IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Waseem Ahmed, Accountant Member and
Shri Soundararajan K., Judicial Member

ITA No. 557/Coch/2023&
SA No. 117/Coch/2023
(Assessment Year: 2018-19)

Mallelil Industries Pvt. Ltd. Amllelil House Attachaakkal P.O. Pathanamthitta 689691 [PAN: AAFCM0761Q]	vs.	The Income Tax Officer Thiruvalla
(Appellant)		(Respondent)

Appellant by:	Shri Surendranath Rao, CA
Respondent by:	Smt. Girly Albert, Sr. D.R.

Date of Hearing:	23.09.2024
Date of Pronouncement:	26.09.2024

O R D E R

Per Bench

This appeal filed by the assessee is directed against the order of the National Faceless Appeal Centre, Delhi [CIT(A)] dated 30.01.2023 for Assessment Year (AY)2018-19. The assessee has also filed a stay application SA No. 117/Coch-2023 seeking stay of recovery of outstanding demand.

2. The appeal was filed with a delay of 114 days. The assessee filed a condonation petition supported by an affidavit stating that the delay has occurred due to the change of auditor who was handling the matters of the assessee. As per the learned A.R. there was sufficient cause which prevented the assessee from filing the appeal within the stipulated time and accordingly prayed to condone the delay. On

the other hand, the learned Sr. DR considering the reasons for the delay in filing the appeal did not raise any serious objection. After hearing both the parties and perusal of the materials available on record, we note that the delay in filing the appeal by the assessee was attributable to the change of auditor and therefore we are of the view that there was sufficient cause which prevented the assessee in filing the appeal within the specified time. Accordingly, we condone the same and proceed to adjudicate the issue raised by the assessee on merit.

3. The only issue raised by the assessee is that the learned CIT(A) erred in denying the set off of the loss u/s 72A of the Income Tax Act, 1961 (the Act) pertaining to the amalgamating company on the ground that the amalgamation has taken place in a period of less than three years.

4. Briefly stated facts are that the company namely, MPPL was incorporated in September 2013 which got amalgamated by virtue of the order of the NCLT dated 15.03.2019 effective from 01.04.2016. The assessee in the year under consideration has set off the loss pertaining to the amalgamating company amounting to Rs. 1,02,06,393.00 under the provisions of section 72A of the Act. However, the Assessing Officer (AO), during the course of assessment proceedings found that the company namely, MPPL got amalgamated with the assessee in a period of less than 3 years after its incorporation and therefore the conditions specified under sub-clause (i), clause (a) of sub-section (2) of section 72A of the Act are not satisfied. Thus, the AO disallowed the same and added to the total income of the assessee. Aggrieved assessee preferred an appeal before the learned CIT(A) who confirmed the order of the AO.

5. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

6. The learned A.R. before us filed a paper book running from pages 1 to 79 and contended that an opportunity was granted to the Revenue to raise any objection about the scheme of amalgamation by the NCLT before granting the approval, but no such objection was raised. As such, the scheme was approved by the higher authority and therefore the same cannot be tinkered with by Revenue during the assessment proceedings.

7. Without prejudice to the above, the learned A.R. also submitted that the Revenue in the first year after amalgamation being AY 2017-18 has allowed set off of the losses of the amalgamating company amounting to Rs.1,92,99,996/- being the first year, therefore the losses of the amalgamating company in the second year cannot be disturbed.

8. Without prejudice to the above, the learned A.R. also contended that by the time the scheme was approved by the NCLT, the amalgamating company satisfied the condition of working for more than 3 years. Therefore, there was no violation of the provisions of section 72A of the Act in so far as the existence of the amalgamating company for 3 years is concerned.

9. On the other hand, the learned Sr. DR contended that the date on which the amalgamation scheme was approved, the amalgamating company did not complete the period of 3 years and therefore the losses of the amalgamating company cannot be allowed to be set off by virtue of the provisions of section 72A of the Act. The learned Sr. DR vehemently supported the orders of the authorities below.

10. We have heard the rival contentions of both the parties and perused the material available on record. Admittedly, the period of 3 years of existence/ working as provided u/s 72A of the Act was not completed in the case of the amalgamating

company as on 01.04.2016, effective date of amalgamation. But without going into the merits of the case whether the period of 3 years got completed in the case of amalgamating company, it is necessary to note that the Revenue in the first year being 2017-18 post amalgamation has allowed the loss of the amalgamating company to be set off against the income of the assessee. This fact can be verified from the observations made by the AO in his order which is reproduced as under: -

> *"From the above, it is evident that the assessee itself has confessed that NCLT approval is with effect from 01.4.2016 and for the A.Y 2017-18 itself, the assesssee has set off the carried forward loss to the tune of Rs. 1,92,99,966/- arose from amalgamating company i.e M/s Mallelil Polymers with the income of the amalgamated company i.e M/s. Mallelil Industries based on the report of NCLT. That is the assessee has availed the advantage of amalgamation in the financial year 2016-17 itself. Moreover, the assessment for A.Y 2017-18 was completed by taking in to account of the amalgamation order of the assessee."*

11. Now the controversy arises whether the Revenue can disturb the proceedings of the subsequent years in the case of the assessee by not allowing set off of loss of the amalgamating company. In this regard we are of the view that the Revenue cannot take a contradictory stand in different assessment years, particularly in a situation where the facts are identical for both the years as discussed above. In simple words we hold that the Revenue cannot disturb the proceedings by disallowing the loss in the year in dispute without disturbing the first year of claim of the assessee as discussed above.

12. It is also important to note that the Hon'ble NCLT before approving the impugned scheme of amalgamation has invited representation Income Tax Department to invite objection if any in the scheme of amalgamation in view circulated issued by the CBDT among its officers vide F. No. 279/MISC./M-171/2013-ITJ, dated 11th April 2014 which reads as under:

> ***F.NO.279/MISC./M-171/2013-ITJ, Dated- 11"' April, 2014***

Government of India,Ministry of Finance, Department of Revenue, C.B.D,T., New Deihl

Subject: Merger/Amalgamation/de-merger Objections entertained by High Courts -reg.

I am directed to refer to the above mentioned subject.

2. In a recant case of proposed amalgamation, it was noted that the scheme of amalgamation was designed seeking amalgamation with retrospective dates so as to claim set off of losses of loss-making Companies against the profits of profit making Companies of the group and thus impacting adversely the much needed public revenue.

This fact of proposed amalgamation was not brought to the notice of Income Tax Department either by the Ministry of Corporate Affairs (MCA) or Registrar of Companies (ROC). The Deportment had to file an intervention application opposing such amalgamation before the High Court which was rejected on the ground that the Department had no locus standi in the matter and that Regional Director, MCA has been delegated power in this regard.

3. In this connection ***Circular No 1/2014 dated 15.01.2014*** *has been issued by MCA to Regional Directors which lays down that while furnishing any report regarding reconstruction or amalgamation of companies under the Companies Act, comments and inputs from the Income Tax Department may invariably be obtained so as to ensure that the proposed scheme of reconstruction or amalgamation has not been designed in such a way as to defraud the Revenue and consequently being prejudicial to public interest. It has further been said that the Regional Directors would invite specific comments from the Income Tax Department within 15 days of receipt of notice before filing response to the Court. It is emphasised that this is the only opportunity with the Department to object to the scheme of amalgamation if the some is found prejudicial to the interest of Revenue and therefore, it is desired that the comments/objections of the Department are sent by the concerned CIT to Regional Director, MCA for incorporating them in its response to the Court, immediately after receiving information about any scheme of amalgamation or reconstruction etc.*

4. This issues with approval of Member (A&J).

13. From the above circular, it is transpired that the Revenue was conscious about the fact that there was the possibility of misusing the provisions of the Income Tax Act in the name of the scheme of amalgamation as provided under section 2(1B) causing prejudice to the Revenue. But the Revenue despite having the opportunity in its hand did not raise any objection within the time allowed by the MCA or subsequently by raising the objection in the impugned scheme of amalgamation. Thus, from the conduct of the Revenue, it is revealed that there was no grievance in the impugned scheme of amalgamation. Had there been any grievance to the Revenue, the same could have been brought to the notice of the regional director of the MCA, then the suitable action should have been initiated against the impugned scheme of the amalgamation. In this regard, we note that recently the Mumbai bench of NCLT in one of the petitions for amalgamation in case of Gabs Investment Pvt Ltd

(Transferor) and Ajanta Pharma limited (Transfree) in CPS No 995 and 996/2017 has not approved the scheme of amalgamation on the objection raised by the revenue. The relevant extract of the order reads as under:

> *36. The rationale given in the scheme among others things are the proposed amalgamation of the transferor company into Transferee Company by the scheme, as a result of which the share holdersoft he transferor company viz. the promoters of the transferor company (who are also the promoters of the transferee company) shall directly hold shares in the transferee company and the promoters would continue to hold the same percentage of shares in the Transferee company pre and post merger.*
>
> *37. The above rationale presented by the petitioner company is without any Justification. Petitioner has to comply with all applicable laws. By this scheme of amalgamation and arrangement Gabs/shareholders of Gabs are avoiding full tax liability which is strenuously objected by the Income Tax Department as discussed Supra. Any transfer of property from one entity to other has to be treated as sale/transfer and the same has to comply with applicable provisions of law including applicable tax liability, stamp duty. In the instant case, the transferor is a private Ltd. company which is a separate legal entity and any transfer of shares to other entity including individuals from the legal entity would attract applicable tax liability. Therefore, we are of the considered view that the Bench can sanction/approve the scheme only if it complies with all applicable provisions of the Act, Rules and if the scheme is in the interest of public, shareholder etc. However, the petitioner companies did not provide details with regard to compliance of tax liability raised by the Income Tax Department, their undertaking to pay the huge tax liability as pointed out by the income department etc.*
> *38. From the above analysis of the financials of Gabs, the bench noted that with an equity share capital of only 1,91,100 the promoters/share holders of Gabs who are also the common promoters of APL, by way of this proposed scheme of amalgamation and arrangement would get the shares of APL worth ?1477.50 Crores (market value as on 31.03.2017) and that too without paying any Income Tax, Stamp Duty etc. for which the bench is of the considered view that the same is not in the public interest, thousands of shareholders of Transferee company especially retail shareholders. The market value of the same number of shares as at 31.03.2016 was 1,182.59 Crores. 39. Since Income Tax department (IT) has raised strong objections about tax benefit, tax avoidance, tax loss as discussed above, we are of the opinion that it would be www.taxguru.in advisable to settle the important/crucial issue of huge tax liability before sanctioning the scheme by the Tribunal rather than disputing the same at a later stage after the scheme is sanctioned by the Tribunal. It is mandatory as per section 230 (5) of the Companies Act, 2013, a notice under sub section (3) along with all the documents in such form shall also be sent to central government, Income Tax Authorities, RBI, SEBI, ROC, stock exchanges, OL, CCI and other Sectoral regulators or Authorities for their representations. In response to the notice received as per above section the Income Tax Department has raised valid observation/objections as detailed above, we find merit in the objections raised by Income Tax Department and we are also inclined to agree with the objections raised.*

14. From the above, it is inferred that the Income Tax Department, being aggrieved with the scheme of amalgamation, raised the objections which was duly accepted by the NCLT and accordingly, the scheme of amalgamation was disapproved in the above case.

15. Now, the question arises whether the scheme once approved by the Hon'ble NCLT after receiving no objection from the Income Tax Department, the AO/revenue has authority to challenge the same. What is the inference that flows from a cumulative consideration of all the aforesaid contending facts is that the revenue cannot object the impugned scheme of amalgamation. It is because, it is implied that the revenue has given its consent in the impugned scheme of amalgamation by raising no objection in response to the letter issued by the regional director of the MCA as discussed above. Furthermore, had there been any grievance to the revenue, then it should have approached to the Hon'ble High Court through the regional director of the MCA. But it did not do so. As such the revenue on one hand is issuing circulars to its officers to object the scheme of amalgamation if it is found prejudicial to the interest of revenue but on the other hand it remains silent when such opportunity was afforded to it and raising the same issue during the assessment proceedings which in our considered view is not desirable.In this regard, we draw the support from the judgment of the Hon'ble supreme court in the case of Dalmia Power Ltd. &Anr. v. ACIT reported in 420 ITR 339 wherein it was held as under:

> *Sub-section (5) of section 230 requires that a notice of the meeting under sub-section (3) of Section 230 along with all the documents pertaining to the scheme, shall be sent to the Central Government, and statutory authorities such as the Income Tax Department, RBI, SEBI, ROC etc. and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement. The statutory authorities could raise objections within 30 days from the date of receipt of the notice, failing which, it would be presumed that they had no representation to make on the proposed schemes of compromise, arrangements and amalgamations.*
>
> ***4.4** Similarly, Rule 8(3) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that any representation made to the statutory authorities notified under Section 230(5), shall be sent to the NCLT within a period of thirty days from the date of receipt of such notice, and a copy of such representation shall simultaneously be sent to the concerned companies. In case no representation is received within thirty days, it shall be presumed that the statutory authorities have no representation to make on the proposed scheme of compromise or arrangement.*

Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 is set out hereinunder for ready reference:
"(3) If the authorities referred to under sub-rule (1) desire to make any representation under sub-section (5) of section 230, the same shall be sent to the Tribunal within a period of thirty days from the date of receipt of such notice and copy of such representation shall simultaneously be sent to the concerned companies and in case no representation is received within the stated period of thirty days by the Tribunal, it shall be presumed that the authorities have no representation to make on the proposed scheme of compromise or arrangement."
[emphasis supplied]
***4.5** The Department did not raise any objection within the stipulated period of 30 days despite service of notice.*
***4.6** Pursuant thereto, the Schemes were sanctioned by the NCLT, Chennai vide Orders 16.10.2017, 20.10.2017, 26.10.2017, 28.12.2017, 10.01.2018, 20.04.2018 and 01.05.2018; and, vide Orders dated 18.05.2017 and 30.08.2017 by the NCLT, Guwahati. Accordingly, the Schemes attained statutory force J.K. (Bom.) (P.) Ltd. v. New Kaiser-I-Hind Spg. &Wvg. Co. Ltd. [1970] 40 Comp. Cas. 689 not only inter se the Transferor and Transferee Companies, but also in rem, since there was no objection raised either by the statutory authorities, the Department, or other regulators or authorities, likely to be affected by the Schemes.*

16. In view of the above, we hold that the assessee cannot be denied the set off the loss of the amalgaming company in the given set of facts and circumstances. Accordingly, we set aside the order of the ld. CIT-A and direct the AO to allow the set off the loss of the amalgamating company. Hence, the ground of appeal of the assessee is hereby allowed.

17. In the result, the appeal filed by the assessee is allowed.

Order pronounced on 26th September, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sad/-	Sd/-
(Soundararajan K)	(Waseem Ahmed)
Judicial Member	Accountant Member

Cochin, Dated: 26th September, 2024

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin