Losses under the head capital gains won't be set-off and carry forward in case of amalgamation and demerger

Summary – The Mumbai ITAT in a recent case of Clariant Chemicals (I) Ltd., (the Assessee) held that wBenefit of set-off and carry forward of losses under head 'capital gains' is not available in case of amalgamation and demerger

Payment of membership entrance fee to club is an allowable expenditure

Since in assessment year 2006-07, rule 8D was not applicable, disallowance on exempt income was to be worked out on some reasonable basis

Expenditure incurred for purchase of software that helped to do work effectively, was revenue expenditure

Where assessee paid remuneration to its managing director, etc. and clearly explained nature and purpose of said payment, which was not considered by Commissioner (Appeals), matter was to be re-examined

Facts

- Many companies got merged into the assessee company. In the tax audit report, long-term capital loss for earlier assessment years of the erstwhile amalgamating company was claimed to be brought forward and set-off against the long-term capital gain of the amalgamated company and set-off against the long-term capital gain for this year, which was on account of surrender of tenancy rights and the balance was sought to be carried forward for the future.
- The Assessing Officer held that assessee's claim was not correct because the provision of section 72A, which deals with accumulation of loss of amalgamating company, allows brought forward and set-off only under the head "profit and gains of business or profession" and such carry forward is subject to certain conditions, whereas in section 74, there was no such stipulation of carried forward in case of amalgamation.
- On appeal, the Commissioner (Appeals) rejected the assessee's claim.
- On second appeal:

Held

- The main issue involved here is, whether the assessee company which is an amalgamated company should be allowed to set-off and carry forward of the losses computed under the head "capital gains" which had arisen to the erstwhile amalgamating companies under the provisions of section 74. The said section provides that in respect of any assessment year if the net result of the

computation under the head 'capital gain' is loss to the assessee, then such a loss is to be carried forward and set-off in the manner provided therein.

- From the perusal of section 74, it is seen that the loss under the head "capital gain" is allowable to an assessee alone. There is nothing mention about the situation and the condition under which such a loss is allowed to be set-off and carried forward in the case of amalgamation, that is, to allow loss or set off loss of one assessee which has merged with another assessee. Likewise, in section 72, the provisions of carried forward and set-off of losses computed under the head "profit and gains of business and profession" of an assessee has been given. Here also, there is no such provision relating to carried forward and set-off of business loss in the cases of amalgamation or demerger.
- In order to cover such benefit of carried forward and set-off of accumulated losses under the head 'business income', specific provision was brought in the statute by Finance Act, 1977, by way of insertion of section 72A. Such a provision was brought to overcome the difficulty in the cases where, if a business carried on by one assessee is taken over by another, then the unabsorbed depreciation and business losses could not be set-off and carried forwarded under the scheme of amalgamation within the ambit of section 72. Therefore, the entire code of section 72A, was brought in the statute for extending or relaxing the provisions relating to carried forward and set-off of accumulated business losses and unabsorbed depreciation allowance in the case of amalgamation of companies. A complete code was enacted and certain terms and conditions were laid down under which such a benefit could be given under the scheme of amalgamation. The said provision of section 72A was amended from time to time so as to include certain more conditions or to relax such conditions. However, the entire code of section 72A was only restricted to carried forward of accumulated losses and unabsorbed depreciation which are to be set-off while computing the income under the head "profit and gain of business or profession" and not for any other head of income including losses computed under the head 'capital gains or speculation business'. Section 72A, envisages several terms and conditions and the circumstances under which the business loss or depreciation is allowed to be set-off or carried forward. Specific rule 9C under Income-tax Rules, 1962, has also been enacted for this purpose. Thus, once the legislature has enacted a different code all together for a specific purpose and intention, then such a code laying down the terms and conditions and the circumstances, cannot be imported or read into other general provisions or sections.
- The intention of legislature for enacting a particular statute or provision has to be kept in mind while interpreting a particular provision of the Act. In the cases of amalgamation wherever the statute has provided certain conditions or benefits or restrictions, the same has been provided categorically. For *e.g.*, section 47, italic dealing with transactions not regarded as transfer, has provided specific clauses (vi) to (vid) for the cases of amalgamation and demerger. It is not the role of the courts specifically the Tribunal to read such a specific provisions into general provisions. The casus omissus cannot be supplied by the courts *i.e.*, the Tribunal is not empowered to read down the provision of section 72, by importing the provisions of section 72A, into the said section. What is apparent from the clear language of the section and intention of the legislature has to be inferred and is to be

applied. Had the legislature intended to allow set-off and carry forward of loss of capital gains in the case of amalgamation or demerger, the legislature could have provided specifically. Thus, section 74 cannot be read or interpreted so as to give benefit of set-off and carried forward of losses under the head 'capital gains' in the case of amalgamation and demerger, *sans* any specific provision therein. No case laws to the contrary has been brought by the assessee. Thus, the view taken by the Assessing Officer and confirmed by the Commissioner (Appeals) is legally correct and is accordingly affirmed.