

Direct Taxes

Carry forward of losses on amalgamation

G. Bhaskar, Advocate

Existing Position:

- Sections 72A & 72AA provide for carry forward and set off of accumulated loss and unabsorbed depreciation allowance in the case of amalgamation or demerger and amalgamation in certain cases respectively.
- As per the existing position, accumulated loss of the amalgamating company shall be deemed to be the loss of the amalgamated company for the previous year in which the amalgamation is effected.
- The section further states that other provisions of the Act relating to set off and carry forward of loss shall apply accordingly.

Proposed Amendment, including the date of its coming into force:

- The amendment in these sections provide for carry forward and set off of accumulated loss in the hands of the successor entity for not more than eight assessment years from the year in which it was first computed for the original predecessor entity.
- In section 72A, the amendment applies to amalgamation of predecessor entity being:
 - ❖ The amalgamating company under sub-section (1)
 - ❖ The firm or proprietary concern under sub-section (6); and
 - ❖ The private limited company or unlisted public company under sub-section (6A)And the amendment applies to amalgamation with successor entity being:
 - ❖ The amalgamated company under sub-section (1)
 - ❖ The successor company under sub-section (6) and
 - ❖ The successor limited liability partnership under sub-section (6A)
- In section 72AA, the amendment applies to amalgamation of predecessor entity being:
 - ❖ The banking company(ies) under sub-clause (a)
 - ❖ The amalgamating corresponding new bank(s) under sub-clause (b) and
 - ❖ The amalgamating Government company(ies) under sub-clause (c)And the amendment applies to amalgamation with successor entity being
 - ❖ The banking institution or company under sub-clause (a);
 - ❖ The amalgamated corresponding new bank(s) under sub-clause (b); and
 - ❖ The amalgamated Government company(ies) under sub-clause (c).

➤ The amendment shall apply to any amalgamation or business re-organisation effected on or after 01.04.2025 and will take effect from the 1st day of April 2026.

(i) The Reasons as assigned in the Memorandum /FM's Speech/ FAQs, etc.

➤ The Memorandum states that the above amendment is brought in order to bring clarity and parity with the provisions of section 72 of the Act.

➤ The present amendment is also aimed to prevent evergreening of the losses of the predecessor entity resulting from successive amalgamations.

➤ The present amendment also would ensure that no carry forward and set off of accumulated loss is allowed after eight assessment years from the immediately succeeding assessment year for which such loss was first computed for the original predecessor entity.

(ii) The Special Comment, if any.

➤ The amendment would result in capping the carry forward of losses to 8 years only, from the date the loss arises and there shall be no ever greening of losses due to amalgamation or further amalgamations and hence genuine amalgamations will not be hit.

➤ Section 72A was inserted in the year 1977 and the amendment is brought in 2025. The reason for the amendment after nearly 50 years is not clear. May be the legislature that "better late than never". But then the Income Tax Bill 2025 is already in the pipeline.

➤ The amendment shall apply to an amalgamation effected on or after 01.04.2025. *The effective date effective date is referred to as the date on which the final sanction have been granted. Hence it is opined that amalgamation schemes sanctioned before 01.04.2025 alone will not be affected by this amendment.*

➤ As per the Hon'ble supreme Court in the case of *PCIT v Intra Pharmaceuticals Ltd*¹ once a scheme is sanctioned, same would relate back to appointed date of amalgamation and that for all purposes including for recognising benefit of unabsorbed depreciation and losses of a merging company with those of principal company would be available from such date, By following the decision of the Honble SC in the decision of *Marshall Sons & Co. (India) Ltd. v. ITO*².

➤ Demerger as given under section 2(19AA) of the Income Tax Act means the transfer of one or more undertakings to any resulting company pursuant to a scheme of arrangement under section 391 to 394 of the Companies Act, 1956, in a manner prescribed. No amendment were brought to the demerger.

➤ As per Section 72A(5) of the Act, "The Central Government may, for the purposes of this Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes".

➤ **Case law**

ITAT Mumbai in the matter of *Supreme Industries Ltd. v DCIT*³ held as follows:

"Having gone through both the provisions of Sections 72A and 32A, of the Act we are of the view that Section 72A deals with carry forward and set off of accumulated business loss and unabsorbed depreciation allowance in case of amalgamation. According to this Section, accumulated business loss and unabsorbed. depreciation allowance of the amalgamating company shall be deemed to be the loss or as the case may be of the amalgamated company for the previous year in which amalgamation was affected and other provisions of this Act relating to set off of and carry forward of loss allowance for depreciation shall apply accordingly. Mean-ing thereby the amalgamated company would get the original period for its carry forward and set off."

The NCLT in the case of *Minda TG Rubber Pvt. Ltd. vs. Toyoda Gosei Minda India Pvt. Ltd.*⁴ “rejects a Scheme of Amalgamation proposed by Minda TG Rubber Pvt. Ltd. (Transferor Company, ‘Applicant’), on finding that the same is not compliant to the provisions of Sec. 72A of the Income Tax (‘I-T’) Act, remarks that it

“...cannot allow the carry forward and set off of loss and unabsorbed depreciation of Transferor Company in the Transferee Company, which is a condition stipulated in the Scheme under consideration.”. The NCLT also Underscores the legal framework of carrying forward losses and unabsorbed depreciation is stipulated u/s 72A of the I-T Act, NCLT outlines that the unabsorbed depreciation and losses can only be carried forward by the Transferee Company only on meeting certain conditions as stipulated u/s 72A(2) of the I-T Act. However later on filing the undertaking as stipulated u/s 72A, the Scheme of amalgamation was approved by order delivered on 26.10.2023.

[Source : AIFTP Journal-February, 2025]