to the new business of transferee of any machinery used by the said transferee in his old business. This decision also clearly buttresses the stand taken by the assessee, negating the differentiation sought to be brought in by the ld. CIT(A).

73. In ' Western Outdoor Interactive (P) Ltd.,' (supra), the assessee, which was into entertainment software exports, had owned a unit at Fort in Mumbai and claimed benefit u/s 80HHE of the Act. It had set up a second

unit and made investments in infrastructure development. Deduction u/s 10A of the Act was claimed. This claim was allowed by the AO for the relevant year, but it was disallowed for the subsequent assessment years, on the ground that the new unit had been set up after splitting the existing business, as the buyer of the product was the same (as in the present case) and also the payments sometimes received were composite for both the units. The Tribunal upheld the ld. CIT(A)'s finding that merely because the products were the same and the buyer of the product was also the same, it could not be held that the assessee was not entitled to the benefit claimed, since there was no evidence to suggest (again, as in the present case), that the new unit had been set up by splitting up the existing unit, nor was there any proof to indicate transfer of plant and machinery.

74. In 'Computer Force', (supra), considering the allowability of deduction u/s 80IB of the Act, it was held, following, inter-alia, 'Textile Machinery Corpn. Ltd.' (supra), that the assets and liabilities of the old unit remained undisturbed and that so, the preumption that the old unit had given birth to the new unit, had no legal basis or sanctity and was not supported by any cogent evidence.

75. In 'Abbas Nabi Sheikh', (supra), considering the allowability of deduction u/s 80IB of the Act, it was held that where at a new location

independent of the earlier existing unit, new plant and machinery are purchased and installed and new capital is invested (as in the case at hand), it would a case of setting up of a new unit even for carrying out the same business, and that whether the assessee carries on the same business or a different one, is not an essential ingredient to hold it to be a case of splitting up or reconstruction.

76. In 'Quality Steel Tubes', (supra), considering the allowability of deduction u/s 80J of the Act, following 'Textile Machinery Corpn. Ltd.' (supra) again, the matter was decided by the Tribunal in favour of the assessee. This decision of the Tribunal was later confirmed by the Hon'ble High Court in 'CIT vs. Quality Steel Tubes Pvt. Ltd.,' 280 ITR 254 (All.) by upholding the finding that merely because some of the activities were common between the old unit and the new one, that would not mean reconstruction or splitting up.

77. In 'Servion Global Solutions Ltd.,' (supra), it was held that the fact that the new unit also dealt in the same products as that of the old unit, or that there were some employees or customers of the old unit, could not be taken as a ground for denying the benefit u/s 10A of the Act on the basis that the new unit had been established as a result of splitting or reconstruction of the old unit.

78. In 'DSM Soft P. Ltd.,' (supra), where a new unit was set up with subtantial investment and increase in the number of employees and nature of services, there was held to be no splitting up and reconstruction of the new business and the assessee was held entitled to exemption u/s 10A of the Act. 'Textile Machinery Corpn. Ltd.,' (supra), was referred to.

79. In 'Sagun Gems (P) Ltd.,' (supra), the ld. CIT(A) observed that it had been brought on record that funds from the existing concern had not been diverted to the new company and investment in share capital of the company had been made from realization of assets other than the capital employed in the firm; and that new plant and machinery had been purchased by the concern and out of seventy employees in the new concern, only eight were from the earlier one. Upholding the CIT(A)'s order, the Tribunal observed that there was no reason to hold that the new concern was nothing but a restructured concern of the earlier concern, not entitled to exemption. The Hon'ble High Court confirmed the order of the Tribunal.

80. In 'Taurus Merchandising (P) Ltd.,' (supra), authored by one of us, the JM, the AO denied exemption u/s 10B of the Act, holding that the assessee had restarted its old business activity of export of the same items and had merely reconstructed the existing business to avail of the deduction

claimed u/s 10B of the Act. It was held by the Tribunal, inter-alia, that the provisions of section 10B of the Act did not place any bar on the assessee having a separate new undertaking for the manufacture and production of the same or similar goods, as done earlier, similar to one of the activities carried on in the existing undertaking.

81. Therefore, as considered in the preceding paragraphs, there is a plethora of case laws supporting the stand taken by the assessee and on the basis thereof, the case of splitting up of the earlier business to form a new unit, as made out by the ld. CIT(A), carries no force.

82. The assessee has also relied on 'ITO vs. vs. DSM Soft (P) Ltd.', 115 TTJ 469 (Chennai) (supra), wherein, 'CIT vs. Poddar Cements Ltd', 26 ITR 625 (SC) and 'Mysore Minerals Ltd.', 39 ITR 775 (SC) have been followed. In that case, it has, inter-alia, been that where two views are possible, the one in favour of the assessee should be adopted. There can possibly be no two opinions about this proposition.

83. Further, the assessee has placed reliance on 'Bajaj Tempo Ltd. vs. CIT', 196 ITR 199 (SC) and 'CIT vs. Chand Diesels', 216 ITR 639 (Bom.), wherein,it has been held that the incentive provisions of the Act should be construed liberally, in a broad commercial sense, keeping their object in

view, so as to obviate defeating the very purpose of the tment thereof. Again, this proposition is trite.

84. Now, for a moment, we revert to the progression of events in the matter of 'Textile Machinery Corporation' (supra). A heavy engineering concern manufacturing boilers, machine parts, wagons, etc., setting up two new units, a Steel Foundry Division and a Jute Mill Division. The Steel Division started manufacturing some castings, which the heavy engineering concern was previously buying from the market. However, the castings were mostly used by other existing Divisions of the engineering concern itself. The raw-materials were supplied to the Jute Mill Division by the Boiler Division of the concern after machining and forging and the parts were given back by the Jute Mill Division to the Boiler Division. The engineering concern claimed exemption from tax under section 15C of the Income Tax Act, 1922 in respect of the profits from the Steel Foundry Division, for assessment years 1958-59 and 1959-60 and in respect of the profits from the Jute Mill Division, for assessment year 1959-60. The taxing Authorities held that the two units were formed by a reconstruction of the business already existing. The Tribunal held that the heavy engineering concern was entitled to the relief claimed, since the two Divisions were not formed by any

reconstruction of the existing business. The Tribunal found that the machinery in the two Divisions were new, that they were housed in a separate building and that an industrial liencese had been obtained for manufacturing parts. It was observed by the Tribunal that the existing business of the engineering concern consisted of manufacturing boilers and wagons, etc., and for that purpose the concern was purchasing parts and getting the forging and casting done from outside; that the business of the new unit was to manufacture these parts; and that, therefore, it could not be said that the new undertakings were formed out of the existing business, to come within the mischief of section 15C(2)(i) of the Income Tax Act, 1922. On a reference, the Hon'ble Calcutta High Court, in 'CIT vs. Textile Machinery Corpn.', 80 ITR 428 (Cal.), held that change of producing one's own goods systematically used in the existing business instead of buying them from outside would only be a reconstruction of an existing business within the meaning of section 15C(2)(i) of the I.T. Act, 1922.

85. The judgment of the Hon'ble Calcutta High Court, was reversed by the Hon'ble Supreme Court in 'Textile Machinery Corpn. Ltd. vs. CIT, West Bengal', 105 ITR 195 (SC), vide judgment dated 25.01.1977. The ld. CIT(A) herein held this judgment of the Hon'ble Supreme Court to go in favour of the assessee, as noted hereinabove.

86. The ld. CIT(A) relied on 'Chembra Peak Estate Ltd. vs. CIT', (supra), to hold in favour of the department , that this was a case of splitting up of the business of M/s. Dynamech. While deciding 'Chembra Peak Estate Ltd. vs. CIT', (supra), it is seen, the Hon'ble Kerala High Court relied on the decision of the Hon'ble Calcutta High Court in the case of 'Textile Machinery Corpn. Ltd.,' (supra). 'Chembra Peak Estate Ltd. vs. CIT', (supra) is dated 18.11.1971. It was post 'Chembra Peak Estate Ltd. vs. CIT', (supra), that the Hon'ble Supreme Court decision in 'Textile Machinery Corpn. Ltd.,' (supra) was delievered on 25.01.1977, reversing the High Court order. Hence, obviously the Hon'ble High Court did not have the benefit of the said Supreme Court decision. This position has also been taken note of by the Allahabad Bench of the Tribunal in 'Quality Steel Tubes,' (supra), and as noted, this Tribunal decision was confirmed by the Hon'ble High Court in 'CIT vs. Quality Steel Tubes', 280 ITR 254 (All.) (supra). Therefore, the ld. CIT(A) has erred in placing reliance on 'Chembra Peak Estate Ltd. vs CIT' (supra).

87. The Ld. CIT(A) also relied on 'Chenab Information Technologies (P) Ltd. vs. ITO' 25 SOT 432 (Mum.). The ld. CIT(A) noted that therein, it was held that it would be a case of splitting up of the business, if either the assets of the old unit stand transferred to the new unit, or the business itself has

been diverted to the new unit and the business of both the units remains the same. The ld. CIT(A) noted that this case applies to the case of the assesse as well, despite some facts therein being different from the facts of the assessee's case. As per the ld. CIT(A), for splitting up, thus, there need not be any transfer of assets. The assessee contends that firstly, this decision was not discussed with the assessee by the ld. CIT(A), and that it is distinguishable from the assessee's case on facts.

88. In this regard, we have already held that for splitting up to be effective, transfer of assets needs must be there from the old unit, to the new unit, which is entirely absent here. Then, the facts of the present case are not in pari materia with those of 'Chenab Information Technologies (P) Ltd.' (supra) in as much as it has been observed therein that the new unit carried on the existing business of the old unit, using the same employees. Herein, as noted, the employees of M/s. Dynamech have not been proved to have carried on the business of Prajna (India). In 'Chenab Information Techonologies (P) Ltd.' (supra), some of the existing staff was found to have been shifted to the new office in the same area taken on lease by making a small investment of about Rs. 2 lakhs in furniture and equipment. These, evidently, are not the facts of the present assessee. In 'Chenab Information Technologies (P) Ltd.' (supra) itself, it has been observed that each case has

to be evaluated on its own facts to determine whether it is a case of splitting up of existing business or not. In assessee's case, as discussed, the facts do not lead to a conclusion of Prajana (India) having been formed by a splitting up of the business of M/s. Dynamech.

89. No other argument was raised before us.

90. To sum up, we hold that:

a) The Tribunal rightly recalled its order dated 31.08.2009 in its entirety, for hearing afresh and no prejudice was caused to any interest of the Revenue thereby.

b) The ld. CIT(A) went wrong in holding it to be a case of transfer of capital from the existing business to the new one.

c) The ld. CIT(A) has erred in holding that orders for manufacture were shifted from the existing business to the new one.

d) The ld. CIT(A) has fallen into error in holding that there was a unity of control in the two businesses.

e) The ld. CIT(A) has wrongly held that there was a shifting of staff from the existing unit to the one newly set up.

f) The ld. CIT(A) has erroneously held that tax evasion was the sole reason for setting up the new unit.

f) The ld. CIT(A) has, on the basis of the above misplaced findings, incorrectly held it to be a case of splitting up of existing business.

91. In view of the above discussion, we hold that the ld. CIT(A) has misdirected himself in sustaining the disallowance of deduction claimed by the assessee u/s 10B of the Act. The grievance of the assessee is accepted. The order of the ld. CIT(A) is reversed.

92. As stated in the beginning of this order, the facts in all the five appeals are, mutatis mutandis, similar. Therefore, our observations will equally apply to the other appeals also.

92. In the result, all the five appeals filed by the assessee are allowed.

Order pronounced in the open court on 5th March, 2015.

Sd/-	Sd/-
(B.P. JAIN)	(A.D.JAIN)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 5th March, 2015
/SKR/
Copy of the order forwarded to:

1. The Assessee:Sh.Rohit Tandon Prop. M/s. Prajna (India) Jalandhar)
2. The ITO Ward 1(3), Jalandhar.
3. The CIT(A), Jalandhar.
4. The CIT, Jalandhar.
5. The SR DR, ITAT, Amritsar.

True copy
By order

(Assistant Registrar)
Income Tax Appellate Tribunal,
Amritsar Bench: Amritsar.