

आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI**

श्री डि. करुनाकर राव, लेखा सदस्य एवं

श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष।

**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No. : 833/Mum/2012

(Assessment year :2008-09)

ACIT -20(1), Piramal Chambers, Lalbaug, Lower Parel, Mumbai -400 012	Vs	Cream Jewellery, 404, Block -I, Seepz, Andheri (East), Mumbai -400 096 स्थयी लेखा सं.: PAN: AAFFC 1352 A
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Udaya Bhaskar Jakke
Respondent by	:	Shri Deepak Tralshwala

सुनवाई की तारीख /Date of Hearing : 14-07-2015

घोषणा की तारीख /Date of Pronouncement : 15-10-2015

आदेश
ORDER

अमित शुक्ला, न्या. स.:

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the Revenue against impugned order dated 26.11.2011 passed by CIT(A)-31, Mumbai for the quantum of assessment passed u/s 143(3) for the assessment year 2008-09 on the following grounds :-

"1. The learned CIT (A) has erred on facts and in law and in the circumstances of the case in ignoring the specific provisions of Section 10A2(iii) whereby exemption is not allowable in case of transfer and machinery previously used for any purpose.

2. The learned CIT (A) has erred on facts and in law and in the circumstances of the case in ignoring that in

the present case it is not under dispute that there is a transfer from a company to a firm and machinery was used for any purpose earlier.

3. *The learned CIT (A) has erred on facts and in law and in the circumstances of the case by relying on the circular and judicial decisions which relates to other provisions of the Act, when clear interpretation of section 10A2(iii) was possible and available.*

4. *The learned CIT (A) has erred on facts and in law and in the circumstances of the case in considering the assessee's plea that the shareholders of the transfer company and partners of the transferee firm are same ignoring the fact that both are separate legal entities and the identity of share holders/partners is no way material to the issue under consideration".*

2. Brief facts are that, the assessee is a partnership firm engaged in the business of export of gold and diamond studded jewellery. The assessee had claimed relief of Rs.3,39,85,870/-, u/s 10A which was duly supported by Audit report in Form 56F. From the Audit report the Ld. Assessing Officer noted that the date of initial registration in FTZ/EPZ/SEZ was 25th September, 2004 and date of commencement of manufacturing of production was 4th September 2004, whereas partnership deed of the assessee firm was dated 3rd August, 2006. Since the assessee firm was formed on 3rd August, 2006 and registration was granted much earlier in September, 2004, therefore, such an exemption / deduction u/s 10A claimed by the assessee cannot be allowed. In response, to the show cause, the assessee submitted that deduction u/s 10A is attached to an undertaking and not to the assessee and in support, certain decisions were also filed. However, the Ld. AO rejected the assessee's contention on the following reasons :-

- i) *The assessee firm has entered in to deed of transfer agreement with Cream Jewellery Pvt Ltd for purchasing the unit with all its assets and liabilities including plant and machineries. The assessee firm has also purchased all the plant and machineries which was previously used by the Cream Jewellery Pvt Ltd. Section 10A(2)(iii) clearly states that the undertaking should not be formed by the transfer to a new business of machineries and plant previously used for any purpose. If the total value of plant and machineries previously used for any purpose is transferred does not exceed 20% of the total value of plant and machineries than the condition is deemed to be satisfied. In this case one undertaking transferred assets used previously to the undertaking & it exceeds the limit of 20% given in 10A(2)(iii). Hence the assessee does not satisfy the condition in section 10A, so naturally assessee Firm will not be eligible for the exemption u/s 10A.*
- ii) *The ownership and beneficial interest in the undertaking is transferred from Cream Jewellery Pvt Ltd to assessee firm and deduction shall not be allowed”.*

and accordingly, denied the claim of deduction u/s 10A.

3. Before the CIT(A), assessee made very exhaustive submissions after referring to relevant provision of section 10A, particularly CBDT Circular and various judicial decisions, which has been discussed by CIT(A) from pages 3 to 8 of the appellate order.

4. After considering assessee's submissions and relevant legal proposition, Ld. CIT(A) we decided the issue in favour of the assessee after concluding as under :-

“Therefore, in view of the aforesaid discussion, to my considered opinion the AO is not justified in rejecting the valid claim of the appellant made u/s 10A of the Act by holding that the exemption claimed is in respect of a new undertaking formed by splitting-up or reconstruction of a business already in existence as provided under clauses (i) & (ii) of subsection (2) of section 10A of the Act. The AO is also not justified in holding that by transfer of undertaking from the M/s Cream Jewellery Pvt Ltd to the appellant firm vide deed of transfer dated 24.11.2006, a new undertaking with a new business he has come into existence and accordingly, the appellant is not eligible for claiming deduction u/s 10A of the Act. In fact, from the facts of the case and the position of law as discussed above, it is clear that by transfer of the undertaking as a going or running concern at its book value and the same business already in existence, is continued by an undertaking even after the change of ownership; would not make the appellant not eligible for deduction/exemption as provided u/s 10A of the Act. Therefore, on account of the same, the AO is directed to allow the deduction claimed by the appellant u/s 10A of the Act. This ground raised by the appellant is therefore allowed”.

5. Before us, the Ld. Counsel submitted that, this view/proposition now stands covered in favour of the assessee by the decision of the Hon'ble jurisdictional High Court in the case of CIT vs Sonata Software Ltd, reported in [2012] 343 ITR 397 and Madras High Court in the case of CIT vs Heartland KG Information Ltd, reported in [2013] 359 ITR 1.

6. On the other hand, Ld. DR strongly relied upon the order of the AO.

7. After considering the relevant finding given in the impugned orders and also the decisions relied upon by the Ld. Counsel, we find that the AO has denied the exemption on the ground that undertaking has been formed by transfer of 'undertaking' from M/s Cream Jewellery Pvt Ltd to the assessee firm, vide, 'Deed of Transfer' dated 26.11.2006, therefore, a new undertaking with new business has come into existence and therefore, assessee was not eligible for claim of deduction u/s 10A. As culled out from the records Ld. CIT(A) has given a finding of fact that the transfer of the undertaking was as a going concern at its book value and same business which was already in existence continued even after change of ownership from Private Limited Company to Partnership Firm. There was continuation of some business activities with some undertaking. The Hon'ble jurisdictional High Court on similar issue and circumstanced has held that *where a running business is transferred lock, stock and barrel by one assessee to another assessee, the principle of reconstruction, splitting up and transfer of plant machinery cannot be applied*. The benefit of section 10A is attached to an undertaking and not to the assessee who owns the undertaking, therefore, assessee is entitled for exemption u/s 10A. Similar view was taken by the Madras High Court in the case of CIT vs Heartland KG Information Ltd (*supra*). Thus, in view of the legal proposition as upheld by the jurisdictional High Court, the observation and finding of the CIT(A) is hereby affirmed and grounds raised by the revenue are dismissed.

8. In the result, appeal of the revenue stands dismissed.
Order pronounced in the open court on 15th October, 2015.

Sd/-
(डि. करुणाकर राव)
लेखा सदस्य
(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

Sd/-
(अमित शुक्ला)
न्याईक सदस्य
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 15th October, 2015

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT(A) -31, Mumbai.
 - 4) The CIT -20, Mumbai.
 - 5) विभागीय प्रतिनिधि "सी", आयकर अपीलीय अधिकरण, मुंबई/
The D.R. "C" Bench, Mumbai.
 - 6) गार्ड फाईल \
- Copy to Guard File.

आदेशानुसार/By Order

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उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स

*Chavan, Sr.PS