



## Resulting Company entitled to claim the losses of the demerged undertaking, even where no claim for loss was made in the original return of income

The Kolkata Bench of the Income-tax Appellate Tribunal in its recent ruling<sup>1</sup>, allowed the Resulting Company to claim the losses of a demerged undertaking, by filing a revised return of income post-issuance of the intimation under section 143(1). The Tribunal also held that the provisions of section 139(3) cannot be invoked to deny losses considering the impossibility of performance as the application for demerger was still pending before the Hon'ble Courts.

### Background

- The Taxpayer (the 'Resulting Company') and the Demerged Company filed a Scheme of Demerger ('Scheme') before the High Courts of Calcutta and Bombay, respectively with an appointed date as March 1, 2010.
- Upon the Scheme becoming effective, the Assessee filed a revised return of income for Assessment Year 2010-11 by declaring 'Nil' income after claiming the set-off of brought forward business losses and unabsorbed depreciation ('UAD') of the demerged undertaking. The revised return of income was filed within the time limits specified under the law.
- The entire series of events is tabled below:

Event	Date
Filing of the original return of income by the Taxpayer	September 28, 2010
Filing of the Scheme with the High Courts	September 13, 2010 & October 06, 2010
Receipt of approval for the Scheme	March 8, 2011 & April 21, 2011

<sup>1</sup> ACIT vs. M/s Padma Logistics & Khanij Pvt. Ltd. [2020] 6 TMI 47 (Kolkata Tribunal)



Receipt of intimation under section 143(1) of the Income-tax Act, 1961 ('Act')	April 14, 2011
Filing of the revised return of income by the Taxpayer	June 09, 2011

- Subsequently, during the scrutiny assessment proceedings, the Assessing Officer ('AO') refused to allow the Taxpayer's claim for the set-off of brought forward business losses and UAD attributable to the demerged undertaking on the following grounds:
  - No disclosure was made by the Taxpayer in its audited accounts regarding the fact that the Scheme was pending for approval before the High Court/s;
  - Taxpayer had not filed a return of loss under section 139(3) of the Act;
  - Taxpayer filed a revised return under section 139(5) of the Act after the receipt of intimation under section 143(1) of the Act. Hence, the condition under section 139(5) of the Act requiring the filing of the revised return prior to completion of the assessment was not fulfilled; and
  - Demerged Company and the Taxpayer both claimed the same loss, resulting in a dual claim of set-off and carry forward of the losses and UAD of the demerged undertaking.
- Upon further appeal, the Commissioner of Income-tax (Appeals) allowed the claim of the Taxpayer, against which the AO filed an appeal before the Tribunal.

### **Tribunal's Ruling**

- AO was factually wrong in stating that the audited accounts did not mention that the Scheme pending before the High Court, since said fact was duly mentioned and disclosed in the audited accounts by the Taxpayer.
- The provisions of belated loss return under section 139(3) of the Act were not applicable to the case of the Taxpayer, since at the time of filing of the return of income, the Taxpayer had no losses. The matter was pending before the High Court/s and it was impossible for the Taxpayer to file the return of income claiming the said losses as provided under section 139(3) of the Act. The losses were transferred to it post the effectiveness of the demerger by virtue of section 72A(4) of the Act.
- The order passed by the High Court/s approving the Scheme specifically provided that the brought forward business losses and unabsorbed depreciation would be available to the Taxpayer as per section 72A(4) of the Act.
- An intimation processed under section 143(1) of the Act did not strictly qualify as an assessment. Accordingly, the Taxpayer's right to file a revised return of income does not lapse with the issuance of the intimation under section 143(1) of the Act as the same cannot be termed as 'completion of assessment'. The AO therefore cannot refuse to accept the revised return filed by the Taxpayer. This is a very important part of the ruling.



- In relation to the dual claim of loss by the Demerged Company and the Taxpayer, it was observed that the Demerged Company did not claim the loss relating to the demerged undertaking, and that the same was claimed only by the Taxpayer.
- Since the Scheme was duly approved by the High Courts and the demerger complied with all of the conditions prescribed under section 2(19AA) of the Act, the Taxpayer is eligible to claim the set-off of brought forward business losses and unabsorbed depreciation allowance of the demerged undertaking by filing a revised return under section 139(5) of the Act.

### **Dhruva Comments**

The issue in relation to carry forward and set-off of losses transferred to the transferee company pursuant to a court approved scheme by filing a revised return of income either after receipt of intimation under section 143(1) or after the due date prescribed under the law has been a matter of some litigation in the past.

In this context, the Apex Court in its ruling has held<sup>2</sup> that where it is impossible for the taxpayer to file the revised return of income, since the NCLT had passed the orders after due date for filing revised return, the Revenue has to consider the revised returns filed beyond the due dates after taking into account the effect of the scheme of amalgamation. This ruling of the Tribunal is in line with the principle enunciated by the Apex Court. In fact, in this case, the revised return was filed well within the time limit.

Further, the emphasis placed by the Tribunal on the terms of the scheme approved by the High Court while allowing the losses to the resulting company reinforces the need to have clauses to this effect being explicitly incorporated into the scheme.

Overall this is an important ruling as the Tribunal, after considering various facets of the matter and law, has come to the correct conclusion i.e. that the losses of demerged undertaking can be claimed by the resulting company through a revised return of income.

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<sup>2</sup> Dalmia Power Limited vs. ACIT [2019] 112 taxmann.com 252 (SC)



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