

TAX FLASH NEWS

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Unutilised foreign tax credit is not allowed as business expenditure

Executive summary

The Hyderabad Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Infor (India) Private Limited¹ (the taxpayer) dealt with the issue of deductibility of foreign taxes for which credit is not allowable under Section 91(1) of the Income-tax Act, 1961 (the Act). The Tribunal held that foreign taxes against which credit is not allowable under Section 91(1) are not deductible as business expenditure under Section 37(1).

Facts of the case

During the Assessment Year 2016-17, the taxpayer claimed the unclaimed foreign tax credit (on foreign sourced income) as a deductible expenditure under Section 37(1). It was contended that the foreign taxes were in the nature of an expenditure incurred wholly and exclusively for the purpose of the business.

The taxpayer relied on the Bombay High Court's decision in the case of Reliance Infrastructure Ltd.²

The Assessing Officer (AO) rejected the contention of the taxpayer and disallowed the claim. The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

Tribunal's decision

Reference was made to the decision of Ahmedabad Tribunal in the case of Elitecore Technologies Private Ltd.³ wherein the Tribunal distinguished the decision of Reliance Infrastructure Ltd to conclude that the same is not a binding precedent since the decision was of a

non-jurisdictional High Court. The Tribunal observed that Section 91 is a specific provision dealing with FTC. FTC was to be granted in case of taxes paid in the specified countries.

If the taxpayer's contention that certain part of FTC as per provisions of the Act is allowable for the purpose of granting credit and the remaining component is to be granted as business deduction under, the same would render the former specific provision itself as otiose going contrary to 'generalia specialism non derogant' which means that a specific provision prevails over the general one.

Whatever is the taxpayer's unallowable foreign tax credit claim under Section 91(1), since it is exceeding the specified limit, it would not be allowed as business expenditure under Section 37. Reference was made to the decision of B. R. Constructions⁴ holding that the Bombay High Court's decision was not a binding precedent for this case.

Our comments

With respect to deduction of foreign tax paid as business expenditure, some of the Courts/Tribunal⁵ have held that income-tax paid in a foreign country is not eligible for deduction in the computation of profits and gains from business or profession. On the other hand, some of the Courts/Tribunal⁶ have held that taxes paid abroad can be allowed as business expenditure.

¹ Infor (India) Private Limited v. DCIT (ITA TP. No. 198/Hyd/2021) – Taxsutra.com

Note: The Tribunal in this decision has dealt with several issues. However, this flash news deals with the issue of allowability of FTC under Section 37(1) of the Act

² Reliance Infrastructure Ltd. v. CIT [2017] 390 ITR 271 (Bom)

³ DCIT v. Elitecore Technologies Private Ltd. [2017] 165 ITD 153 (Ahd)

⁴ CIT v. B R Constructions [1979] 222 ITR 202 (AP)

⁵ CIT v. Tata Sons Ltd. [2011] 43 SOT 27 (Bom), DCIT v. Elitecore Technologies Private Ltd. [2017] 165 ITD 153 (Ahd)

⁶ DCIT v. Mastek Limited [2013] 36 taxmann.com 384 (Ahd), Virmati Software & Telecommunication Ltd v. DCIT [ITA No. 1135/Ahd/2017], Bank of India v. ACIT [2021] 125 taxmann.com 155 (Mum)

Explanation 1 to Section 40(a)(ii) provides that any sum paid outside India and eligible for relief of tax under Section 90 or deduction from the income-tax payable under Section 91 is not allowable, and is deemed to have never been allowable, as a deduction under Section 40. However, the taxpayers will continue to be eligible for tax credit in respect of income tax paid in a foreign country in accordance with the provisions of Section 90 / 91, as the case may be.

However, the Bombay High Court in the case of Reliance Infrastructure Ltd held that if the benefit of double taxation relief is not available on the foreign tax paid, the said amount should be allowed as business expenditure.

The Tribunal in the present case chose not to follow the decision of the Bombay High Court in the case of Reliance Infrastructure and held that it was not a binding precedent. Therefore, foreign taxes against which credit was not allowable under Section 91(1) is not a deductible business expenditure under Section 37(1) since a special provision will prevail over a general provision.



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