Cit I vs American Express India Pvt Ltd on 15 January, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

$~127-131
* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ITA 149/2013 & CM APPL. 2232/2025
CIT I
Through:

versus

AMERICAN EXPRESS INDIA PVT LTD .....Responden
Through: Mr. Nageswar Rao, Adv.
128
+ ITA 170/2016
PR. COMMISSIONER OF INCOME TAX -1 .....Appel
Through: Mr. Debesh Panda, SSC with
Mr. Vikramaditya Singh, Ms
Zehra Khan, JSCs & Mr.
Udhbav Gady, Adv.

versus

AMERICAN EXPRESS (INDIA) PVT.LTD. .....Respondent
Through: Mr. Nageswar Rao, Adv.
129
+ ITA 223/2016
PR. COMMISSIONER OF INCOME TAX-1 .....Appell
Through: Mr. Debesh Panda, SSC with
Mr. Vikramaditya Singh, Ms
Zehra Khan, JSCs & Mr.
Udhbav Gady, Adv.

versus

AMERICAN EXPRESS (INDIA) PVT. LTD. .....Responden
Through: Mr. Nageswar Rao, Adv.
130
+ ITA 577/2016

ITA 149/2013 & Connected Matters

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-1, NEW DELHI .....Appellan

Through: Mr. Debesh Panda, SSC with Mr. Vikramaditya Singh, Ms Zehra Khan, JSCs & Mr. Udhbav Gady, Adv.

versus

AMERICAN EXPRESS (INDIA) PVT. LTD. .....Responden

Through: Mr. Nageswar Rao, Adv.

131

\+ ITA 91/2017

PRINCIPAL COMMOSSIONER OF INCOME TAX -1 .....Appel

Through: Mr. Debesh Panda, SSC with Mr. Vikramaditya Singh, Ms Zehra Khan, JSCs & Mr. Udhbav Gady, Adv.

versus

M/S AMERICAN EXPRESS INDIA PVT.LTD. .....Responde

Through: Mr. Nageswar Rao, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

ORDER

% 15.01.2025

1. We note that these appeals stood admitted on a common question of law and which reads as follows:-

> "Whether AEGSC (STP) unit was eligible for deduction under Section 10A of the Income Tax Act, 1961?"

2. The same is identical to question (ii) which formed subject matter of CIT v. M/s American Express India Pvt. Ltd.1 and which ITA 691/2012 decided on 15 January 2025 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/02/2025 at 23:01:52 has come to be decided today in favour of the respondent- assessee with the following conclusions having been rendered in affirmation of the judgment of the Income Tax Appellate Tribunal2:-

> "4. During the year in question the respondent-assessee was stated to be carrying on functions through an export oriented unit which commenced its business on 01 June

1995. This unit undisputedly was availing of exemption under Section 10B right from Assessment Year 1996-97. The respondent assessee is stated to have applied for setting up a unit under the STP Scheme on 10 January 2002 and it was pursuant to the permissions and approvals so granted that the AEGSC Unit came to be established. The AEGSC was stated to be engaged in operating as a call centre and performing other back office and support centre services.

5. The Assessing Officer rejected its claim for exemption under Section 10A taking the position that the newly set up AEGSC Unit was merely a splitting up of the existing unit which was already availing benefits under Section 10B of the Act. The view so taken was however overturned by the Commissioner of Income Tax (Appeals) and which ultimately came to be affirmed by the Income Tax Appellate Tribunal . The Tribunal has in this regard rendered the following findings:-

"36. We have heard both the parties and perused the material placed before us. We find that the CIT(A) has considered all the parameters which may be necessary for adjudicating whether the set up of the new unit is byway of splitting up of the existing business or it is a new set up over and above the existing set up. He has recorded the finding that the physical location of both the units is different. The nature of activities is different, separate license is obtained for the new unit, separate infrastructure. is created in the new unit, fresh funds have, been invested in the new unit and even after the setting up of the new unit, the turnover of the old unit has not reduced but, on the other hand, increased. During AY 2002-03, when no new unit was in existence, the turnover of bid unit was Rs. 129 crores which, after the setting up of the new unit, has increased to Rs. 294 crores in AY 2008-09. In view of the above facts, we do not find any infirmity in the order of learned CIT(A). The same is sustained and ground No. 3 of the Revenue's appeal is rejected."

6. Mr. Panda, learned counsel appearing in support of the appeal, has taken us through the provisions comprised in Section Tribunal This is a digitally signed order.

10A and more particularly to the language in which clause (ii) of sub-section (2) stands couched and which speaks of splitting up or reconstruction of a business already in existence. According to Mr. Panda, most of the activities which were being undertaken by the AEGSC were also lines of business which were being pursued by the original unit. It was thus, according to Mr. Panda, a clear case of the splitting up of an existing business and which would thus fall foul of Section 10A(2)(ii).

7. Quite apart from the finding on facts which had come to be recorded by the Tribunal, including the establishment of that unit being at a physical location different from where the original unit had been established, a separate license and infrastructure having been obtained and created and funds separately invested in the new unit, it had also significantly taken note of the quantum jump in the turnover of the old unit from INR 129 crores to INR 294 crores in AY 2008-09 after the setting up of

the new unit. This clearly constituted an aspect which would have been sufficient to dispel the assumption of AEGSC being a splitting up of an existing unit.

8. On a more fundamental plane we find merit in the contention advanced by Mr. Nagi, learned counsel appearing for the respondents, who draws our attention to the judgment rendered by the Supreme Court in Commissioner of Income-tax v. Sociedade De Fomento Industrial Pvt. Ltd. and which, while reiterating the foundational principles culled out in Textile Machinery Corporation v. CIT , had held as follows:-

> "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, by its decision dated March 24, 2011, applied the tests which have been formulated in the decision of this court in Textile Machinery Corporation Ltd. v. CIT. 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 This is a digitally signed order.

 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 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 plant 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 per cent. 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.

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 licence No. CIL/420 (1985), dated December 26, 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 lakh tons of beneficiated ore per year ;
>
> (ii) in these circumstances it was considered imperative to install a new and more sophisticated This is a digitally signed order.

 beneficiation plant whose operations would result in production of higher ferrous content of about 63 per cent. 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 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 machinery 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 lakh tons compared to the earlier capacity of 2 lakh tons per annum in the old unit ;

(vi) a photograph taken of the new unit established in 1998-99 (copy enclosed at page 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"

> 9. It is pertinent to note that the Supreme Court had clarified the aspect of expansion of an existing business and ultimately held that the true test would really not be whether it amounts to an expansion but as to the coming into being of a new and identifiable undertaking separate and distinct from the existing business. These tests when employed in the backdrop of the facts that have come to be recorded by the Tribunal, clearly convince us to hold that no interference is merited.
>
> 10. We also take in consideration a lucid explanation on This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/02/2025 at 23:01:53 splitting up and expansion of business units in the context of deductions which could be claimed under Section 10A or 10B of the Act, in a recent judgment handed down by a Division Bench of the Court in CIT-I v. Birlasoft Ltd. and where, while reiterating the principles propounded in Textile Machinery Corporation, the Court had held as follows:
>
> "40. In Textile Machinery Corpn. Ltd. v. CIT., the Supreme Court had examined the exclusionary clause under Section 15C of the Indian Income Tax Act, 1922. Under the said Section, tax was not payable by an assessee on profits not exceeding 6% per annum on the capital employed in a new industrial undertaking. The said benefit was available to the new industrial undertaking, which was not formed by splitting up, or the reconstruction of business already in existence or by the transfer to a new business of building, machinery, or plant, previously used in any other business.
>
> 41. In the aforesaid context, the Court observed as under:
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> "...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."

42. In Bajaj Tempo Ltd., Bombay v. CIT- a decision This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/02/2025 at 23:01:53 rendered in the context of the exclusionary clause under Section 15C of the Indian Income Tax Act, 1922 which is similar in its import as the exclusionary clauses (ii) and

(iii) of sub-section (2) of Section 10A of the Act - the Supreme Court referred to the earlier decision of the Textile Machinery Corpn. Ltd. v. CIT and explained that the emphasis of the Court was on the expression "not formed" and the same was "construed to mean that the undertaking should not be a continuation of the old but emergence of a new unit". The Supreme Court further observed that "the initial exercise, therefore should be to find out if the undertaking was a new one. Once this test is satisfied then clause (i) should be applied reasonably and liberally in keeping with the spirit of Section 15C(1) of the Act".

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45. In the present case, the fact that NOIDA-II unit was engaged in the same business is not dispositive of the question whether the said undertaking does not fulfil the criteria as specified in Clauses (ii) and (iii) of sub-section (2) of Section 10A of the Act. The Assessee had explained that it would set up the new undertaking to cater to its growth plans. It had hired a separate space from NOIDA (New Okhla Industrial Development Authority) for establishing the said unit. It had made an investment in the additional assets for setting up the said unit and resultantly not only the Assessee's gross block but also the seating capacity had doubled. As noted before, the Assessee's claim that the sitting capacity had increased from 300 seats to 700 seats with the establishment of the new undertaking (NOIDA-II unit) has not been controverted.

46. It is also material to note that the learned ITAT had in its order dated 27.03.2009 in respect of the AY 2003-2004 considered the question as to whether the new STP unit (NOIDA-II unit) was formed as a result of reconstruction of the existing business and had rejected the same. The relevant passage of the said order as set out in the written submissions filed on behalf of the Assessee - which was expressly admitted by the learned counsel for the Revenue during the course of the hearing - is reproduced below:.....

47. Admittedly, the Revenue had accepted the aforesaid findings of the learned ITAT, which is evident from the fact that the Revenue had not appealed the said finding. Significantly, the Revenue had filed an appeal before this court (being ITA No. 71/2010) but had not proposed any This is a digitally signed order.

 question of law with regard to the ineligibility of the new STP unit (NOIDA-II unit) for deduction under Section l0A of the Act. The Revenue's appeal (ITA No. 71/2010) was dismissed by this court by an order dated 06.01.2011.

48. It is material to note that the benefit under Section l0A is in respect of an undertaking and not the assessee. In CIT v. Yokogawa India Limited, the Supreme Court had held as under:

> "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(l); 10-A(l-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 This is a digitally signed order.

 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".

49. The question whether a new undertaking has been set up, which is eligible for deduction under Section l0A of the Act is, therefore, most relevant in the initial year of operation. In CIT v. Heartland Delhi Transcription Services Private Limited, (2015) 228 Taxmann 326 (Del), this court had in the context of Section 10B of the Act - which includes similar exclusionary clauses - observed as under:

> "10. Sub-section (1) refers to deduction of profit and gains of an undertaking. The deduction is to be allowed for a period of 10 years from the year in which undertaking begins to manufacture, produce etc. articles, things or computer software. The beginning and end points for claiming the deduction are stipulated. These have reference to the eligible undertaking. Sub-clause (ii) to Section 10B (2) incorporates a negative condition and states that the undertaking must not be formed by splitting up or reconstruction of business already in existence. Clause (ii) refers to the date on which the undertaking mentioned in sub-section (1) is created or formed. On the date of formation, the undertaking should not violate the condition stipulated in clause
>
> (ii) i.e. that it should not be created by splitting up or reconstruction of a business already in existence.

Clause (ii) does not have any reference to the period of 10 years stipulated in sub-section (1) to Section 10B, after an undertaking is formed or created without violation of clause (ii) to Section 10B(2). Clause (ii) to Section 10B(2) does not apply to the period, post formation of the undertaking, covered under sub-section (1), when the undertaking which at the time of formation meets the requirements of clause (ii) to Section 10B(2). The undertaking, of course meet the requirements and fulfil the condition that it manufactures or produces articles, things or computer software during the assessment year. The proviso equally supports the said interpretation as it also refers to the date of formation of the This is a digitally signed order.

 undertaking, for seeking benefit under Section 10B(l). The requirements under clauses (ii) and (iii) in this manner do not relate to the subsequent period, i.e. post or after formation."

50. Clearly, once the Revenue accepts in the initial year of operation that a new undertaking has been set up and does not fall within the exclusionary clauses - that is, it is not formed by the splitting up, or the reconstruction of an extant business or by transfer to a new business of machinery or plant previously used for any purpose - the controversy must rest for future years as well. This is of course subject to the condition that no additional material or facts, which establish otherwise are found subsequently. It would be debilitating to the rule of consistency and certainty in the matter of taxation, if the question of eligibility of a unit is permitted to be re-agitated on the same set of facts despite the Revenue having accepted the findings - which are essentially factual findings - in favour of the Assessee in the initial year(s). It is difficult to accept that the Revenue could accept a set of facts in one year and yet challenge the same in another, without any change in circumstances or any new fact coming to light." Consequently we answer question (ii) in the negative and in favour of the respondent-assessee."

3. Following the aforenoted decision, we answer the question in the negative and against the appellants. These appeals shall stand dismissed.

YASHWANT VARMA, J HARISH VAIDYANATHAN SHANKAR, J JANUARY 15, 2025/kk This is a digitally signed order.