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TAX FLASH NEWS

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Benefit of Section 10A is allowed on the enhanced income pursuant to the MAP resolution

Recently, the Bangalore Bench of Income-tax Appellate Tribunal (the Tribunal) in the case of Dell International Services India Pvt Ltd.[1] (the taxpayer) dealt with the eligibility of benefit under Section 10A of the Income-tax Act, 1961 (the Act) on the enhanced income pursuant to Mutual Agreement Procedure (MAP) resolution. The Tribunal observed that the first proviso to Section 92C(4) which denies the allowability of Section 10A benefit on the enhanced income will apply only to adjustment made by the Assessing Officer (AO) and not to any other modes of determination of Arm's Length Price (ALP) for e.g. MAP in the present case. Accordingly, the Tribunal held that the taxpayer is eligible for the benefit of Section 10A with respect to such enhanced income under the MAP resolution.

Facts of the case

The taxpayer is a wholly owned subsidiary of Dell International Inc. The taxpayer provides support services to its group entities. During Assessment Year (AY) 2007-08, the taxpayer received payment for rendering call centre services, software development services, and back-office support services, etc. The Transfer Pricing Officer (TPO) observed that there was a shortfall in the price received by the taxpayer from Associated Enterprise (AE) and the shortfall was added to the total income of the taxpayer as an adjustment[2]. Against such order, the taxpayer filed an appeal before the Commissioner of Income-tax (Appeals) [CIT(A)]. During the pendency of the appeal, the taxpayer's AE in the U.S. had approached the Competent Authority seeking resolution under the MAP[3] for determining the ALP in relation to the transaction between the taxpayer and its AEs. Subsequently, the Competent Authorities of the U.S. and India mutually arrived at terms with respect to the mark up on cost to be earned by the taxpayer for the services rendered to the U.S. tax residents. As per the resolution, the export income of the taxpayer was enhanced.

In terms of the agreement, the AO passed an order[4] giving effect to the MAP resolution allowing 10A deduction without considering the enhanced exports income arrived at in the MAP. The AO applied the first proviso to Section 92C(4)[5] and observed that the taxpayer would not be entitled to claim benefit under Section 10A on the enhanced income.

The CIT(A) upheld the order of the AO and held that the upward adjustment made as per MAP is undisclosed in the books of accounts and hence the same cannot be allowed as deduction.

Tribunal's decision

The first proviso to Section 92C(4) indicates that the benefit under Section 10A will not be allowed in respect of amount of income by which the total income of the taxpayer is enhanced after computation of income under Section 92C(4) by the AO. Such enhanced income was on the basis of the ALP computed by the AO pursuant to an order passed by the TPO.

The addition on account of determination of ALP can be in the following manner:

- *Suo motu* by the taxpayer in his return of income.
- By the AO which has been accepted by the taxpayer or to the extent confirmed by the appellate forums under the Act.

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[1] Dell International Services India Pvt Ltd. v. DCIT (IT(TP)A No. 879/Bang/2018, AY 2007-08) – Taxsutra.com
Note – The Tribunal in this decision has dealt with several issues. However, our flash news is based on the issue of allowability of 10A deduction on the enhanced exports income pursuant to MAP resolution

[2] Under Section 92

[3] Under Article 27 of India-USA tax treaty

[4] Under Rule 44H(4) of the Income-tax Rules, 1962 (the Rules)

[5] First proviso to Section 92C(4) - No deduction under Section 10A or Section 10AA or Section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the taxpayer is enhanced after computation of income under Section 92C(4)

- Determined by an advance pricing agreement.
- As per the safe harbour rules framed under Section 92CB.
- Arising as a result of resolution of an assessment by way of the MAP.

The proviso to Section 92C(4) will apply only to an adjustment to transfer pricing made by the AO and not to any other modes of determination of ALP.

Further the purpose for which the first proviso of section 92C(4) was enacted is given in the CBDT Circular[6]. It states that the first proviso to Section 92C(4) recognises the commercial reality that even when a transfer pricing adjustment is made under that sub-section, the amount represented by the adjustment would not actually have been received in India or would have actually gone out of the country. Therefore, it has been provided that no deductions under Section 10A or 10B or under Chapter VI-A shall be allowed in respect of the amount of adjustment. In the present case, the conditions under which the dispute was resolved under MAP, was that the taxpayer had to increase its taxable income and the sum agreed was to be subsequently invoiced and realised and thereby there was an inflow of foreign exchange in India. Such features do not exist when the adjustment to ALP is suggested by a TPO which is subsequently incorporated in an order of assessment by the AO.

The Pune Tribunal dealt with an identical question in the context of determination of ALP under the Advance Pricing Arrangement (APA) in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited[7] where it was held that taxpayer is eligible to claim benefit under Section 10A on additional income offered as per APA.

Further it is undisputed that the taxpayer has received foreign exchange in respect of the sum agreed under the MAP and has duly accounted for in its books of account in the relevant AY. However, the said income was excluded in the computation of total income in said AY. On identical facts, the Pune Tribunal in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited took the view that benefit under Section 10A should be allowed in the AY in which the international transaction took place.

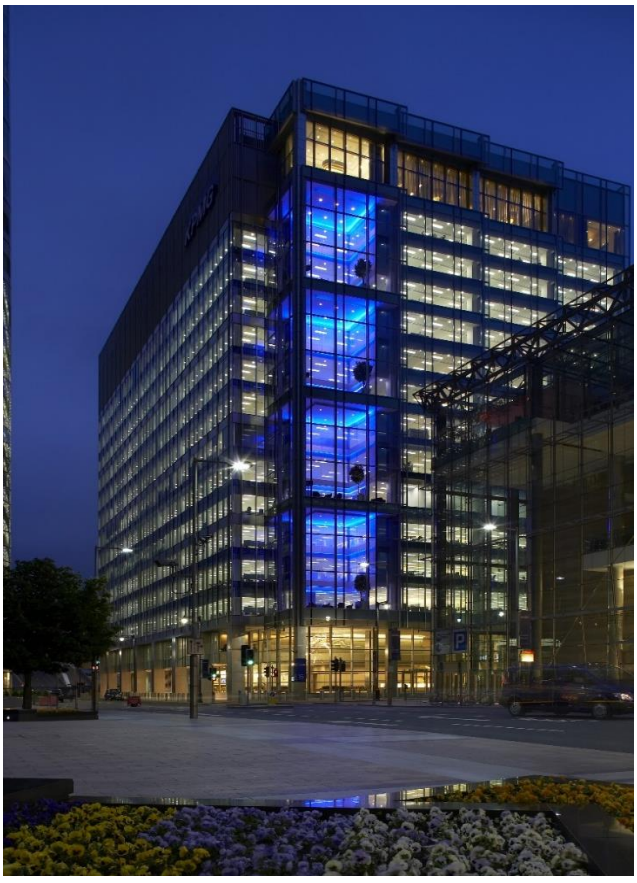
Accordingly, the Tribunal held that the taxpayer should be allowed the benefit of Section 10A with respect to the amount settled under the MAP.

Our comments

The issue with respect to the eligibility of deduction under Section 10A of the Act on an enhanced exports income pursuant to MAP resolution has been a subject matter of debate before the Tribunal.

The Pune Tribunal in the case of Approva Systems Pvt Ltd[8] observed that the taxpayer is entitled to claim Section 10A deduction on the additional transfer pricing income offered by the taxpayer on its own motion in the return of income. It was observed that it is not the AO or TPO who has determined the additional income on account of transfer pricing provisions under Section 92C or 92CA respectively.

The Bangalore Tribunal in the present case while dealing with the issue of allowability of enhanced income under Section 10A pursuant to MAP resolution held that the proviso to Section 92C(4) will apply only to adjustment to transfer pricing made by the AO and not to any other modes of determination of ALP. Therefore, the taxpayer was eligible to claim deduction under Section 10A on the additional income offered pursuant to the MAP resolution.



[6] CBDT Circular No.14/2001, 9 November 2001
[7] Dar Al Handasah Consultants (Shair & Partners) India Pvt Ltd v. DCIT (ITA No. 1413/PUN/2019, dated 02 Dec 2019)
[8] Approva Systems Pvt Ltd v. DCIT (ITA No.1051/PUN/2015)

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