

# Carry-forward and set-off of losses of transferor company not permissible if 75% shareholding condition not met on 'appointed date' - Chennai ITAT

15 July 2021



## Summary

The Chennai Income Tax Appellate Tribunal (ITAT) has held<sup>1</sup> that the requirement of shareholders, holding not less than 75% (in value) shares in the amalgamating company, should become shareholders in the amalgamated company needs to be checked on the '**appointed date**' mentioned in the Scheme of Amalgamation, as approved by the High Court.

In the instant case, the taxpayer held 26% shareholding in the transferor company (Transferor Co.), as on the appointed date (which was later increased to 100% before filing the petition for amalgamation with the High Court). Accordingly, the ITAT denied set-off and carry-forward of accumulated unabsorbed business losses of the transferor company to the taxpayer.

## Facts of the case

- Scheme of amalgamation between the taxpayer and the transferor company was sanctioned by Madras High Court on 28 April 2014 with appointed date as 1 April 2013.
- As on the appointed date, i.e. on 1 April 2013, the taxpayer held 26% shares in Transferor Co. and remaining 74% shares were held by the promoters.
- On 14 February 2014, the taxpayer acquired the remaining stake of 74% in the Transferor Co. from the promoters and moved a petition for amalgamation on the same date with the Madras High Court.
- In Financial Year 2013-14, the taxpayer claimed set-off of accumulated unabsorbed business losses of ~INR 7.05 crore. This business loss had been transferred from Transferor Co<sup>2</sup>.
- However, the tax officer was of the view that the condition<sup>3</sup> of at least 75% shareholders (in value) of the Transferor Co. becoming shareholders of the taxpayer is to be satisfied on the 'appointed date' (i.e., 1 April 2013, in the instant case). Accordingly, the tax officer denied the set-off and carry-

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<sup>1</sup> Roca Bathroom Products Pvt. Ltd. vs DCIT

<sup>2</sup> Pursuant to Section 72A of the Income-tax Act, 1961 (the Act)

<sup>3</sup> Section 2(1B)(iii) of the Act

forwarded the accumulated business losses (of the Transferor Co.) by the taxpayer since the aforesaid condition is not satisfied on the appointed date.

- The Commissioner of Income Tax (Appeals) upheld<sup>4</sup> the view of the tax officer by holding that the tax officer is correct in strictly interpreting the provisions of the Act.

### Taxpayer's contentions

- The shareholders of Transferor Co. would be vested with the right or interest arising from the scheme of amalgamation only upon scheme becoming effective. Accordingly, compliance with the requirement of 75% shareholders<sup>5</sup> needs to be checked **on effective date and not appointed date.**

### Revenue's contentions

- On the other hand, the tax department contended that when the provisions of the

Act are clear, there is no case for any ambiguity and, hence, the interpretation of the tax officer is in accordance with the law.

### ITAT ruling

- The ITAT held that the taxpayer is not entitled to carry-forward and set-off loss of the Transferor Co.
- It observed that it is a settled law that once amalgamation is approved, the Transferor Co. ceases to exist and cannot be regarded as a 'person'<sup>6</sup> against whom assessment proceedings can be initiated or an order of assessment passed. Therefore, appointed date i.e. 1 April 2013 is crucial in this case.
- Thus, the ITAT held that since the taxpayer did not have 3/4th of the shares of the Transferor co. as on 31 March 2013, the appointed date being 1 April 2013, it is not entitled to claim carry-forward and the set-off of loss of Transferor Co.

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<sup>4</sup> Placing reliance on Supreme Court decision in the case of Smt. Tarulata Shyam and others v. CIT, West Bengal (1977) 108 ITR 345 (SC)

<sup>5</sup> with condition under section 2(1B)(iii) of the Act

<sup>6</sup> under Section 2(31) of the Act

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## Our comments

Significance of the appointed date has been highlighted in past by the Apex Court in Marshall Sons & Co. India Ltd. v. ITO,<sup>7</sup> wherein it was held that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation shall take place. Such date may precede the date of sanctioning of the scheme by the Court, the date of filing of certified copies of the orders of the Court before the Registrar of Companies and the date of allotment of shares, etc. It was observed therein that the scheme, however, would be given effect from the appointed date itself.

Chennai ITAT ruling in the instant case further emphasises on the importance of appointed date in a scheme of amalgamation. As per the ITAT ruling, in a nutshell, the appointed date, and not effective date, would be considered for checking compliance with 75% shareholding condition in case of amalgamation. Accordingly, the appointed date must be decided keeping in view this fact.

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<sup>7</sup> [1997] 233 ITR 809 (SC)

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