

TAX FLASH NEWS

Mumbai Tribunal held that the taxpayer is not entitled for deduction under Section 10B of the Act in respect of the suo moto addition made by the taxpayer as per Form No. 3CEB but not brought into India within the stipulated time frame

Background

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Agilisys IT Services India Pvt. Ltd. (Formerly known as Netdecisions Pvt. Ltd.)¹ (the taxpayer), held that provisions of Section 92C of the Income-tax Act, 1961 (the Act), have to be read in consonance with the provisions of Section 10B of the Act. Under Section 10B of the Act, tax holiday is extended only when the money is brought into India in convertible foreign exchange. Thus, the taxpayer is not entitled for deduction under Section 10B of the Act in respect of the suo moto addition made by the taxpayer as per Form No. 3CEB, but not brought into India within the stipulated time frame.

Facts of the case

- The taxpayer was engaged in the business of software development and export of software and was a registered 100 per cent Export Oriented Unit (EOU). While filing the Form No. 3CEB, the taxpayer had made a suo moto adjustment to its income. However, the taxpayer had not recorded the aforementioned adjustment amount as income in its books of accounts and did not bring the aforementioned adjustment amount in India. In its return of income, the taxpayer had claimed exemption under Section 10B of the Act on income which also included the suo moto adjustment.

- The matter was referred to the Transfer Pricing Officer (TPO) and the TPO accepted suo moto adjustment made by the taxpayer and did not dispute the Arm's Length Price (ALP) of the international transactions. The Assessing Officer (AO) however did not allow the tax holiday benefit under Section 10B of the Act on the amount of suo moto adjustment and computed the taxpayer's income accordingly.
- Against the aforesaid action of the AO, the taxpayer appealed to the Commissioner of Income-tax (Appeals) [CIT(A)]. The CIT(A) confirmed the action of the AO and the taxpayer carried the matter in appeal before the Tribunal.

Tax department's contentions

- While the taxpayer had made a suo moto adjustment to its income which was accepted by the TPO, the taxpayer had not brought the amount of suo moto adjustment in India.
- As per the provisions of Section 10B(3) of the Act, the deduction is allowed on sale proceeds that are brought to India in convertible foreign exchange within six months. As the foreign exchange for the amount of suo-moto TP adjustment was not realized in India within six months, the taxpayer was not entitled to the exemption and hence deduction under Section 10B was to be calculated after excluding the amount of suo-moto TP adjustment.

¹ Agilisys IT Services India Pvt. Ltd. (Formerly known as Netdecisions Pvt. Ltd.) v. ITO (ITA 2113/M/11, ITA 2226/M/11 & C.O. 89/Mum/2011) – Taxsutra.com

- Tax authorities relied upon the decision of Deloitte Consulting India (P.) Ltd.² and Bechtel India (Pvt.) Ltd.³.

Taxpayer's contentions

- The taxpayer stated that all the export turnover reported in the books has been received in convertible foreign exchange within the stipulated time, therefore, the claim of exemption should be allowed on the entire turnover, including the amount of suo moto adjustment.
- The first proviso to Section 92C(4) of the Act provides for a denial of tax holiday benefit for the amount of income with regard to which a transfer pricing adjustment has been made. The provisions of Section 92C(4) of the Act would come into operation only when the income of a taxpayer is enhanced as a consequence of the ALP determined by the tax authorities under Section 92C(3) of the Act. The taxpayer further argued that a suo-moto TP adjustment made by the taxpayer and accepted by the TPO cannot be said to be an enhancement made by the TPO.
- Taxpayer relied upon the decision of I Gate Global Solutions Ltd.⁴.

Tribunal's ruling

- The first proviso to Section 92C(4) of the Act provides that, in case of enhancement of income consequent to determination of the ALP by the tax authorities, tax holiday benefit is not to be allowed in respect of the enhanced income. Even though the emphasis is on the enhancement of the total income by way of TP adjustment, the Act is silent in respect of the suo moto adjustment made by the taxpayer as done in the present case.
- If Section 92C of the Act is read in isolation to other provisions of the Act there would be no difficulty in interpreting the word 'enhance' as done by the Tribunal in the case of I Gate Global Solutions Ltd. (referred to above) However, in the present case the provisions of Section 92C of the Act have to be read in consonance with the provisions of Section 10B of the Act.

- Section 10B of the Act is a special provision in respect of newly established 100 per cent EOUs wherein a deduction is allowed to 100 per cent EOU from the export of articles or things or computer software for a period of ten consecutive assessment years. Thus the legislative intention is to give incentive to 100 per cent EOUs but at the same time expecting such EOUs to bring the sale proceeds in convertible foreign exchange in India within a period of six months from the end of the previous year. Thus the tax holiday is extended only when the money is brought into India in convertible foreign exchange.
- If in the taxpayer's case, benefit of Section 10B of the Act is allowed, without the taxpayer having brought the money to India, then every taxpayer will first under-price its sale with Associated Enterprises (AEs) and thereafter suo-moto enhance the sale price by making TP adjustment and claim the deduction under Section 10B of the Act.
- Keeping the legislative intent in mind the taxpayer cannot be permitted to stretch a benevolent provision to avail benefit which the legislature never intended to provide. Thus, the taxpayer is not entitled for deduction under Section 10B of the Act in respect of the suo moto addition declared by the taxpayer in the Form No. 3CEB but not brought into India within the stipulated time frame (six months as explained above).
- Case law relied upon by the taxpayer⁵ has not considered the relevant provisions of the Act with legislative intent and is therefore distinguished from peculiar facts of the case in hand.

Our comments

The above ruling confirms an important principle that transfer pricing provisions cannot be read in isolation, but need to be read in conjunction with other overriding provisions of the Act. The ruling has also confirmed that one will need pay due attention to the legislative intent of the provisions of the Act as against the verbatim interpretation.

² Deloitte Consulting India (P.) Ltd. v. DCIT [2012] 137 ITD 21 (Mum)

³ ACIT v. Bechtel India (Pvt.) Ltd. [2013] 141 ITD 200 (Del)

⁴ I Gate Global Solutions Ltd. v. ACIT (ITA No. 248 & 249(Bang) of 2007)

⁵ I Gate Global Solutions Ltd. v. ACIT (ITA No. 248 & 249(Bang) of 2007)

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