

New undertaking won't be treated as existing one due to common management or accounts; sec. 10A relief available

Summary – The High Court of Karnataka in a recent case of Wipro GE Medical System Ltd., (the Assessee) held that newly established undertaking means an undertaking of an assessee independent of all other undertakings that he is already possessing and mere fact that there is common management or common accounts would not lead to conclusion that they are not separate undertakings

Facts

- The assessee filed returns for the assessment years 1997-98 and 1998-99. Certain additions were made by the Assessing Officer and on the assessee's appeals, the Commissioner (Appeals) deleted the additions made for both the assessment years. In the meantime, the Commissioner issued a notice under section 263 for the assessment year 1997-98. This was suitably replied by the assessee and on the basis of the reply filed, the Commissioner, dropped the proceedings. In the meantime, a notice under section 148 was issued for both the assessment years under consideration. The reasons for such reopening were the same reasons for which the Commissioner (Appeals) initiated revision proceedings under section 263 for the assessment year 1997-98. Therefore, the assessee contended before the Assessing Authority that the proceedings initiated under section 147 was not maintainable as there was no new material which justified the initiation of the proceedings.
- However, by overruling the objections, the Assessing Authority passed the order withdrawing the benefit conferred under section 10A to the assessee in respect of the two undertakings which were established in the software technology park.
- On appeal, the Appellate Authority was of the view that the issue was already the subject matter of an appeal and a revision. In the reasons recorded by the Assessing Officer, nowhere it was stated that there was failure on the part of the assessee to disclose any material required for assessment. The reopening was basically to reallocate the expenditure recorded by the assessee to various businesses. Further, the reasons recorded by the Assessing Officer did not indicate any new material or information which came to its possession subsequent to the original assessment. The assessee has provided a detailed break up at the time of original proceedings. The Commissioner had issued a notice under section 263, subsequently, the proceedings were dropped. Accordingly, he dismissed the appeal.
- On revenue's appeal, the Tribunal dismissed the same.
- On revenue's appeal to the High Court:

Held

Whether merely because Commissioner dropped proceedings under section 263 would not act as a bar for Assessing Officer to initiate proceedings under section 147

- Section 263 deals with the powers of the Commissioner to revise the orders which are prejudicial to the interests of the revenue. Therefore, the Commissioner can exercise the revisional powers, if on the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue. Once the said condition is satisfied, the Commissioner is vested with the power to revise the orders passed by the Assessing Officer.
- Section 147 deals with the income escaping assessment. Therefore, the grounds on which the Commissioner could initiate proceedings in revising the orders passed by the Assessing Officer is totally different from the grounds on which an Assessing Officer could initiate proceedings for assessment or reassessment under section 147. Therefore, merely because the Commissioner dropped the proceedings under section 263 would not act as a bar for the Assessing Officer to initiate proceedings under section 147, if he has reason to believe that any income chargeable to tax is escaped assessment. Therefore, the findings recorded by both the appellate authorities is unsustainable in law. Therefore, the question is answered in favour of the revenue and against the assessee.

Whether assessee has to set up a new independent undertaking to be eligible for benefit under section 10A

- In the entire section 10A, it is nowhere mentioned that the assessee has to set up a new independent undertaking to be eligible for such benefit. Though the heading in section 10A, refers to newly established undertaking which has to be understood in the context of assessee establishing new undertakings. The said establishment of new business is necessarily has to be by way of an expansion because as it is clear from sub-section (2), if he starts an undertaking by transfer of the machineries and the plant which is already using, he is not entitled to the benefit under section 10A. Similarly if he wants to form an undertaking by splitting up or by reconstruction of a business already in existence, then also the assessee is not entitled to the benefit under section 10A. An assessee who is carrying on business by setting up an undertaking if he sets up an independent undertaking to manufacture or produce articles, it is already producing or manufacturing in the existing undertaking in the software technology park, the profits and gains derived from that undertaking from export of articles, things or computer software, the assessee is entitled to the benefit under section 10A.
- Newly established undertaking does not mean a new company or a partnership. The newly established undertaking is an undertaking of an assessee independent of all undertakings that he is already possessing. The fact that there was common management or the fact that separate accounts had not been maintained, would not lead to the conclusion that they were not separate undertakings. Even if separate account is not maintained, the investment on each of the units can be reasonably determined with the material which the assessee may make available to the department. It has to be understood that by establishing of a new industrial undertaking the assessee expands its existing business. The assessee should not be deprived of the benefit under

section 10A. In order that the new undertaking is said to be not from part of the already existing business there must be new emergence of a physically and separate industrial unit which may exist on its own as a viable unit. An undertaking newly formed should be in physical identity and the old unit be preserved. The fact that if there was common management or separate accounts had not been maintained would not lead to the conclusion that there were not separate undertakings. Even if separate accounts are not maintained, the investment on each of the units can be reasonably determined with the material, which the assessee may make available with the department.

- In the background of the law, the assessee set up an undertaking in the third floor of the Golden Enclave which is a software technology park. It was commenced prior to 1993. It is enjoying the benefit under section 80HHE. It is not eligible for the benefit under section 10A as it was commenced prior to 1-4-1994. The assessee wanted to expand the business. Therefore, a request was made to the authorities for permission to expand the business. Permission was granted. As an expansion, the assessee has set up one unit in Kadugodi and two units in the second floor of the same building on 16-11-1995 and sixth floor on 30-7-1996. The material on record discloses that for setting up these two undertakings nothing from the existing undertaking is made use of. Fresh machinery and plant were purchased, fresh employees were recruited and it was running as an independent unit. Because it is an undertaking belonging to the assessee, only single account is maintained by the assessee.
- In the light of the aforesaid undisputed facts, it cannot be said that the assessee is not entitled for the benefit under section 10A in respect of these two newly established undertakings which it satisfies all the conditions stipulated in sub-section (2) of section 10A.