

# The Commissioner Of Income Tax vs M/S Sociedade De Fomento Industrial ... on 25 January, 2022

**Bench: D.Y. Chandrachud, Sanjiv Khanna**

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ITEM NO.4

Court 4 (Video Conferencing)

SECTION IX

S U P R E M E C O U R T O F  
RECORD OF PROCEEDINGS

I N D I A

Petition(s) for Special Leave to Appeal (C)

No(s).6730/2021

(Arising out of impugned final judgment and order dated 22-10-2020 in TA No. 23/2012 passed by the High Court of Judicature at Bombay at Goa)

THE COMMISSIONER OF INCOME TAX

Petitioner(s)

VERSUS

M/S SOCIEDADE DE FOMENTO INDUSTRIAL PVT. LTD.

Respondent(s)

(FOR ADMISSION and I.R.)

WITH

SLP(C) No. 5940/2021 (IX)

SLP(C) No. 6201-6202/2021 (IX)

(FOR ADMISSION and I.R.)

SLP(C) No. 8001-8002/2021 (IX)

(FOR ADMISSION and I.R.)

SLP(C) No. 6854-6855/2021 (IX)

(FOR ADMISSION and I.R.)

Date : 25-01-2022 These petitions were called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE D.Y. CHANDRACHUD  
HON'BLE MR. JUSTICE SANJIV KHANNA

For Petitioner(s)

Mr. N. Venkataraman, ASG  
Mr. Rupesh Kumar, Adv.  
Mr. Manish Pushkarna, Adv.  
Mr. B.K. Satija, Adv.  
Mr. Mohammed Akhil, Adv.  
Mr. P.V. Yogeshwaran, Adv.  
Mr. Raj Bahadur Yadav, AOR

For Respondent(s)  
Signature Not Verified

Digitally signed by  
Sanjay Kumar  
Date: 2022.01.27  
16:42:52 IST  
Reason:

Mr. Rafique Dada, Sr. Adv.  
  
Mr. Yashraj Singh Deora, AOR  
Ms. Jasmin Amalsadvala, Adv.  
  
  
Mr. Nishant Thakkar, Adv.  
Ms. Prakriti Roy, Adv.  
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UPON hearing the counsel the Court made the following  
O R D E R

1 In arriving at the conclusion that the respondent-assessee was entitled to the benefit of the provisions of Section 10B of the Income Tax Act 1961, the Income Tax Appellate Tribunal<sup>1</sup>, by its decision dated 24 March 2011, applied the tests which have been formulated in the decision of this Court in Textile Machinery Corporation Ltd v CIT<sup>2</sup>. These tests which have been formulated in the decision of this Court are reproduced below:

“i. 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.

ii. 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. Every new creation in business is some kind of expansion and advancement.

iii. 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, iv. 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.

v. The new unit 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.

vi. The products produced by the new unit may be 1“Tribunal” 2107 ITR 195 (SC) 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.

vii. The industrial unit 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.

viii. In order to deny the benefit the new undertaking must be formed by reconstruction of the old unit which can take place only when the assets of more than 20% value of new unit are transferred to the new unit from the old unit.”

2 These tests have been reiterated in the decision in CIT v Indian Aluminium<sup>3</sup>. 3 In coming to the conclusion that the tests which have been formulated in the decision of this Court in Textile Machinery Corporation Ltd (supra) and reiterated in Indian Aluminium (supra) have been duly fulfilled, the Tribunal has entered specific findings of fact which are contained in paragraph 19 of the judgment which is extracted below:

“19. It is thus submitted that the following facts will go to establish the assessee's claim that the unit formed in 1998 is a new undertaking:

i. the old unit approved under license No.CIL/420 (1985) dt.26-12-1985 started producing Iron ore in the year 1986 and was setup at a total cost of Rs.3 crores having a capacity of producing 2 lac tons of beneficiated Ore per year;

ii in these circumstances it was considered imperative to install a new and more sophisticated beneficiation plant whose operations would result in production of higher ferrous content of about 63% plus;

iii. accordingly the appellant applied for allowing it to import plant and machinery, pursuant to the approval from the Ministry of Industry, an agreement came to be entered into between the appellant and the Government which recognized the setting up of the new unit and required that the unit should comply with fresh net foreign exchange earnings from the date of commencement of 3108 ITR 367 (SC) production of newly set up unit;

iv. pursuant to the approval the appellant set up and installed primary beneficiation section (PBS-II) and other related plant and machineries along with a slime treatment plant from a Swedish company, this plant is independently capable of producing ore of higher ferrous content, i.e. up to 63% to 65% with lower content of alumina and silica as required in the international market from the low-grade ore which is mined;

v. the new unit was formed in the financial year 1998-99 at a cost of over Rs.30 crores and the capacity of this unit is 15 lakhs tons compared to the earlier capacity of 2 lakhs tons per annum in old unit;

vi. a photograph taken of the new unit established in 1998- 99 (copy enclosed at pg.37 of paper book) clearly shows that the new unit is a completely different and independent unit which is located at a separate plot adjacent to the old unit;

vii. a certificate given by the Engineer of the appellant, one Mr. Y.S. Reddy establishes that the Greater Ferro-met Unit is capable of independently producing ore on its own of the desired ferrous" content." 4 The Tribunal has noted that the new unit was fully a independent unit with a production capacity of 15 lakh tons per annum as compared to the earlier production capacity of 2 lakh tons per annum of the old unit. The Tribunal has also dealt with the reasons which were furnished by the CIT in coming to the conclusion that what was set up was only an expansion of the old unit and not a new unit. Ex facie, the reasons which weighed with the CIT were not compliant with the tests which have been formulated in the judgments of this Court. 5 In this backdrop, the judgment of the Division Bench of the High Court of Bombay at Goa dated 22 October 2020 affirming the judgment of the Tribunal does not suffer from any error. The Special Leave Petition is accordingly dismissed.

6 Pending application, if any, stands disposed of.

SLP(C) Nos 5940/2021, 6201-6202/2021. 8001-8002/2021 and 6854-6855/2021 1 In view of the order passed in SLP(C) No 6730/2021, we are not inclined to entertain the Special Leave Petitions. The Special Leave Petitions are accordingly dismissed.

2 Pending application, if any, stands disposed of.

(SANJAY KUMAR-I)  
AR-CUM-PS

(SAROJ KUMARI GAUR)  
COURT MASTER