

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.2342/Bang/2019
Assessment Year: 2011-12

EYGBS (India) LLP (Earlier known as EYGBS (India) Pvt.Ltd.) RMZ Infinity Tower C, 3 rd Floor Old Madras Road K.R. Puram Bengaluru-560 016. PAN NO :AAHFE0349K	Vs.	Deputy Commissioner of Income-tax Circle-3(1)(2) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri Rajan Vora, A.R.
Respondent by	:	Smr. R. Premi, D.R.

Date of Hearing	:	23.11.2020
Date of Pronouncement	:	23.11.2020

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 13.9.2019 passed by Ld. CIT(A)-2, Bengaluru and it relates to assessment year 2011-12.

2. At the time of hearing, the Ld. A.R. did not press ground No.2 and hence, the same is dismissed as not pressed. Ground No.3 relates to levy of interest u/s 234B of the Income-tax Act,1961 [the Act' for short] and the same is consequential in nature. The remaining ground relate to denial of claim of deduction u/s 10AA of

Page 2 of 11

the Act on transfer pricing adjustment made by the assessee voluntarily.

2. The Ld. A.R. submitted that the assessee is 100% subsidiary of EYGI B.V., Netherlands. It is engaged in the business of providing back office support services, which are in the nature of 'Information Technology Enabled Services' (ITES). The nature of services provided by the assessee to its Associated Enterprises (AEs) includes financial analysis and reporting functions such as standard reporting/analysis, work-in-progress details, time sheet details etc., accounting centre processing activities/functions such as accounts receivable, accounts payable functions, billing analysis and invoice preparation etc and financial assistance/administration functions such as time and expenses review, helpdesk providing assistance on employee queries etc. The assessee is remunerated at "cost plus" basis for the services provided to its AEs.

3. The Ld. A.R. submitted that the only issue contested before the Tribunal relates to eligibility to claim deduction u/s 10AA of the Act on transfer pricing adjustment made by the assessee voluntarily. He submitted that this issue has been decided in favour of the assessee by the Bengaluru bench of Tribunal, vide its order dated 20.5.2020 passed in IT(TP)A No.218/Bang/2015, passed in the assessee's own case.

4. We heard Ld. D.R. and perused the record. We notice that an identical issue has been examined by the Bengaluru bench of Tribunal in the assessee's own case in assessment year 2010-11 and it has been decided in favour of the assessee by following the decision rendered by the Pune Bench of Tribunal in the case of Apoorva Systems Pvt. Ltd. For the sake of convenience, we extract below the relevant portion of the order of the Tribunal passed in assessment year 2010-11:

Page 3 of 11

15. *“We shall now take up the appeal of the assessee. The main ground urged by the assessee relates to the rejection of claim for deduction u/s 10AA of the Act on the amount of transfer pricing adjustment voluntarily made by the assessee.*

16. *The additional grounds relate to the inclusion/exclusion of certain comparable companies. The Ld A.R submitted that the assessee may not press the additional grounds, if the revenue’s appeal is dismissed. Since we have dismissed the appeal of the revenue in the earlier paragraphs, the additional grounds urged by the assessee are not adjudicated, as the same would be academic in nature.*

17. *We have noticed earlier that the assessee had made transfer pricing adjustment of Rs.8,11,70,000/- voluntarily and added the same to the total income while filing return of income. The assessee also claimed deduction u/s 10AA of the Act on the profits of business arrived at after inclusion of above said amounts. The Ld DRP took the view that the assessee did not furnish the details as to how the above said figure was arrived at by the assessee. It further took the view that the assessee will not be bringing the above said amount in foreign exchange within the period prescribed in sec.10AA of the Act, which is one of the mandatory conditions for allowing deduction under that section. The Ld DRP also noticed that the eligible unit has actually incurred loss and hence the assessee is not eligible to claim deduction u/s 10AA of the Act. However, the assessee, by making voluntary Transfer pricing adjustment, is attempting to avail deduction u/s 10AA of the Act and the same should not be permitted. The Ld DRP also held that the Transfer pricing adjustment determined by the TPO is added to the total income for tax purposes, irrespective of the profits/loss of 10A/10AA units and whether they are eligible for deduction under those sections or not. Further the Ld DRP also proceeded on the ground that the assessee did not determine the voluntary T.P adjustment in its Transfer Pricing Study. Accordingly, the Ld DRP held that the decision rendered by the co-ordinate bench in the case of I-Gate Global Solutions Ltd (2007)(112 TTJ 1002) is distinguishable. Accordingly the Ld DRP directed the AO to disallow the deduction claimed u/s 10AA in respect of Voluntary Transfer pricing adjustment.*

18. *We heard the parties on this issue and perused the record. The Ld A.R submitted that the Ld DRP was factually not correct in observing that the assessee did not furnish details of voluntary Transfer pricing adjustment. It has added the amount of voluntary TP adjustment while computing the revised margin of the assessee, which is placed at page 680 of the paper book. He further submitted that the assessee has arrived at the amount of voluntary T.P adjustment in a scientific manner by comparing the margins of comparable companies selected by the assessee. Accordingly he submitted that the Ld DRP was not justified in observing that the same is an adhoc amount. He further submitted that the co-ordinate bench has held in the case of I-Gate Global Solutions Ltd (supra) has held that the assessee is eligible for deduction u/s 10AA on the amount of voluntary TP adjustment. He submitted that the decision of the Tribunal in the above said case has since been upheld by the Hon’ble High Court of Karnataka. He further submitted that the Pune bench of Tribunal has rendered a decision in favour of the*

assessee in the case of Apoorva Systems (P) Ltd (2018)(92 taxmann.com 82) by considering the decision rendered in the case of I-Gate Global Solutions Ltd. On the contrary, the Ld D.R supported the order passed by Ld DRP on this issue.

19. We notice that an identical issue has been examined by the Pune bench of Tribunal in the case of Apoorva Systems (P) Ltd (supra). For the same of convenience, we extract below the relevant observations made by the Pune bench in the above said case:-

“15. Now, coming to the second claim of deduction under section 10B/10A of the Act on TP adjustment of Rs. 64,07,399/-. The assessee on its own motion had offered adjustment on account of transfer pricing provision to the extent of Rs. 64,07,399/-. The computation of income is placed at page 40 of the Paper Book. The assessee claims that on the aforesaid additional income offered, it is entitled to claim the benefit of deduction under section 10B/10A of the Act. We may point herein itself that in the return of income, the assessee had claimed the said deduction under section 10B of the Act. However, during the course of hearing before the authorities below, the said claim was revised to 10A deduction. The question thus, which arises before us is whether the assessee is entitled to claim 10A deduction on the additional TP adjustment offered by the assessee on its own motion in the return of income. The assessee was 100% Export Oriented Unit which was captive service provider to its associated enterprises. The total exports were to the associated enterprises and the plea of assessee in this regard is that foreign exchange due on exports has been received in India in time. In order to adjudicate the issue, we need to take into consideration the provisions of section starting with section 92(1) of the Act. The Chapter X of the Act lays down the special provisions relating to avoidance of tax. Under section 92 of the Act, any income arising from international transactions shall be computed having regard to the arm's length price. In other words, section provides computation of income from international transactions having regard to the arm's length price. The income which is so computed in respect of international transactions entered into by the assessee is notional income in the hands of assessee. This is the basic point which has to be kept in mind while adjudicating the issue raised in the present appeal.

16. Under section 92CA of the Act, where a person has entered into an international transaction in any previous year with its associated enterprises, then in order to benchmark the arm's length price of such an international transaction and to compute its arm's length price under section 92C of the Act, reference is to be made to the TPO by the Assessing Officer under the specified conditions, who in turn has to compute the said arm's length price in the hands of assessee.

Page 5 of 11

17. Section 92C(4) of the Act provides that where an arm's length price is determined under sub-section (3), then the Assessing Officer may compute total income of assessee having regard to the arm's length price so determined. In other words, the Assessing Officer is empowered to compute total income of assessee in relation to international transactions undertaken by the assessee with its associated enterprises. The proviso therein provides that no deduction under section 10A/10AA or 10B or Chapter VI-A of the Act shall be allowed in respect of such amount of income, by which the total income of assessee had been enhanced after computation of arm's length price of international transactions. The income so determined by the Assessing Officer by following the procedure laid down in Chapter is to be added as additional income of assessee, on which no deduction under section 10A/10AA or Chapter VI-A of the Act is to be allowed.

18. However, in the facts of present case before us, it is not the Assessing Officer or TPO who has determined the additional income on account of transfer pricing provisions. The assessee on its own motion has offered additional income on account of transfer pricing provisions to the extent of Rs. 64,07,399/-. The said income was offered as part of business profits of assessee and was declared as income from business in the computation of income filed by the assessee. The issue which arises is whether on such additional income, the assessee is entitled to claim the benefit of section 10B/10A of the Act. In the first instance, in the paras hereinabove, the assessee is found to be entitled to claim the deduction under section 10A of the Act, which has also been allowed to the assessee in earlier years. Consequently, we restrict our observations to the aforesaid claim whether to be allowed or not in the case of assessee under section 10A of the Act. In this regard, there is need to look at the computation provisions provided in sub-section (4) to section 10A of the Act. The said sub-section reads as under: —

"10(A)(1)..

(2) & (3)

(4) For the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking."

19. As per said sub-section, the profits derived from the export of articles or things or computer software, shall be the amount which

Page 6 of 11

bears to the profits of business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software, bears to the total turnover of business carried on by the undertaking. Thus, the first step we have to look at the profits derived from export of articles or things of computer software and the profits of business of undertaking. The additional income is on the basis of artificial/notional income computed in the hands of assessee under the provisions of section 92(1) of the Act. The case of CIT(A) is that the assessee has failed to bring into country the export proceeds in foreign exchange in respect of such additional income offered and consequently, no deduction under section 10A of the Act is to be allowed. The connected aspect of the issue is that there is no dispute in the minds of authorities below that it is profits of business. Such profit of business is neither export turnover nor the total turnover of assessee but is artificial income which needs to be taxed in the hands of assessee. **Consequently, we hold that the said artificial income cannot be part of export turnover or total turnover though it will be part of profits of business. Simile which follows is that in the absence of it being offered as export turnover or total turnover, then there could not be any condition for getting foreign exchange to India.** The assessee has computed the additional income by following the transfer pricing provisions and has offered the same to tax as its business profits. Once it has been so offered to tax, it forms part of profits of business and while computing the deduction under section 10A(4) of the Act, the said profits have to be taken into consideration and the deduction so computed.

20. We find that on similar facts the Bangalore Bench of Tribunal in the case of iGate Global Solutions Ltd. (supra) had allowed the deduction under section 10A of the Act in respect of transfer pricing adjustment suo-moto offered by the assessee. The relevant findings of Tribunal are as under:—

'17. We have heard both the parties. Before proceeding further, it will be relevant to reproduce section 10A(1).

"Section 10A. Special provision in respect of newly established undertakings in free trade zone, etc.—(1) Subject to the provisions of this section a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee :

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by

Page 7 of 11

application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years :

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone, by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the (undertaking began to manufacture or produce such articles or things or computer software) in such free trade zone or export processing zone :

Provided also that for the assessment year beginning on the 1-4-2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software :

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1-4-2010 and subsequent years."

18. Section 10A(4) has also been amended with effect from 1-4-2001. Before amendment, the profit derived from export of articles or things was the amount which bears to the profit of the business, the same, proportion as the export turnover in respect of such article or thing or computer software, bears to the total turnover of the business. With effect from 1-4-2001, instead of profits of the business, the words 'profit of the business of the undertaking have been substituted. The word 'undertaking' has not been defined under section 10A. The words 'industrial undertaking' have been defined in the book Law Lexicon by Venkataramiya, at p. 1133 it has been defined as under :—

"The expression 'industrial undertaking' must have a technical and economic content. An industrial undertaking would normally be in its ordinary excitement some industrial concern or enterprise for adventure which is undertaking to be done by the person concerned. The definition of 'industrial undertaking in section 3(d) of the Industrial Development and Regulation Act. 1951, means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government. CIT v. Textile Machinery Corpn. Ltd. [1971] 11 ITJ 105 at pp. 112, 113 (Cal.) 75 CWN 186 (Cal.): AIR 1971 Cal. 1, see also Union of India v. Sakseria Cotton Mills Ltd. [1973] 75 Bom. L.R. 100 at p. 105."

19. *Industrial undertaking has been defined in section 33B of the Income-tax Act for that section. As per this definition, industrial undertaking' means an undertaking, which is mainly engaged in the business of generation or distribution of electricity or another form of power or in the construction of ships or in the manufacture or processing of goods or in mining. Hence, the meaning of 'industrial undertaking' is not restricted to one unit. The undertaking is to be considered as consisting of a number of units provided all the units are engaged in any of the activities mentioned in Explanation to section 33B. Industrial undertaking has also been defined in Explanation to section 10(15).*

20. *Before us, it has not been clarified that Pune unit is an independent unit and is in no way related with the activities carried out at Bangalore or Chennai unit. In absence of the facts, it is not possible to say that Pune unit was an independent undertaking engaged in the business of software development, which was in no way related to the software development done at Bangalore or Chennai unit. In case, the Pune unit is found to be independent, then loss from such unit is to be independently calculated. In case such unit is associated with the activities, which are carried out at Bangalore or Chennai unit, then Pune unit will be considered as part of that undertaking. Hence, the issue of ascertaining as to whether Pune unit was an independent unit or a unit associated with activities of other two units is restored back on the file of the Assessing Officer. In case it is found that it is part of the other two units and is associated with the activities done in other two units, then it will be considered as part of the same undertaking and loss will be adjusted. However, in case, if it is found, it is an independent unit, then it will be treated as independent undertaking and the assessee cannot be forced to have exemption in respect of such independent undertaking. In that case the loss will (not) be adjusted against other income.*

21. *The last grievance is in respect of not allowing deduction under section 10A on the adjustment made by the assessee to the arm's length price.*

22. *In the instant case, the assessee company entered into transaction with associated enterprise. The assessee company determined arm's length price and accordingly made adjustment to the income because arm's length price determined was more than the consideration, at which the transactions were shown in the books of account. The deduction under section 10A has not been allowed as per proviso to section 92C(4). As per this proviso, no deduction under section 10A or 10B or under Chapter VI-A is to be allowed in respect of amount of income, by which the total income of the assessee is enhanced after computation of income under the sub-section. The learned Authorised Representative during the course of proceedings has referred to the*

Page 9 of 11

word 'enhanced'. In case the income is enhanced, then deduction is not permissible. However, in the instant case, income has not been enhanced because the same was already returned by the assessee. In the Memo Explaining the Provisions of Finance Bill, 2006, it has been mentioned as under :—

[2006] 201 CTR (St) 147 : [2006] 281 ITR (St) 196

"Under sub-section (4), it has been provided that on the basis of arm's length price so determined, the Assessing Officer may compute the total income of an assessee. The first proviso to sub-section (4) provides that where the total income of the assessee as computed by Assessing Officer is higher than the income declared by the assessee, no deduction under section 10A or section 10B or under Chapter VI-A will be allowed in respect of the amount of income, by which the total income of the assessee is enhanced after computation of income under sub-section."

23. From the Memo Explaining the Provisions of Finance Bill, 2006 as well as from the literal meaning of the word 'enhanced', it is clear that if income increased, as a result of computation of arm's length price, then such increase is not to be considered for deduction under section 10A. In the instant case, the assessee himself has computed the arm's length prices and has disclosed the income on the basis of arm's length prices. It is not a case, where there is an enhancement of income due to determination of arm's length price. Hence, it is held that assessee was entitled to deduction under section 10A in respect of income declared in the return of income on the basis of computation of arm's length price.'

21. The Hon'ble High Court of Karnataka in its order in the case of iGate Global Solutions Ltd. (supra) considered the following substantial question of law raised by the Revenue.

"(4) Whether the Tribunal was correct in holding that deduction u/s. 10A of the Act is allowable in respect of income computed on the arm's length price by ignoring the proviso to Section 92(4) of the Act"

22. The Hon'ble High Court in paras 5 and 6 of its order held as under:—

"5. In so far as substantial question of law No.4 is concerned, the error committed by the Assessing Officer was relying on Section 92(C)(4) to a case where Arm's Length Price was determined by the assessee, whereas the said provision applies to a case where Arm's Length Price was determined by the Assessing Officer. That mistake has been corrected by the Tribunal by setting aside the order passed by the Commissioner as well as the assessing authority.

Page 10 of 11

6. In that view of the matter, we do not see any error committed by the Tribunal in the impugned order. Therefore, the said question is also answered in favour of the assessee and against the Revenue."

23. The issue thus, has been decided by the Hon'ble High Court of Karnataka in the case of iGate Global Solutions Ltd. (supra), wherein the assessee's claim for deduction under section 10A of the Act in respect of suo-moto TP adjustment made by the assessee, has been allowed.

24. The Bangalore Bench of Tribunal in a later decision in the case of Austin Medical Solutions (P.) Ltd. (supra) has applied the said proposition of the Hon'ble High Court of Karnataka (supra) and had allowed the deduction claimed under section 10A of the Act in respect of suo-moto TP adjustment amounting to Rs. 28,61,352/- while determining the arm's length price of international transactions.

25. The learned Departmental Representative for the Revenue on the other hand, had placed reliance on the ratio laid down by Mumbai Bench of Tribunal in Deloitte Consulting India Pvt. Ltd.'s case (supra), which does not stand because of the ratio laid down by the Hon'ble High Court of Karnataka on the said issue. Though the said decision is of non-jurisdictional High Court, but the same is binding on the Tribunal in the absence of any contrary decision of the jurisdictional High Court as held by the Hon'ble Bombay High Court in Smt. Godavaridevi Saraf 's case (supra). The learned Authorized Representative for the assessee has also placed reliance on various decisions of different Benches of Tribunal for the proposition that the decision of non-jurisdictional High Court is binding on the Tribunal. However, the issue stands covered by the jurisdictional High Court and applying the said proposition and in view of our decisions in the paras hereinabove on other issues raised in the present appeal, we hold that the assessee is entitled to claim the aforesaid deduction under section 10A of the Ac on additional income offered on account of suo-moto adjustment on account of transfer pricing provisions. The provisions of section 92C(4) of the Act are not attracted. The modified ground of appeal No.4 raised by the assessee is thus, allowed."

Identical view has been expressed by the Delhi bench of Tribunal in the case of AT Kearney India P Ltd (ITA No.2623/Del/2015 dated 21.06.2019). Accordingly we hold that the assessee is eligible for deduction u/s 10AA of the Act in respect of voluntary Transfer Pricing adjustment made by it. We direct accordingly."

5. Consistent with the view taken in the assessee's own case, we hold that the assessee is eligible for deduction u/s 10AA of the Act

Page 11 of 11
in respect of voluntary transfer pricing made by it. We direct accordingly.

6. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 23rd Nov, 2020.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 23rd Nov, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.