Carry forward and set off of losses are not allowed in view of change in shareholding, however, it does not impact unabsorbed depreciation

**Background**

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Credila Financial Services Private Ltd (the taxpayer) dealt with an issue with respect to allowability carry forward and set off of unabsorbed losses and unabsorbed depreciation in case of change of shareholding. The Tribunal held that carry forward and set off of losses shall not be permitted under Section 79 of the Income-tax Act, 1961 (the Act) as there was change in shareholding in the relevant previous year. Further listed company held more than 50 per cent shares in the taxpayer, however since it did not hold the same for the entire year, the condition for becoming a public company in which public are substantially interested was not satisfied.

The Tribunal also held that the provisions of Section 79 of the Act will not be applicable to carry forward and set off of unabsorbed depreciation. The Tribunal observed that wherever statute wanted it has used unabsorbed depreciation and accumulated losses separately which is evident from provisions of Section 72A of the Act. In Section 79 of the Act lawmakers have consciously restricted disallowance of losses under certain circumstances while there is no mention of unabsorbed depreciation.

- The taxpayer is engaged in the business of ground handling operations and related activities at Airport. The taxpayer’s shares were initially held by Mr. Ajay Bohora and Mr. Anil Bohora both holding 50 per cent shares each aggregating to 100 per cent from Assessment Year (AY) 2007-08 to 2009-10.
- During AY 2010-11, DSP Merrill Lynch Limited became shareholder to the tune of 25.64 per cent by virtue of its holding of Compulsorily Convertible Preference Shares (CCPS) and hence shareholding of Mr. Ajay Bohora and Mr. Anil Bohora got diluted to 37.18 per cent each aggregating to 74.36 per cent on the said allotment of shares.
- During the same AY, DSP Merrill Lynch Limited sold its entire shareholding in taxpayer to HDFC Limited. Thus, the consolidated shareholding of these two shareholders namely Mr. Ajay Bohora and Mr. Anil Bohora got diluted from 100 per cent to 74.36 per cent, while HDFC Limited held 25.64 per cent during AY 2010-11.
- In AY 2011-12, there was a fresh allotment of shares by way of issue of new shares by the taxpayer in favour of HDFC Ltd. while at the same time no fresh shares were allotted to Mr. Ajay Bohora and Mr. Anil Bohora, wherein the shareholding of HDFC Ltd. in taxpayer increased to 62.28 per cent while the shareholding of Mr. Ajay Bohora and Mr. Anil Bohora came down to 18.86 per cent each aggregating to 37.72 per cent.

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1 DCIT v. Credila Financial Services Private Limited (ITA No.1491/Mum/2016) – Taxsutra.com
2 More than fifty per cent shares carrying voting rights are beneficially held throughout the year by a company listed on recognised stock exchanges
3 Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.
HDFC Ltd. was a listed company which was duly listed on the recognised stock exchanges in India. The taxpayer become subsidiary company of HDFC Ltd., a company in which public are substantially interested, as shareholding of HDFC Limited in taxpayer exceeded fifty percent in AY2011-12. There was no change in the shareholding pattern of the taxpayer in AY2012-13.

The taxpayer has claimed brought forward losses from AY 2007-08 to 2011-12 for set off. The taxpayer never sought carry forward and set off of brought forward business loss from AY 2007-08 to 2009-10 in the return of income. However, the taxpayer sought carry forward and set off of business losses from AY 2010-11 to 2011-12 and also the taxpayer claimed set off of total unabsorbed depreciation till AY 2011-12.

The Assessing Officer (AO) did not allow carry forward of business losses as well as unabsorbed depreciation till AY 2012-13 on the allegation that the taxpayer is hit by bar created by provisions of Section 79 of the Act owing to the aforesaid change in shareholding pattern and consequently voting power of the shareholders.

While Commissioner of Income-tax (Appeals) [CIT(A)] allowed business losses and unabsorbed depreciation for AY 2012-13 to be carried forward to the subsequent years for set off, rest of the business losses and unabsorbed depreciation of the preceding years was disallowed by the CIT(A).

Tribunal's decision

Carry forward and set off of unabsorbed loss

Perusal of the relevant provisions of the Act and the Companies Act, 1956, it indicates that the taxpayer was a private company and not a public company. Even the concept of deemed public company as was contained in Section 43A of the Companies Act, 1956 which existed prior to the coming into force of the Companies (Amendment) Act, 2000 stood abolished.4

There was an amendment in Section 43A by the Companies Amendment Act, 2000. Thus, as per new law as is applicable during the relevant period, the taxpayer continued to be a private company when HDFC stepped in as shareholder in AY 2010-11 with shareholding exceeding 25 per cent. Thus, condition provided in Section 2(18)(b) of the Act is not met and hence the taxpayer cannot be categorised as company in which public are substantially interested.

One of the other conditions stipulated under Section 2(18) of the Act is with respect to company becoming a company in which public are substantially interested is that more than fifty per cent shares carrying voting rights are beneficially held throughout the year and it should be listed on recognised stock exchanges.

The taxpayer became subsidiary company of HDFC Ltd. in AY 2011-12 as shareholding of HDFC Ltd in taxpayer exceeded fifty percent in AY 2011-12 by virtue of Section 4(1)(b) of the Companies Act, 1956. HDFC Limited did not hold more than 51 per cent shares for the entire AY 2011-12 as the said increase in shareholding beyond 51 per cent occurred during the AY 2011-12 and it is only for part of the AY 2011-12, the HDFC Limited held shares more than fifty one percent. There was no change in the shareholding pattern of the taxpayer in AY 2012-13 and HDFC Limited held 62.28 per cent in taxpayer for the entire AY 2012-13.

In the present case HDFC Limited is a company which is listed on recognised stock exchanges in India. Thus, in the AY 2011-12, a listed company HDFC Limited did hold more than 50 per cent shares in the taxpayer but it did not hold the same for the entire AY 2011-12 and hence the other condition for becoming a public company in which public are substantially interested is as stipulated in Section 2(18)(b)(B)(c) of the Act was also not satisfied.

In AY 2011-12, when HDFC Limited were allotted new shares by the taxpayer raising its shareholding to 62.28 per cent and thus the persons namely Mr Anil Bohora and Mr Ajay Bohora who held 100 per cent shares in AY 2007-08 to 2009-10 and 74.36 per cent in AY 2010-11 which were in any case more than 51 per cent had their shareholding skid to 37.72 per cent in AY 2011-12 which led to falling of their equity below fifty-one percent thereby being hit by the bar created by provisions of Section 79 of the Act so far as carry forward of losses for AY 2007-08 to 2010-11 is concerned. This would lead to disallowance of the brought forward losses of the taxpayer from AY 2007-08 to 2011-11 and no carry forward of losses for AY 2007-08 to 2010-11 shall be allowed.

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4 The provisions, inter-alia, earlier stipulated that in case where not less than twenty-five percent shares of a private company are held by body corporate being public company or private companies, the said private company shall be deemed to be public company by virtue of Section 43A.
In AY 2012-13, there was no change in shareholding of the taxpayer as HDFC Limited continued to hold 62.28 per cent shareholding in the taxpayer and there will be no difficulty in allowing set off or carry forward of losses for the AY 2011-12 to the succeeding years.

The decision of the Supreme Court relied on by the taxpayer in the case of Italindia Cotton Company Private Limited is distinguishable on the facts of the present case.

**Carry forward and set off of unabsorbed depreciation**

Perusal of Section 79 of the Act read in conjunction with Section 72A of the Act reveals that both the afore-stated sections deal with provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation in different circumstances. Perusal of these two sections reveal that wherever statute wanted it has used unabsorbed depreciation and accumulated losses separately which is evident from provisions of Section 72A, while in Section 79 of the Act lawmakers have consciously restricted to disallowance of losses under certain circumstances while there is no mention of unabsorbed depreciation in Section 79 of the Act.

Taxing statute are to be construed strictly and when the language used in taxing statute is clear, plain, simple and unambiguous, it is impermissible to insert or delete words into taxing statute which are not mentioned therein by the legislature. The taxing statute are to be strictly construed as per the language used by legislatures if the words used are simple, clear, plain and unambiguous provided the results produced by their use are not absurd, albeit the result produced may be harsh.

No words are to be ordinarily added or deleted from the statute as there are no surpluses in the words used by legislature in enacting statute and each words so used by legislature has to be given ordinarily full effect. Perusal of provisions of Section 79 of the Act clearly reveals that it did not provide carry forward and set off of unabsorbed depreciation and the bar created by provisions of Section 79 will not be applicable so far as carry forward and set off of unabsorbed depreciation is concerned.

The Supreme Court in the case of Shri Subhulaxmi Mills Limited has affirmed the decisions of the Gujarat High Court in the case Shri Subhulaxmi Mills Limited by holding that Section 79 of the Act has no applicability so far as carry forward and set off unabsorbed depreciation. Accordingly, it has been held that the taxpayer will be entitled for carry forward and set off of unabsorbed depreciation from AY 2007-08 to 2012-13 and Section 79 of the Act did not apply it.

Our comments

Carry forward and set off of losses/unabsorbed depreciation has been a matter of debate before the courts/Tribunal. The Mumbai Tribunal in the present case held that the listed company was not holding more than 51 per cent shares for the entire year as the increase in shareholding beyond 51 per cent was only for part of the year. Accordingly, conditions under Section 2(18)(b) of the Act were not satisfied. Therefore, no carry forward of losses was allowed. Further the Tribunal held that the provisions of Section 79 of the Act are not applicable to carry forward and set off of unabsorbed depreciation.

This decision would provide guidance to the taxpayers to claim carry forward and set-off of losses and unabsorbed depreciation in case of change of shareholding.

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