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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 910/2019

THE PR. COMMISSIONER OF INCOME TAX -6 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Monica Benjamin, Ms. Nancy Jain, JSCs, Ms. Pratishtha & Ms. Nivedita, Advs.

versus

CORFORGE LTD. .....Respondent

Through: Mr. Rohit Jain & Mr. Aniket D. Agrawal, Advs.

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\+ ITA 267/2022

THE PR. COMMISSIONER OF INCOME TAX -4 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Monica Benjamin, Ms. Nancy Jain, JSCs, Ms. Pratishtha & Ms. Nivedita, Advs.

versus

NIIT TECHNOLOGIES LTD. .....Respondent

Through: Mr. Rohit Jain & Mr. Aniket D. Agrawal, Advs.

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\+ ITA 272/2022

THE PR. COMMISSIONER OF INCOME TAX -4 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Monica Benjamin, Ms. Nancy Jain, JSCs, Ms. Pratishtha & Ms. Nivedita, Advs.

versus

NIIT TECHNOLOGIES LTD. .....Respondent

Through: Mr. Rohit Jain & Mr. Aniket D. Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

% **29.08.2024**

1. These appeals came to be admitted in terms of our order dated 12 October 2023. Mr. Chawla, learned counsel appearing for the appellants, has placed for our consideration the following tabular statement of the questions which arise in these set of appeals:

ITA No.	**910/2019**	**272/2022**	**267/2022**
Assessment Year	**2006-07**	**2007-08**	**2008-09**
Arising out of order of the Hon'ble ITAT	3076/Del/2012 (ITAT Order dt. 27.02.2019)	5491 & 5492/ Del/2013 & 5424 & 5525/Del/2013 (ITAT Order dt. 28.01.2020)	5491 & 5492/Del/2013 & 5424 & 5525/ Del/2013 (ITAT Order dt. 28.01.2020)
Substantial Question of Law as admitted by the Hon'ble Court vide order dt. 12.10.2023			
(i) Whether the Tribunal erred in deleting indirect interest expenditure as computed by the Commissioner of Income Tax (Appeals) [in short "CIT(A)] and restricting administrative expenses allegedly incurred in relation to the exempt income?	✘	✓	✓
(ii) Whether the Tribunal erred in excluding depreciation allowance while computing profits	✓	✘	✓

derived from a newly established undertaking?			
(iii) Whether the Tribunal erred in law in holding that the different Export Oriented Units (EOUs) of the respondent/ assessee constituted separate undertakings intendedly, in their own right, and hence eligible for deduction under Section 10B of the Income Tax Act, 1961 [in short "Act"]?	✓	✓	✓
(iv) Whether the Tribunal erred in law in holding that deduction under Section 10B of the Act is to be computed at the stage of computation of "profits and gains of business" of the eligible undertakings under Chapter IV, prior to determination of gross total income under Chapter VI of the Act?	✓	✘	✘
(v) Whether the Tribunal erred in holding that the brought forward business losses/ unabsorbed depreciation of the non-eligible units, if any, are not required to be adjusted against the income of the eligible units, prior to computing/ allowing deduction under Section 10B of the Act?	✓	✘	✓
(vi) Whether the Tribunal failed to appreciate that the respondent/ assessee does not maintain unit-wise separate books of account and hence was not eligible for deduction under Section 10B of the	✓	✓	✓

Act?			
Whether the Tribunal erred in not appreciating the provisions of the CBDT circular 1/2013 dated 17.01.2013, in particular, para 2(v) of the said circular?	✘	✓	✘
(vii) Whether the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"] erred in law in admitting the additional evidence furnished by the respondent/ assessee under Rule 46A of the Income Tax Rules, 1962?	✓	✘	✘

2. One of the principal issues which appears to have been canvassed in all three appeals was whether the different **Export Oriented Units**[1] of the respondent-assessee would constitute separate undertakings for the purposes of eligibility of deductions under Section 10B of the **Income Tax Act, 1961**[2].

3. We note that the tests for identifying separate and independent undertakings came to be enunciated by the Supreme Court in **Textile Machinery Corporation Limited, Calcutta vs Commissioner of Income Tas**[3] in the following terms:-

> "**15.** Under sub-section (1) of Section 15-C the tax shall not be payable by an assessee on profits not exceeding six per cent per annum on the capital employed in the new industrial undertaking from the profits of which alone exemption is claimed. Sub-section (2) of Section 15-C has a negative as well as a positive aspect. Negatively, the new industrial undertaking of the assessee should not be formed—
>
> (1) by the splitting up of the business already in existence,
>
> (2) by the reconstruction of business already in existence, or

[1] EOUs
[2] Act
[3] (1977) 2 SCC 368

(3) by the transfer to a new business of building, machinery or plant used in a business which was being carried on before April 1, 1948.

We agree that it is not possible to exclude any new industrial undertaking other than the three categories mentioned above.

16. We are concerned in these appeals with the type (2) mentioned above. Positively, the new industrial undertaking must produce result, that is to say, it has to manufacture or produce articles at any time within a period of 13 years from April 1, 1948. The further requirement under sub-section (2) is with regard to the personnel in the undertaking, namely, that ten or more workers have to work in the manufacturing process carried on with the aid of power or twenty or more workers have to carry on work without the aid of power. The above element with regard to the number of workers engaged in the undertaking would go to show that even small industrial undertakings, newly started, are within the exemption clause, where, for example, twenty workers may complete the industrial process without the aid of power. There is no controversy about the positive aspects in these appeals.

17. Again, the new undertaking must not be substantially the same old existing business. The third excluded category mentioned above is significant. Even if a new business is carried on but by piercing the veil of the new business it is found that there is employment of the assets of the old business, the benefit will be not available. From this it clearly follows that substantial investment of new capital is imperative. The words "the capital employed" in the principal clause of Section 15-C are significant, for fresh capital must be employed in the new undertaking claiming exemption. There must be a new undertaking where substantial investment of fresh capital must be made in order to enable earning of profits attributable to that new capital.

18. The assessee continues to be the same for the purpose of assessment. It has its existing business already liable to tax. It produced in the two concerned undertakings commodities different from those which he 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 is the heart of the matter, to earn benefit from the exemption of tax liability under Section 15-C. Sub-section (6) of the section also points to the same effect, namely, production of articles. 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 15-C. 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 expansion of trade and industry. The fact that an assessee by establishment of a new industrial undertaking expands his existing business, which he certainly does, would not, on that score, deprive him of the benefit under Section 15-C. 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 15-C 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.

19. It is clear that the principal business of the assessee is heavy engineering in the course of which it manufactures boilers, wagons, etc. If an industrial undertaking produces certain machines or parts which are, by themselves, identifiable units being marketable commodities and the undertaking can exist even after the cessation of the principal business of the assessee, it cannot be anything but a new and separate industrial undertaking to qualify for appropriate exemption under Section 15-C. The principal business of the assessee can be carried on even if the said two additional undertakings cease to function. Again, the converse is also true. The fact that the articles produced by the two undertakings are used by the Boiler Division of the assessee will not weigh against holding that these are new and separate undertakings. On the other hand the fact that a portion of the articles produced in these two new industrial undertakings had been sold in the open market to others is a circumstance in favour of the assessee that the new industrial units can function on their own. Use of the articles by the assessee is not decisive to deny the benefit of Section 15-C.

20. Section 15-C partially exempts from tax a new industrial unit which is separate physically from the old one, the capital of which and the profits thereon are ascertainable. There is no difficulty to hold that Section 15-C is applicable to an absolutely new undertaking for the first time started by an assessee. The cases which gave 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. 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 fare 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 recognisable 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 to the new undertaking which takes place when there is reconstruction of the old business. For the purpose of Section 15-C 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 15-C the new undertaking must be formed by reconstruction of the old business. Now in the instant case there is no formation of any industrial undertaking out of the existing business since that can take place only when the assets of the old business are transferred substantially to the new undertaking. There is no such transfer of assets in the two cases with which we are concerned.

21. We will now deal with the question whether the two undertakings of the assessee are formed by reconstruction of the existing business. The word "reconstruction" is not defined in the Act but has received judicial interpretation. In re South African Supply and Cold Storage Company, Wild v. Same Company [(1904) 2 Ch. 268] , Buckley, J. dealing with the meaning of the word "reconstruction" in a company matter observed as follows:

> "What does 'reconstruction' mean? 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 some 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, that 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 or 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."

22. This concept of reconstruction was accepted by the Bombay High Court in the CIT v. Gaekwar Foam and Rubber Co. Ltd [35 ITR 662 (Bom HC)] , dealing with Section 15-C of the Act. While adverting to the passage which we have just quoted the Bombay High Court observed as follows in the above decision:

> "Now fully appreciating the distinction which counsel for the Revenue has sought to make between the case of a reconstruction of a company and the case of reconstruction of a business, these observations, as we read them, are equally illuminating in the context of reconstruction of a business

already in existence in the case of a newly established industrial undertaking."

23. The Delhi High Court also in CIT v. Ganga Sugar Corporation Ltd. [92 ITR 173 (Delhi HC)], accepted the above concept of "reconstruction" in the following passage:

"We have given the matter our earnest consideration and are of the view that in the reconstruction of a business, as in the reconstruction of a company, there is an element of transfer of assets and of some change, however partial or restricted it may be, of ownership of the assets. The transfer, however, need not be of all the assets. It is none the less imperative that there should be continuity and pre-servation of the old undertaking though in an altered form. The concept of reconstruction of business would not be attracted when a company which is already running one industrial unit sets up another industrial unit. The new industrial unit would not lose its separate and independent identity even though it has been set up by a company which is already running an industrial unit before the setting up of the new unit."

We endorse the above views with regard to reconstruction of business.

24. Reconstruction of business involves the idea of substantially the same persons carrying on substantially the same business. It is stated on behalf of the Revenue that the same company in the instant case continues to do the same business of heavy engineering no matter certain spare parts necessary as components to completion of the end-product are now manufactured in the business itself. The fact that the assessee is carrying on the general business of heavy engineering will not prevent him from setting up new industrial undertakings and from claiming benefit under Section 15-C if that section is otherwise, applicable. However, in order to be entitled to the benefit under Section 15-C, the following facts have to be established by the assessee, subject always to the time-schedule in the section:

"(1) investment of substantial fresh capital in the industrial undertaking set up,

(2) employment of requisite labour therein,

(3) manufacture or production of articles in the said undertaking,

(4) earning of profits clearly attributable to the said new undertaking, and

(5) above all, a separate and distinct identity of the industrial unit set up.

We may add that there is no bar to an assessee carrying on a particular business to set up a new industrial undertaking on account of which exemption of tax under Section 15-C may be claimed."

4. Tested on the aforesaid precepts, we find that the **Commissioner of Income Tax (Appeals)**[4] had on facts come to the conclusion that all EOUs had been able to establish a separate and independent existence and consequently came to answer the admissibility under 10B in favour of the respondent-assessee. It was the aforesaid findings of facts as rendered by the CIT(A) which ultimately came to be affirmed by the **Income Tax Appellate Tribunal**[5]. We find no justification to take a contrary view.

5. The other related aspect pertained to the deductions contemplated under Section 10B and the manner in which it is to be computed. The question posed for our consideration was at what stage of computation would those deductions come into play. The aforesaid question is no longer res integra bearing in mind the following observations and principles enunciated by the Supreme Court in **Commissioner of Income Tax vs Yokogawa India Limited**[6]:-

> "**9.** The amendment of Section 10-A of the Act, by the Finance Act, 2000 with effect from 1-4-2001, specifically uses the words "deduction of profits and gains derived by an eligible unit … from the total income of the assessee". There are other provisions of Section 10-A, as amended, which could be suggestive of the fact that by the amendment made by the Finance Act, 2000, Section 10-A had changed its colour from being an exemption section to a provision providing for deduction. Yet, Section 10-A continued to remain in Chapter III of the Act which chapter deals with incomes which do not form part of the total income. There are several circulars that have been placed before us by the contesting parties to explain the purpose and object of the amendment.
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> **xxxx xxxx xxxx**
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> **14.** The retention of Section 10-A in Chapter III of the Act after the amendment made by the Finance Act, 2000 would be merely suggestive and not determinative of what is provided by the section

[4] CIT(A)
[5] Tribunal
[6] (2017) 2 SCC 1

as amended, in contrast to what was provided by the unamended section. The true and correct purport and effect of the amended section will have to be construed from the language used and not merely from the fact that it has been retained in Chapter III. The introduction of the word "deduction" in Section 10-A by the amendment, in the absence of any contrary material, and in view of the scope of the deductions contemplated by Section 10-A as already discussed, it has to be understood that the section embodies a clear enunciation of the legislative decision to alter its *nature* from one providing for exemption to one providing for deductions.

15. The difference between the two expressions "exemption" and "deduction", though broadly may appear to be the same i.e. immunity from taxation, the practical effect of it in the light of the specific provisions contained in different parts of the Act would be wholly different. The above implications cannot be more obvious than from the case of Civil Appeals Nos. 8563 and 8564 of 2013 and civil appeal arising out of SLP (C) No. 18157 of 2015, which have been filed by loss-making eligible units and/or by non-eligible assessees *seeking the benefit of adjustment of losses against profits made by eligible units*.

16. Sub-section (4) of Section 10-A which provides for pro rata exemption, necessarily involving deduction of the profits arising out of domestic sales, is one instance of deduction provided by the amendment. Profits of an eligible unit pertaining to domestic sales would have to enter into the computation under the head "profits and gains from business" in Chapter IV and denied the benefit of deduction. The provisions of sub-section (6) of Section 10-A, as amended by the Finance Act of 2003, granting the benefit of adjustment of losses and unabsorbed depreciation, etc. commencing from the year 2001-02 on completion of the period of tax holiday also virtually works as a deduction which has to be worked out at a future point of time, namely, after the expiry of period of tax holiday. The absence of any reference to deduction under Section 10-A in Chapter VI of the Act can be understood by acknowledging that any such reference or mention would have been a repetition of what has already been provided in Section 10-A. The provisions of Sections 80-HHC and 80-HHE of the Act providing for somewhat similar deductions would be wholly irrelevant and redundant if deductions under Section 10-A were to be made at the stage of operation of Chapter VI of the Act. The retention of the said provisions of the Act i.e. Sections 80-HHC and 80-HHE, despite the amendment of Section 10-A, in our view, indicates that some additional benefits to eligible Section 10-A units, not contemplated by Sections 80-HHC and 80-HHE, was intended by the legislature. Such a benefit can only be understood by a legislative mandate to understand that the stages for working out the deductions under Sections 10-A and 80-HHC and 80-HHE are substantially different. This is the next aspect of the case which we would now like to turn to.

17. From a reading of the relevant provisions of Section 10-A it is more than clear to us that the deductions contemplated therein are qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9-8-2000 which states in para 15.6 that,

"The export turnover and the total turnover for the purposes of Sections 10-A and 10-B shall be of the undertaking located in specified zones or 100% export-oriented undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision".

18. If the specific provisions of the Act provide [first proviso to Sections 10-A(1); 10-A(1-A) and 10-A(4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous circular of the department (No. 794 dated 9-8-2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10-A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10-A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10-A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10-A as "total income of the undertaking"."

6. The question of maintenance of separate books of accounts by eligible and ineligible units also does not merit any authoritative pronouncement bearing in mind Circular No. 1 dated 17 January 2013

issued by the **Central Board of Direct Taxes**[7] and which was followed by Instruction No. 17 dated 19 November 2013 and Instruction No. 3 dated 14 March 2014, which clearly bound the Revenue.

7. Insofar as the question of admission of additional evidence is concerned, bearing in mind the discretion which stands placed in the hands of the CIT(A) by virtue of Rule 46A of the Income Tax Rules, 1962, we find no justification to interfere with the exercise of that power since the same has not been established to suffer from any patent illegality or perversity.

8. Insofar as the remainder question pertaining to Section 14A of the Act and the restriction of administrative expenses with reference to exempt income is concerned, we take note of our judgment rendered in **Coforge Limited (formerly known as NIIT Technologies Ltd.) vs. Assistant Commissioner of Income Tax**[8] which pertained to the appeals instituted by the respondent-assessee itself and where the aforesaid aspect came to be answered in its favour. The question thus posited with reference to Section 14A in these appeals is rendered academic.

9. In view of the aforesaid, the appeals shall stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 29, 2024/kk

[7] CBDT
[8] 2021 SCC OnLine Del 3608