Section 72A doesn't prohibit amalgamation of two companies suffering from losses: HC

Summary – The High Court of Karnataka in a recent case of Sadashiva Sugars Ltd., (the Assessee) held that Section 72A does not prohibit amalgamation of two companies suffering from losses

Facts

- The High Court permitted amalgamation of Sadashiva Sugars Ltd. (Transferor Company) with E.I.D. Parry (India) Ltd. (Transferee Company).
- The Revenue contended that Transferee Company has been suffering losses for number of years, and has carried forward the same to the subsequent years and in case the amalgamation were permitted, Transferee Company would be entitled to carry forward and set-off the accumulated losses of Transferor Company. It contended that even if the Transferee Company makes good the profits in future, and after the set-off of its own accumulated losses, it would still be eligible for set-off of the accumulated losses of the Transferor Company and therefore, it is the revenue that will suffer loss as it cannot recover tax on the income of the Transferor Company. It was further contended that under section 72A, which deals with carry forward and set-off of accumulated losses, amalgamation could not be permitted by this Court.
- On the other hand, the Transferor Company, has pleaded that section 72A of the Act does not contain a bar which would prevent the Transferor Company from amalgamating with the Transferee Company.

Held

- A bare perusal of the relevant extract clearly reveals that section 72A merely creates a legal fiction whereby the accumulated loss and the unabsorbed depreciation of the amalgamating company is deemed to be the loss, or as the case may be, allowance for unabsorbed depreciation of the amalgamated Company for the previous year in which the amalgamation was affected. Furthermore, it grants the benefit that the provisions of this Act relating to set-off and carry forward of loss, and allowance for depreciation shall apply to the amalgamated company.
- However, sub-section (2) of section 72A carves out an exception and describes the circumstances under which the benefit of set-off and carry forward and allowance of depreciation will not be permitted to the amalgamated company.
- Sub-section (3) of section 73A further states that in case any of the conditions laid down in sub-section (2) are not complied with, then, in fact, the set-off of loss, or allowance of depreciation shall be deemed to be the income of the amalgamated company chargeable to tax in the year in which such condition has not been complied with. Therefore, section 72A in fact, deals with the post amalgamation scenario. By no stretch of imagination, does section 72A debar two companies from amalgamating. In fact, section 72A deals with the relationship between the Income Tax Department,

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and the assessee in the post-amalgamated period. Therefore, the contention being raised by the revenue that under section 72A, amalgamation between two companies suffering from losses is prohibited, the said argument is highly misplaced.

- Since section 72A does entitle the amalgamated company to claim set-off and carry forward of losses and allowance depreciation, therefore, if any benefit accrues to the amalgamated company, that benefit cannot be denied ostensibly on the ground that it is the Revenue Department that would suffer. Hence, the contention being raised by the revenue that in case the amalgamation were allowed, it is the revenue department that would suffer, as it would not be able to recover the tax, as it will be entitled to, even the said argument is unacceptable.

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