Transfer of only specific 'assets and liabilities' in lieu of consideration couldn't be held as demerger

Summary – The Mumbai ITAT in a recent case of NOCIL Ltd., (the Assessee) held that where only 'specific assets and liabilities' of two divisions of assessee-company were transferred to other company for 'consideration', there would be no demerger; hence, accumulated loss and unabsorbed depreciation relating to transferred division would remain with assessee-company

Facts

- The assessee-company had three divisions namely, Petro chemical Division of Polymer (PCD), Rubber Chemical Division (RCD) and the Plastic Product Division (PPD). A scheme of demerger was proposed under sections 391 to 394 of the Companies Act, 1956, which was approved by the High Court. In terms of the said arrangement, specified assets and liabilities of the PCD and PPD divisions were transferred to Relene Petrochemicals and NOCIL Petrochemicals respectively. Movable and immovable properties and liabilities of the PCD and PPD divisions which were not transferred to Relene Petrochemicals and NOCIL Petrochemicals continued to belong and remain vested with the assessee-company.
- During assessment, the assessee was allowed to carry forward and set off the unabsorbed business loss and depreciation. The balance was also allowed to be carried forward to the next year. The Assessing Officer issued a notice under section 148 to reopen assessment on the ground that the accumulated loss and unabsorbed depreciation pertaining to the PCD and PPD divisions could not be allowed to be carried forward and set off in the hands of the assessee-company.
- On appeal, the Commissioner (Appeals) held that the transfer of divisions in the instant case did not constitute demerger as defined in section 2(19AA). Hence, the provisions of section 72A(4) were not attracted.
- On appeal to the Tribunal:

Held

- A perusal of sub-section (4) of section 72A, brings out that the restriction contained therein with regard to the accumulated losses and unabsorbed depreciation gets triggered only when there is a scheme of demerger, which results in a 'demerged company' and a resulting company. Quite clearly, the 'demerger' in relation to a company envisages transfer pursuant to sections 391 to 394 of the Companies Act, 1956.
- Similarly, a 'demerged company' is defined as per section 2(19AAA) to mean that company whose undertaking is transferred pursuant to demerger to a resulting company. The expression resulting company has also been defined in section 2(41A) meaning one or more companies (including a wholly owned subsidiary thereof) to which the undertaking of the demerged company is transferred in a scheme of demerger and the resulting company in consideration of such transfer of

undertaking, issues shares to the shareholders of the demerged company and includes any authority or body or local authority or public sector company or a company established, constituted or formed as a result of demerger.

- A conjoint reading of the meaning of the expression 'demerger', 'demerged company' and the 'resulting company' signifies the manner in which section 72A(4) is to be understood since the three expressions find a place therein. The scheme of arrangement is to be understood as 'demerger' for the purposes of section 2(19AA) only if the conditions prescribed therein are satisfied. One of the conditions prescribed is that all the properties and the liabilities relatable to the undertaking should be transferred by the demerged company to the resulting company by virtue of the demerger. Factually speaking, in the instant case, there is no dispute to the fact that the scheme of restructuring approved by the Bombay High Court involved transfer of only the specified assets and liabilities of the PCD and PPD divisions to the Relene Petrochemicals and NOCIL Petrochemicals respectively. The aforesaid fact was very much before the Assessing Officer and has been eloquently brought out by the Commissioner (Appeals) in his order, to which there is no dispute. Therefore, on this aspect itself one can conclude that the scheme of arrangement in question does not qualify to be a 'demerger' in terms of section 2(19AA). Another factual aspect which has been noted by the Commissioner (Appeals) is to the effect that in the scheme of arrangement, the consideration in lieu of the transfer of specified assets and liabilities of the two divisions is received by the assessee company, whereas in order to qualify to be a 'demerger' in terms of section 2(19AA), the consideration to be paid by the resulting company is by way of issuance of shares to the shareholders of the demerged company. On these factual findings of the Commissioner (Appeals), there is no negation by the revenue. Be that as it may, it is quite clear that the factual matrix clearly points out that the instant scheme of arrangement is not a 'demerger' as defined in section 2(19AA), thus, assessee also does not qualify to be a 'demerged company' as specified in section 2(19AAA) and Relene Petrochemicals, and NOCIL Petrochemicals. also do not qualify to be 'resulting companies' within the meaning of section 2(41A).
- In the above background, the provisions of sub-section (4) of section 72A are not attracted in relation to the instant scheme of arrangement.
- In view of the matter, the decision of the Commissioner (Appeals) in holding that the accumulated loss and unabsorbed depreciation relating to the transferred divisions have to remain with the assessee company for set-off and carry forward for set-off in future years, deserves to be affirmed.