

TAX FLASH NEWS

3 June 2020

In a court approved scheme, the resulting company is eligible to set-off brought forward losses transferred from the demerged company and claimed through a revised return

Recently, the Kolkata Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Padma Logistics & Khanji Pvt Ltd¹ (the taxpayer) dealt with the set-off of brought forward losses transferred from the demerged company to the resulting company. The Tribunal held that the resulting company is eligible for set-off of brought forward losses claimed through a revised return. Specific provisions dealing with the filing of loss return are not applicable to the instant case. Further the right to file a revised return of income does not lapse with the issuance of intimation². Such intimation cannot be said to be a 'completion of assessment'.

Facts of the case

The taxpayer and another Indian company filed a joint petition before the Calcutta and the Bombay High Court for demerger of a division of an Indian company³ with the taxpayer. Pursuant to the scheme of demerger approved by the High Courts, the taxpayer filed a revised return of income showing 'nil' income. In the revised return of income, the taxpayer claimed the set-off of brought forward losses and unabsorbed depreciation of a division merged into the taxpayer.

The Assessing Officer (AO) disallowed the claim of the taxpayer and held that there was no mention of the scheme of demerger pending before the Calcutta High Court in the audited accounts of the taxpayer. The taxpayer had not filed the loss return⁴ in time. The taxpayer company filed a revised return after receipt

of intimation⁵ and hence do not fulfill the conditions of revised return⁶ which required the filing of revised return prior to completion of the assessment. Both the demerged company and the resultant company have claimed the same loss resulting in double claim of set-off and carry forward of losses pertaining to the demerged undertaking. The Commissioner of Income-tax (Appeals) [CIT(A)] allowed the appeal of the taxpayer. Accordingly, the tax department filed an appeal before the Tribunal.

Tribunal's decision

The Tribunal observed that since the application for demerger was filed before the original return of income and in between there was no order from the High Courts. The appointed date of the scheme, being the effective date of demerger, falls within the relevant Assessment Year (AY) 2010-11. Since the High Court orders were passed only on 8 March 2011 and 21 April 2011, the taxpayer filed a revised return of income on 9 June 2011. Along with original tax return filed⁷, the taxpayer filed the audited financials and the fact that demerger application was pending before the High Court was duly reported by the taxpayer.

The AO was factually wrong that there was no mention in the audited accounts of the company of the scheme of demerger pending before the High Courts.

As per the provision of loss return⁸, the loss of previous year under the head 'Income from Business/profession' and under the head 'Capital Gains' cannot be carried forward unless the loss return is submitted before the due date of filing the return. However, Section 139(3) of

¹ ACIT v. Padma Logistics & Khanji Pvt. Ltd. (I.T.A. No. 606/Kol/2018) – Taxsutra.com

² Under Section 143(1)

³ Under Sections 391(2) and 394 of the Companies Act, 1956

⁴ As prescribed under Section 139(3)

⁵ Under Section 143(1)

⁶ Under Section 139(5)

⁷ Dated 28 September 2010 under Section 139(1)

⁸ Under Section 139(3)

the Income-tax Act, 1961 (the Act) applies to the taxpayer who wants to avail it while filing the return of income within the stipulated time prescribed under Section 139(1).

At the time of filing the return of income, the taxpayer was not having any loss of the previous year to be carried forward. Only after the demerger order, the demerged company stood vested with the taxpayer. The said losses do not pertain to the losses incurred by the taxpayer during the relevant previous year under the above specified heads of income.

Further in this case, the taxpayer had claimed the benefit of set-off and carry forward of losses of the demerged undertaking by virtue of Section 72A(4) and not under other specific provisions⁹, being the sections mentioned in Section 139(3). Section 72A(4) provides that the eligible losses and unabsorbed depreciation of the demerged company shall be allowed to be carried forward and set-off in the hands of the resulting company.

Further the Calcutta High Court while sanctioning the scheme observed that the losses of the demerged undertaking will be available to the resulting-company, being the taxpayer company in the present case.

Hence, provision of Section 139(3) is not applicable to the facts of the case as contended by the AO and therefore this ground raised by the AO in rejecting the revised return filed by the taxpayer is baseless.

The right to file a revised return of income does not lapse with the issuance of intimation under Section 143(1). Such intimation cannot be said to be a 'completion of assessment' and more so, when assessment has subsequently been completed¹⁰. Therefore, in the light of various decisions¹¹, it was observed that the intimation does not preclude the taxpayer from filing a revised return of income. When assessment order was also passed in the present case of the taxpayer, the intimation loses its importance. In this case, the taxpayer had rightly filed the revised return of income under Section 139(5).

The scheme of arrangement enabling the demerger was drawn and approved by the respective board of directors of the taxpayer and the Indian company and it was submitted under Sections 391(2) and 394 of the Indian Companies Act, 1956. Further, the same was duly sanctioned by the High courts at Calcutta (on 8 March 2011) and Bombay (on 21 April 2011) specifying

the appointed date as 1 March 2010. In the instant case, all the conditions stated in demerger provisions¹² under the Act have been fulfilled. Accordingly, the taxpayer was eligible to claim the set-off of brought forward losses transferred from the demerged company.

Our comments

The issue with respect to set-off of brought forward losses transferred from a demerged company to a resulting company pursuant to a scheme approved by the High Court has been a matter of debate before Courts/Tribunal.

The Kolkata Tribunal in the case *Electrocast Sales India Ltd.*¹³ held that the merger scheme approved by the High Court having in mind the larger public interest, cannot be disturbed by the revenue merely because the taxpayer is not entitled for benefits under specified section. The accumulated losses of amalgamating companies, comprising of unabsorbed short-term as well as long-term capital losses and unabsorbed business losses, would belong to the amalgamated company pursuant to the scheme of amalgamation which was approved by the High Court.

The Madras High Court in the case of *Pentamedia Graphics Ltd.*¹⁴ held that once amalgamation scheme has been sanctioned with effect from a particular date, it is binding on everyone including statutory authorities. Tax authorities would be bound to take a note of state of affairs of the applicant as on the date of sanction of the scheme and a return filed subsequent to the modification of the scheme reflecting same could not be ignored by holding that it was filed beyond limitation prescribed in Section 139(5).

The Tribunal in the present has held that the High Court while sanctioning the scheme observed that the losses of the demerged company will be available to the taxpayer (resulting) company. Hence, the provision of Section 139(3) relating to loss return is not applicable in the instant case. Further the right to file a revised return of income does not lapse with the issuance of intimation under Section 143(1). Such intimation cannot be said to be a 'completion of assessment'. Accordingly, the taxpayer was eligible to claim the set-off of brought forward losses transferred from the demerged company which were claimed through the revised return.

⁹ Section 72(1), Section 73(2), Section 73A(2) or Section 74(3)(1), Section 74A(3)

¹⁰ Under Section 143(3)

¹¹ *CIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* [2007] 291 ITR 500 (SC), *Coates of India Ltd. v. Deputy CIT* [1995] 214 ITR 498 (Cal), *Himgiri Foods Ltd v. CIT* [2010] 231 CTR 470 (Gujarat), *Dalmia Power Ltd v. ACIT* (dated 18 December 2019)

¹² Section 72A(4) read with section 2(19AA)

¹³ *Electrocast Sales India Ltd. v. DCIT* [2018] 92 taxmann.com 85 (Kol)

¹⁴ *Pentamedia Graphics Ltd. v. ITO* [2012] 20 taxmann.com 755 (Mad)

home.kpmg/in/socialmedia

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate
Road,
Pralhad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru –
560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2,
Serilingampally Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

1st Floor, Lodha Excelus,
Apollo Mills,
N. M. Joshi Marg,
Mahalaxmi,
Mumbai – 400 011.
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2020 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

This document is meant for e-communication only