

CBDT issues clarification regarding carry forward of losses in case of change in shareholding due to strategic disinvestment

Background

Hon'ble finance minister, Smt. Nirmala Sitharaman in the budget speech for FY 2021-2022 had emphasized on promoting 'strategic disinvestment. In order to promote strategic disinvestment of PSUs (Public Sector Units) it was proposed to relax the condition regarding carry forward of loss for disinvested PSU in amalgamation. Taking the same forward, the CBDT (Central Board of Direct Taxes) issued clarification regarding carry forward of losses in case of change in shareholding due to strategic disinvestment vide press release dated September 10, 2021.

Proposed Amendment

Finance Act, 2021 has amended S. 72A of the Income-tax Act, 1961 (the Act) to inter alia provide that in case of an amalgamation of a public sector company (PSU) which ceases to be a PSU (erstwhile public sector company), as part of strategic disinvestment, with one or more company or companies, then, subject to the conditions laid therein, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss, or as the case may be, allowance for unabsorbed depreciation of the amalgamated company for the previous year in which the amalgamation was effected.

The notification also mentions applicability of S.79 to an erstwhile PSU which has become so as a result of strategic disinvestment. S.79 mentions of loss not being allowed to be carried forward and set off for closely held companies where a substantial change (i.e.shareholding has changed more than 49%) has taken place in the current financial year.

As per notification, S. 79 shall not apply to an erstwhile public sector company which has become so as a result of strategic disinvestment. Accordingly, loss incurred in any previous year prior to, and including, the previous year of strategic disinvestment shall be carried forward and set off by the erstwhile public sector company. The above relaxation shall cease to apply from the previous year in which the company, that was the ultimate holding company of such erstwhile public sector company immediately after completion of the strategic disinvestment, ceases to hold, directly or through its subsidiary or subsidiaries, fifty-one per cent of the voting power of the erstwhile public sector company.

Hence as per notification, in case of strategic disinvestment, the losses will be allowed to be carried forward and set off subject to fulfillment of conditions without attracting provisions of S. 79

¹'strategic disinvestment' means sale of shareholding by central government or any state government in a public sector company which results in reduction of its shareholding below 51% along with transfer of control to the buyer.

²'erstwhile public sector company' means a company which was a public sector company in earlier previous years and ceases to be a public sector company by way of strategic disinvestment by the government.

Though the applicability of S. 79 has been curtailed it has not been completely ruled out.

The notification also says that necessary legislative amendments for the above decision shall be proposed in due course of time.

Key Takeaways

It is known that certain PSUs up for strategic disinvestment are loss making entities. To make them lucrative proposal for prospective investors, the carry forward of losses should be allowed irrespective of caveat mentioned in S.79. Hence this notification provides relaxation. However total free pass has been avoided by mentioning that in case holding company of PSU reduces its shareholding under 51% directly or indirectly, then the relaxation so provided by this notification shall cease to exist. Hence the benefit is kept limited to center/state government holding and not any other holding. It shows clear intention of government that it does not want to run business, but focus on governance.

This notification is a welcome step. However since legislative amendments are yet to come, it would be interesting to know how provisions would be introduced to give a boost to strategic disinvestment while keeping a milder check over relaxations granted.

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