

Webathon Series

Decoding Income Tax Law Set off or Carry Forward [Sections 70 to 80]

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Carried forward and set off losses

1. **Set off loss : Intra head section 70**
2. **Set off loss : inter head section 71**
3. **Carried forward and set off loss (Section 71B, 72, 73, 73A, 74 and 74A)**
House property loss , business loss (Speculation loss , Specified business loss), capital loss ,
Loss under other source .
4. **Carried forward and set off loss and unabsorbed depreciation entitle to person other than the person incurred the loss and have to carried forward and set off loss**
 - a) **Amalgamation and demerger including succession of a proprietary concern or a partnership firm by a company and reorganisation of company to LLP**
Section 72A
 - b) **Scheme of Amalgamation in case of bank and insurance etc section 72AA**
 - c) **Reorganisation of co-operative banks Section 72AB**
5. **Restriction in carried forward and set off loss in case of :**
 - a) **Change in constitution of Partnership firm and LLP**
 - b) **Change in shareholding of Company**
6. **Disclosure : Tax audit information**

Carried forward and set off losses : provided under other sections (other than section 70 to 80 of chapter VI)

- Agricultural loss (Part 4 schedule 1 of the Income Tax Act)
- Brought forwarded Loss as per books of accounts in computing Book Profit (section 115JB)
- Computing total income under section 115BBA : Tax on income of certain domestic companies
- Computing Total Income Under Section 115BAC : Tax on income of individual and HUF
- Computing income u/s 68, 69,69B, 69C and 69D (Section 115BBE(2))
- Loss from activity of owning and maintenance racehorse races. (Section 58(4))
- Loss on account of winning of lotteries, crossword puzzles, games races, etc. (section 58(4))

Intra head adjustment

Set off of loss from one source against income from another source

(under the same head of income)

Restrictions :

1. Loss from a speculation business : Section 73(1)
2. Loss of a specified business referred to in section 35AD. Section 73(1)
3. Loss from activity of owning and maintenance racehorse races. Section 58(4)
4. Loss on account of winning of lotteries, crossword puzzles, games races, etc. 58(4)
5. Loss from a source which is exempt. Except agricultural income
6. Capital loss. Section 70(2) and (3)

Capital Losses

- Short-term capital loss can be setoff from any capital gain (long-term or short-term), Section 70(2)
- long-term capital loss can now be set off *only against long-term capital gain*. Section 70(3)
- Long-term Capital loss : With indexation can be set off against without indexation. [Vipul A Shah v Asst CIT (2011) 63 DTR 272 (Mum)(Tri)].
- Short term capital loss determined as per section 111A is allowed to be set off from short-term capital gain computed under section 115AD.
- Whether Short-term capital loss be set off from long-term capital gain even through there was short-term capital gain which was taxable @ 15% as per section 111A or slab rate of such short-term capital gain due to total income being less than 10%?

Bonus stripping :

Section 94(8) :

- (a) a person buys or acquires any units within a period of three months prior to the record date.
- (b) such person is allotted or entitled to additional units on the basis of such units without making any payment; and
- (c) he sells all or any of such units while continuing to hold all or any of the additional units within a period of nine months after such date,

then, the loss, if any, arising to him on account of such purchase and sale of units shall be ignored for the purpose of computing his income chargeable to tax.

But that loss shall be deemed to be the cost of purchase or acquisition of such additional units (held by assessee on the date of such sale or transfer)

Loss of individual and set off with income of minor/spouse, etc. (clubbing)

Loss can be set off against Income included under Section 64 –

Section 64 operates, the profit or loss from a business of spouse included in the total income of the assessee should be treated as profit or loss of a business 'carried on' by him for the purpose of carry forward and set off of such loss under section 72

CIT v. J.H. Gotla [1985] 156 ITR 323 (SC).

Option or mandatory ?

Set off the loss : When profit from one source of income and loss from another source ,

No option

To set off the loss against such profits (in accordance with under section 70)

CIT v Milling Trading Co. P. Ltd (1995) 211 ITR 690 (Guj)

Inter head adjustment

Set off of loss from one head of income against income from other head of income

Exceptions/ restrictions :

1. Loss under income from house property up to Rs 2 Lac only : 71 (3A)
2. Business loss against salary income : 71(2A)
3. Loss from a speculation business : 73(1)
4. Loss of a specified business referred to in section 35AD.: 73A
5. Capital loss. : 71(3)
6. Loss from activity of owning and maintenance racehorse races. 58(4)
7. Loss on account of winning of lotteries, crossword puzzles, games races, etc. 58(4)

Carried forward losses

All losses are not allowed to be carried forward (C/F) .

The following losses are allowed to be C/F and set off in the subsequent A.Y's

- (a) House property loss; Section 71B
- (b) Business loss other than referred to in section 35 AD; Section 72
- (c) Speculation loss; Section 73
- (d) Loss from a specified business referred to in section 35 AD; Section 73A
- (e) Capital loss; Section 74
- (f) Loss on account of owning and maintain racehorses; Section 74A

Judicial Decisions

Loss from Exempt source cannot be Carried Forward –

If the loss arising in the previous year was under a head not chargeable to tax, it could not be allowed to be carried forward and absorbed against income in a subsequent year from a taxable source. In such cases, neither the assessee is required to show the same in the return nor is the ITO under any obligation to compute or assess it, much less for the purpose of 'carry forward'

CIT v. Harprasad & Co. (P.) Ltd. [1975] 99 ITR 118 (SC).

Section 80 and 139(3) : Carried forward loss vis a vis timely filing of return

80. Notwithstanding anything contained in this Chapter, **no loss which has not been determined in pursuance of a return filed in accordance with the provisions of sub-section (3) of section 139, shall be carried forward and set off** under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (2) of section 73A or sub-section (1) or sub-section (3) of section 74 or sub-section (3) of section 74A.

139(3) If any person **who has sustained a loss in any previous year** under the head "Profits and gains of business or profession" or under the head "Capital gains" and **claims that the loss or any part thereof should be carried forward** under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (2) of section 73A or sub-section (1) or sub-section (3) of section 74, or sub-section (3) of section 74A, **he may furnish, within the time allowed under sub-section (1)** a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1)139.

Section 80 : Compulsory to file a return of loss to carry forward the losses in time

The carry forward is allowed : Loss determined in pursuance of a return of loss submitted by the assessee on or before the due date for filing of the returns prescribed under 139(1).

Not covered :

Loss under the head income from house property and that can be carried forward even return filed after the time prescribed u/s 139(1)

Not applicable for carrying forward of unabsorbed depreciation. Governed under section 32(2).

Entitled to set off unabsorbed depreciation of earlier year even no valid return for the previous assessment has been filed

Section 80 : Compulsory to file a return of loss to carry forward the losses in time

LOSS DETERMINED IN RETURN FILED UNDER SECTION 139(4) CAN ALSO BE CARRIED FORWARD –

Sub-section (4) of section 139 has to be read as a proviso to sub-section (1), so that a return filed under sub-section (4) can be treated as a return under sub-section (1). Consequently, the loss determined is to be allowed to be carried forward in terms of sub-section (3) of section 139. This apart, even section 80 which provides for the submission of return of loss contemplates the determination of the loss in pursuance of a return filed under section 139 and not under sub-section (1) or (2) of section 139. Therefore, it can be safely inferred that the return contemplated under section 80 includes a return filed under sub-section (4) of section 139

CIT v. B.V.R. Glucose Products Ltd. [2001] 250 ITR 512 (AP).

CONDONATION OF DELAY IN FILING : CIRCULAR NO. 8/2001, DATED 16/05/2001

SECTION 119 OF THE INCOME-TAX ACT, 1961 - INCOME-TAX AUTHORITIES - INSTRUCTIONS TO SUBORDINATE AUTHORITIES - CONDONATION OF DELAY IN FILING REFUND CLAIM AND CLAIM OF CARRY FORWARD LOSSES UNDER SECTION 119(2)(b)

.....the present Circular is being issued containing comprehensive guidelines on the conditions for condonation and the procedure to be followed for deciding such matters.

2. The Principal Commissioners of Income-tax/Commissioners of Income-tax (Pr.CsIT/CsIT) shall be vested with the powers of acceptance/rejection of such applications/claims if the amount of such claims is not more than Rs.10 lakhs for any one assessment year. The Principal Chief Commissioners of Income-tax/Chief Commissioners of Income-tax (Pr.CCsIT/CCsIT) shall be vested with the powers of acceptance/rejection of such applications/claims if the amount of such claims exceeds Rs.10 lakhs but is not more than Rs. 50 lakhs for any one assessment year. The applications/claims for amount exceeding Rs.50 lakhs shall be considered by the Board. Board has the power under section 119(2)(b) to condone the delay in filing the loss return and allowed to be carried forward.

3. No condonation application for claim of refund/loss shall be entertained beyond six years from the end of the assessment year for which such application/claim is made. This limit of six years shall be applicable to all authorities having powers to condone the delay as per the above prescribed monetary limits, including the Board. A condonation application should be disposed of within six months from the end of the month in which the application is received by the competent authority, as far as possible.

5. The powers of acceptance/rejection of the application within the monetary limits delegated to the Pr.CCsIT/CCsIT/Pr.CsIT/CsIT in case of such claims will be subject to Following conditions:

i. At the time of considering the case under Section 119(2)(b), it shall be ensured that the income/loss declared and/or refund claimed is correct and genuine and also that the case is of genuine hardship on merits.

ii. The Pr.CCIT/CCIT/Pr.CIT/CIT dealing with the case shall be empowered to direct the jurisdictional assessing officer to make necessary inquiries or scrutinize the case in accordance with the provisions of the Act to ascertain the correctness of the claim.

House property loss; Section 71B

Allowed to be carried forward for 8 years

To set off under the head Income from House property .

If individual and HUF opts for tax u/s 115BAC

Total income to be computed without set off of any loss

“ under the head “income from house property “ with any other head of income

Section 80 and 139(3) not applicable

Business loss other than referred to in section 35 AD; Section 72

Loss from other business other than specified business or speculation business

Not set off in AY either not having income under other head or that is less than the loss

Can be carried forward to following AY's and set off against profit and gain from business and profession

Carried forward for 8 AY's immediate succeeding's AY in which loss computed

Business loss.....Rehabilitation of business discontinued due to natural calamities, etc : Section 33B

- The business of any industrial undertaking carried on in India is discontinued in any previous year
- Due to extensive damage to, or destruction of, any building, machinery, plant or furniture owned by the assessee and used for the purposes of such business as a direct result of-
 - flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature
 - riot or civil disturbance
 - accidental fire or explosion
 - action by an enemy or action taken in combating an enemy
(whether with or without a declaration of war,

Business loss.....Rehabilitation of business discontinued due to natural calamities, etc.

72(1) proviso : loss of a business

- Discontinued in the **circumstances specified in section 33B**
- Re-established, reconstructed or revived
- **Before the expiry of a period of three years** from the end of the previous year in which it was discontinued
- Business loss of the previous year and brought forward loss:
 - (a) Allowed to be set off against the profit and gains, if any, of **that business or any other business carried on by him** and assessable for that assessment year
 - (b) Loss cannot set off, the amount of balance loss be carried to the following assessment year and **so on for 7 assessment years immediately succeeding.** However re established/reconstructed or revived business is continued to be carried by the assessee.

Order in which business loss, unabsorbed depreciation, etc is to be set off

Section 72(2),

The order of set off will be as under:

- (i) Current year depreciation [Section 32(1)]
- (ii) Current year capital expenditure on scientific research and current year expenditure on family planning to the extent allowed.
- (iii) Brought forward business or profession losses [Section 72(1)]
- (iv) Unabsorbed depreciation [Section 32(2)]
- (v) Unabsorbed capital expenditure on scientific research [Section 35(4)]
- (vi) Unabsorbed expenditure on family planning [Section 36(1)(ix)]

Section 71 precedence over section 72, 74

CIRCULAR: NO. 587, DATED 11-12-1990

1. The question whether the provisions of section 71 of the Income-tax Act, providing for set-off of loss from one head against income from another in an assessment year, take precedence over the provisions of section 72 (carry forward and set-off of business losses) and section 74 (carry forward and set-off of losses under the head 'Capital gains' has been considered in consultation with Ministry of Law.
2. The Board are advised that effect has **first to be given to the provisions of section 71**, i.e., where in respect of an assessment year, there is income under a head, the loss, if any, under any other head for that assessment year should first be set-off against it before the carried forward losses under the former head can be set-off against such income. This position is, however, subject to the exceptions provided in Chapter VI of the Income-tax Act which prohibit inter-head adjustments with regard to certain losses, such as speculation loss or the loss incurred in the activity of owning and maintaining race-horses.

Business loss, unabsorbed depreciation, etc is to be set off....Conti....

Section 72(2) does not control operation of section 32(2) to have set off of unabsorbed depreciation against income from other sources.

Therefore, in cases where after having set off of business loss as against current year income from business, there existed no further business income, assessee was entitled to set off unabsorbed depreciation against income from other sources.

CIT v. SPEL Semi Conductor Ltd. [2013] 212 Taxman 506/[2012] 27 taxmann.com 242 (Mad.).

Business loss : Carried forward of business loss for more than 8 assessment years

- Section 41(5)
- The business or profession no longer in existence
- Income chargeable to tax under section 41(1), (3), (4) or (4A) in respect of that business or profession,
- loss , (not a speculation business) arose in that business or profession *during the previous year in which it ceased to exist* and could not be set off
- Loss be set off against the income chargeable to tax under the section 41 (1)(3)(4)(4A)

Section 73 Speculation business : set off and carried forward

- The loss of a speculation business of AY to be set off only against the profits and gains of another speculation business in same AY .
- If could not be set off allowed to be carried forward and set off only against the income of any speculation business.
- Allowed to be carried forward for 4 assessment years immediately succeeding the assessment year for which the loss was first computed.
- **Not necessary that the same speculation business must continue**

Deemed Speculation loss in case of company : Explanation to section 73

- Where any part of the business of a company consists of purchase and sale of shares of other companies
- That shall be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.

Excluding

1. A company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources"
2. A company the principal business of which is
the business of **trading in shares** or
banking or the granting of loans and advances

Judicial Decisions

Explanation to section 73

Will cover both shares which are stock-in-trade and shares which are traded in course of financial year for purpose of considering loss and profit for that year;

Prasad Agents (P.) Ltd. v. ITO [2009] 180 Taxman 178 (Bom.).

In the absence of a definite definition of 'principal business', one has to go by the memorandum and articles of a company for the purposes of section 73. One cannot determine 'principal business' based on a single year's financial statements

CIT v. Ashley Services Ltd. [2014] 44 taxmann.com 44 (Mad.).

Judicial Decisions

Explanation to section 73 :

Creates a legal fiction by which purchase and sale of shares specified in said Explanation is deemed to be speculation business; **this Explanation can be applied to sections 70, 71 and 72; in determining gross total income said Explanation can be applied while considering set off of losses under sections 70 and 71 and carry forward of such losses under section 72 –**

R.P.G. Industries Ltd. v. CIT [2011] 198 Taxman 349/10 taxmann.com 121 (Cal.).

For purpose of setting off or carrying forward of loss, selling of shares by certain companies is considered by statute as speculation business, even though transaction of purchase and sale was followed by delivery of scrips; **such transaction as such, cannot be treated as a speculative transaction as defined in section 43(5)**

Paharpur Cooling Towers Ltd. v. CIT [2011] 198 Taxman 83/9 taxmann.com 213 (Cal.).

Damages for breach of contract : speculative losses ?

- Contract for supply of commodity
- Unable to make the supply due to extremely high rise in the price of the commodity
- Pay damages to the buyer for breach of contract,
- Payment of damages for breach of a contract **does not Speculative transaction as section 43(5)**

[*CIT v Shantilal P. Ltd* (1983) 144 ITR 57(SC)].

CIRCULAR : NO. 13(102)-IT/53, DATED 8-9-1954

Transactions are taken out of the category of speculative transactions

Losses from an illegal speculative business

- Cannot be carried forward to the subsequent years for set off against the profits of same speculative business or any other speculative business carried by the assessee

CIT v Kurji Jinabhai Kotecha (1977) 107 ITR 101 (SC).

CIT v Sooraj Mal Baijnath Agencies Pvt. Ltd. (2005) 272 ITR 525 (Cal)].

Section 73A : Loss of a specified business (Section 35AD)

- Any loss computed in respect of any specified business referred to in section 35AD
- Business of cold chain facility, business of warehouse for storage of agriculture produces, hotels/hospitals, etc.
- Not be set off except against profit any other specified business.
- Cannot be set off from any other business income.
- Carried forward no time limit

Section 74 : capital gain loss carried forward

- Loss under the head 'Capital gains'
- Short-term or Long-term : Separately carried forward.
- Carried forward short-term capital loss can be set off in the subsequent assessment year from income under the head capital gains, whether short-term or long-term.
- Brought forward long-term capital loss shall be allowed to be set off only from long-term capital gain.
- Carried forward to a maximum of 8 assessment years, immediately succeeding the assessment year for which the loss was first computed.

Brought forward long-term capital loss be set off from the capital gain on the sale of depreciable

- Section 50 : Provides and prescribed stage of computation of capital gains
- Capital gain resulting from transfer of depreciable assets which were held for a period more than 2/3 years would retain the character of long-term capital gain for all other provisions except section 50
- That capital gain shall qualify for set off against brought forward loss from long-term capital assets

Manali Investments v ACIT (2011) 56 DTR 218 (Mum) (Tri)

Section 74A : Losses from activity of owning and maintaining racehorse

- Loss from the activity of owning and maintaining racehorses in AY shall be set off against the income from the activity of owning and maintaining racehorses in the same A.Y.
- Shall be carried forward and set off only against the income from the activity of owning and maintaining racehorses
- Carried forward for a maximum of 4 assessment years

Contd.. Loss on account of owning and maintain racehorses; Section 74A

‘amount of loss incurred by the assessee in the activity of owning and maintaining racehorses’ means—

(i) in any case where the assessee has no income by way of stake money, the amount of expenditure (not being in the nature of capital expenditure) laid out or expended by him wholly and exclusively for the purposes of maintaining racehorses.

ii) in a case where the assessee has income by way of stake money the amount by which such income falls short of the amount of expenditure (not being in the nature of capital expenditure) laid out or expended by the assessee wholly and exclusively for the purposes of maintaining racehorses.

‘Horse race’ means a horse race upon which wagering, or betting may be lawfully made.

‘Income by way of stake money’ means the gross amount of prize money received on a racehorse or racehorses by the owner thereof on account of the horse or horses or any one or more of the horses winning or bidding placed second or in any lower position in horse races.

Loss an account of lottery, crossword, puzzles, etc

- Section 58(4)
- no expenditure or allowance is allowed from winning from lotteries of crossword puzzle, etc
- No loss from any lottery, card games, races, etc is allowed to be set off at all against any other income,
- Not even against income of another wining of lotteries, crossword puzzles, card games, races, etc.

Loss on account pre-mature encashment of the fixed deposit eligible to be set off

- Loss incurred on account of premature encashment of the fixed deposits with banks
- Interest whereon was assessed in earlier years on accrual basis,
- has been held to be eligible for set off under section 71

[CIT v Purushottamdas Dhoribhai and Co. (1997) 226 ITR 579 (MP)].

Brought forward losses must be set off in the immediately succeeding year

- The losses which are eligible to be carried forward must be set off against the income/profit of the immediately succeeding year
- If there is any balance still to be set off, it should be set off in the immediately next succeeding year or years within the time allowed.
- Where the losses incurred are not set off against the income/profits of the immediately succeeding year/years, as the case may be, they cannot be set off at a later date

Tyresoles (India) v CIT (1963) 49 ITR 515 (Mad) ,

B.C.S. Kartar Chit Fund & Finance Co. Pvt. Ltd v CIT (1989) 179 ITR 137 (P&H)].

Assessee fails to claim the benefit of set off

AO required to allow set off

- The duty of the Assessing Officer to apply the relevant provisions of the Act for the purpose of computing correct amount true figure of the Assessee's taxable income and the consequential tax liability
- The assessee fails to claim the benefit of a set off, it cannot relieve the ITO of his duty to apply section 72 in an appropriate case

The Supreme Court in the case of CIT v Mahalakshmi Sugar Mills Co. Ltd (1986) 160 ITR 920 (SC)

Circular : No. 14(XL-35) of 1955, dated 11-4-1955

- Claim for depreciation - Department not to take benefit of assessee's ignorance
- Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessee on whom it is imposed by law, officers should—
 - (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;
 - (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.

Business loss be set off by a person other than the person who has incurred the loss

The assessee, who has suffered the loss and whose hands the loss has been assessed,

- is the person who can carry forward the loss and
- set off the same against his business income of the subsequent year.

The following are the exceptions:

- (a) Inheritance
- (b) Succession of proprietary concern or a firm by a company
- (c) Conversion of private company or unlisted company into Limited Liability Partnership
- (d) Amalgamation
- (e) Demerger

Cont...Situations when business loss can not be set off by a person other than the person who has incurred the loss

- Loss/unabsorbed depreciation of HUF cannot be carried forward by the member of HUF on partition of HUF.
- Loss/unabsorbed depreciation of a firm succeeded by another firm cannot be carried forward as the assessee has changed.
- Loss/unabsorbed depreciation of sole proprietary concern taken over by the firm cannot be carried forward by the firm even if sole proprietor also becomes the partner of such firm.
- Loss/unabsorbed depreciation of partnership firm taken over by one of the partners cannot be carried forward in the hands of such partner.
- The profits of partnership firm are shared by partner and are exempt in their hands, Losses of firm can not carry forward or set off by partner The firm can only set off and carry forward and set off of its own losses and not the partners.

Section 78(2) : Inheritance

Where any person carrying on any business or profession has been succeeded in such capacity by another person **otherwise than by inheritance**,

Nothing in this Chapter shall entitle any person other than the person incurring the loss to have it carried forward and set off against his income.

Judicial Decisions

The term '**inheritance**' used in section 78(2) must mean only a transmission of the assets or liabilities of one person to another by the personal law applicable to them and not in any other mode of transfer known to law

Hindustan Aeronautics Ltd. v. CIT [1984] 149 ITR 795 (Kar.).

A **partnership is not a matter of heritable status** but purely one of contract and no heir of a deceased partner can claim to have become a partner without the consent, express or implied, of the other partners. A partnership of two partners gets dissolved in law by the death of one of them; there is therefore no question of succession by inheritance –

Smt. S. Parvathammal v. CIT [1987] 163 ITR 161 (Mad.).

Judicial Decisions

Where **sole proprietary speculation business of one 'M' was carried on by legal heirs by forming partnership firm**, firm could claim carry forward of loss of sole proprietor, as it was found by Tribunal that **there was succession to business of deceased**

- CIT v. Madhukant M. Mehta [2001] 247 ITR 805 (SC).

Where assessee, an individual, took over running business of a partnership firm, in which he was a partner, including fixed assets, current assets and liabilities and in return filed in status of individual, assessee claimed that he was entitled to set-off loss suffered by erstwhile partnership firm against his individual income, **it was held that since partnership firm and individual are two separate taxable entities or persons under Act, loss suffered by partnership firm could not be set-off from income of assessee as an individual –**

Pramod Mittal v. CIT [2012] 205 Taxman 444/19 taxmann.com 24 (Delhi)

Section 72A(6) : succession of a proprietary concern or a partnership firm by a company

Accumulated losses and unabsorbed depreciation

- Reorganization of business,
- Firm is succeeded by a company fulfilling the conditions laid down in clause (xiii) of section 47 or
- Proprietary concern is succeeded by a company fulfilling the conditions laid down in clause (xiv) of section 47,
- The accumulated loss and the unabsorbed depreciation of the predecessor firm or the proprietary concern, as the case may be, shall be deemed to be the loss or allowance for depreciation of the successor company for the purpose of previous year in which business reorganization was affected
- Provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.

Amalgamation or demerger Section 72A

- Accumulated loss and unabsorbed depreciation of the predecessor proprietary and firm company
Shall become the accumulated loss and unabsorbed depreciation of the **successor company of the previous year in which business reorganization was effected and**
Such business loss can be carried forward for **fresh 8 assessment years** and the unabsorbed depreciation will be carried forward indefinitely.
- If any of the conditions laid down under section 47(xiii) and (xiv) are not complied with,
the set off of loss or allowance of depreciation made in any previous year in the hands of the successor company, shall be deemed to be the income of the company chargeable to tax in the year in which such conditions are not complied with.

Amalgamation or demerger Section 72A

- **Accumulated loss** means so much of the loss of the predecessor firm or the proprietary concern, as the case may be, under the head 'Profits and gains of business or profession' (not being a loss sustained in a speculation business) which such predecessor firm or the proprietary concern, would have been entitled to carry forward and set off under the provisions of section 72 if the reorganization of business had not taken place
- **Unabsorbed depreciation** means so much of the allowance for depreciation of the predecessor firm or the proprietary concern or the amalgamating company or the demerged company, as the case may be, which remains to be allowed and which would have been allowed to the predecessor firm or the proprietary concern or amalgamating company or demerged company, as the case may be, under the provisions of this Act, if the reorganization of business or amalgamation or demerger had not taken place.

Section 47(xiii) : Firm to company

any transfer of a capital asset or intangible asset by a firm to a company as a result of succession of the firm by a company in the business carried on by the firm, or any transfer of a capital asset to a company in the course of demutualisation or corporatisation of a recognised stock exchange in India as a result of which an association of persons or body of individuals is succeeded by such company :

Provided that—

(a) all the assets and liabilities of the firm or of the association of persons or body of individuals relating to the business immediately before the succession become the assets and liabilities of the company;

(b) all the partners of the firm immediately before the succession become the shareholders of the company in the same proportion in which their capital accounts stood in the books of the firm on the date of the succession;

(c) the partners of the firm do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company; and

(d) the aggregate of the **shareholding in the company of the partners of the firm is not less than fifty per cent of the total voting power in the company** and their shareholding continues to be as such **for a period of five years from the date of the succession;**⁴⁹

Section 47(xiv) : Proprietary to company

where a sole proprietary concern is succeeded by a company in the business carried on by it as a result of which the sole proprietary concern sells or otherwise transfers any capital asset or intangible asset to the company :

Provided that—

(a) All the assets and liabilities of the sole proprietary concern relating to the business immediately before the succession become the assets and liabilities of the company;

(b) the shareholding of the sole proprietor in the company **is not less than fifty per cent of the total voting power in the company** and his shareholding continues to remain as such for a **period of five years from the date of the succession; and**

(c) the sole proprietor does not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company;

Section 72A(6A) Succession of private company or unlisted public company by a Limited Liability Partnership

- Reorganization of business
- Private company or unlisted public company is succeeded by a limited liability partnership
- **fulfilling condition laid down in the proviso to section 47(xiiib),**
- The accumulated loss and the unabsorbed depreciation of the predecessor company, shall be deemed to be loss or allowance for depreciation of the successor limited liability partnership for the purpose of the previous year in which business reorganization was effected
- Other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly:
- Conditions not complied :
the set off of loss or allowance of depreciation shall be deemed to be the income of LLP

Section 47(xiii b), Company to LLP

- (a) all the assets and liabilities of the company immediately before the conversion become the assets and liabilities of the limited liability partnership;
- (b) all the shareholders of the company immediately before the conversion become the partners of the limited liability partnership and their capital contribution and profit-sharing ratio in the limited liability partnership are in the same proportion as their shareholding in the company on the date of conversion;
- (c) the shareholders of the company **do not receive any consideration or benefit**, directly or indirectly, in any form or manner, **other than by way of share in profit and capital contribution in the limited liability partnership**;
- (d) the aggregate of **the profit-sharing ratio of the shareholders** of the company in the limited liability partnership shall **not be less than fifty per cent** at any time during the **period of five years** from the date of conversion;
- (e) the **total sales, turnover or gross receipts** in the business of the company in any of the three previous years preceding the previous year in which the conversion takes place does **not exceed sixty lakh rupees**;
- (ea) the **total value of the assets** as appearing in the books of account of the company in any of the three previous years preceding the previous year in which the conversion **takes place does not exceed five crore rupees**; and
- (f) **no amount is paid**, either directly or indirectly, to any partner out of balance of accumulated profit standing in the accounts of the company on the date of conversion for a **period of three years from** the date of conversion

Section 72A : Losses of the amalgamating company be carried forward and set off by the amalgamated company

- The carry forward and set off of loss and unabsorbed depreciation
- When Amalgamation is as per the provisions of section 2(1B) of the Income-tax Act, 1961.
- Amalgamation of –
 - a) A company owning an industrial undertaking, or a ship or a hotel with another company. or
 - b) A banking company referred to in section 5(c) of the Banking Regulation Act, 1949 with a specified bank, or
 - c) One or more public sector company or companies engaged in the business of operation of aircraft with one or more public sector company or companies engaged in similar business,

Amalgamation or demerger Section 72A

The term **'industrial undertaking'** shall mean any undertaking engaged in:

- (i) the manufacture or processing of goods, or
- (ii) the manufacture of computer software, or
- (iii) the business of generation or distribution of electricity or any other form of power, or
- (iv) mining, or
- (v) the construction of ships, aircrafts or rail systems, or
- (vi) the business of providing telecommunication services, whether basic or cellular including radio paging, domestic satellite service, network of trunking, broadband network and internet services.

Section 2(1B) amalgamation

Means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

- (i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;
- (ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;
- (iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

Amalgamation or demerger Section 72A

- Conditions laid down in section 72A(2)

- a) To be satisfied by amalgamating company

- Engaged for 3 or more years in the business, in which the accumulated loss occurred, or depreciation remains unabsorbed.
 - Has held continuously as on the date of the amalgamation at least 75% of the book value of fixed assets held by it two years prior to the date of amalgamation.

- b) To be satisfied by the amalgamated company

- Holds Continuously at least 75% of the book value of fixed assets of the amalgamating company acquired in the scheme of amalgamation for a minimum period of 5 years

- (book value is to be considered on the date of amalgamation) ;

- Continues the business of the amalgamating company for a period of 5 years ;
 - Fulfills conditions as prescribed under Rule 9C.

Conditions as prescribed under Rule 9C.Amalgamation or demerger Section 72A

- (a) An industrial undertaking of the amalgamating company by way of amalgamation,
- shall achieve the level of production of at least 50% of the installed capacity of the said undertaking **before the end of four years** from the date of amalgamation and
 - Continue to **maintain the said minimum level of production till the end of five years** from the date of amalgamation.

The Central Government may relax the condition of

- a) achieving the level of production or
- b) the period during which the same is to be achieved or
- c) both in suitable cases

Genuine efforts made by the amalgamated company to attain the prescribed level of production and the circumstances preventing such efforts from achieving the same.

- (b) Furnish **certificate in form no. 62**, duly verified by an accountant,

Amalgamation or demerger Section 72A

- Conditions Satisfied by both the amalgamating and amalgamated company,
- Accumulated loss and unabsorbed depreciation of the amalgamating company shall become the business loss and unabsorbed depreciation of the amalgamated company.
- Such accumulated loss will be allowed to be carried forward by the amalgamated company for fresh 8 years and
- Such unabsorbed depreciation can be carried forward indefinitely.

Amalgamation or demerger Section 72A

If the conditions stipulated section 72A are not satisfied by the amalgamated company

Section 72A(3),

- Where conditions laid down under clause (b) of section 72A(2) are not complied.
- The set off loss or allowance of depreciation made in any previous year shall be deemed to be the income.
- The balance accumulated loss and unabsorbed depreciation not yet set off shall not be allowed to be carried forward and set off.

Amalgamation or demerger Section 72A

Accumulated losses and unabsorbed depreciation in case of demerger of a company

Demerger section 2(19AA)

Section 72A(4) and (5),

•The demerged company shall—

(a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company.

In this case, the accumulated loss will be carried forward for the balance unexpired period and the unabsorbed depreciation can be carried forward indefinitely.

(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company,

Amalgamation or demerger Section 72A

be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company,

Balance be allowed to be carried forward and set off in the hands of the demerged company or the resulting company,

The accumulated loss will be carried forward for the unexpired period and the unabsorbed depreciation will be carried forward indefinitely.

The Central Government may, for the purposes of this Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes.

Section 2 (19AA) demerger :

"demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 391 to 39498 of the Companies Act, 1956 (1 of 1956), by a demerged company of its one or more undertakings to any resulting company in such a manner that—

- (i) All the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger;
- (ii) all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;
- (iii) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger:

Provided that the provisions of this sub-clause shall not apply where the resulting company records the value of the property and the liabilities of the undertaking or undertakings at a value different from the value appearing in the books of account of the demerged company, immediately before the demerger, in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015;

Section 2 (19AA) demerger :

- (iv) the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis except where the resulting company itself is a shareholder of the demerged company ;
- (v) the shareholders holding **not less than three-fourths in value of the shares** in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become share-holders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company;
- (vi) the transfer of the undertaking is on a going concern basis;
- (vii) the demerger is in accordance with the conditions, if any, notified under sub-section (5) of section 72A by the Central Government in this behalf.

Amalgamation or demerger Section 72A

Note :

1. The carry forward and set off of accumulated loss and unabsorbed depreciation shall be allowed only when demerger is as per the provisions of section 2(19AA) of Income-tax Act.

2. Accumulated loss means :

So much of the loss of the demerged company under the head 'profits and gains of business or profession' (not being a loss sustained in a speculation business) which such demerged company would have been entitled to carry forward and set off under the provisions of section 72 if the demerger had not taken place.

Amalgamation of certain cases Section 72AA

Scheme of amalgamation of banking company

Banking company amalgamated with a banking institution under a scheme sanctioned and brought into force by the Central Government under section 45(7) of the Banking Regulation Act, 1949

The accumulated loss and unabsorbed depreciation of the amalgamating banking company shall be deemed to be the loss or the allowance or depreciation of the banking institution for the previous year in which the scheme of amalgamation is brought into force, and

All the provisions contained in the Income tax Act, 1961, relating to set off and carry forward of loss and unabsorbed depreciation shall apply accordingly.

Amalgamation of certain cases Section 72AA

Section 72AA substituted W.e.f. A.Y. 2020-21

Where there has been an amalgamation of—

- (i) One or more banking company with any other banking institution under a scheme sanctioned and brought into force by the Central Government under section 45(7) of the Banking Regulation Act, 1949; or
- (ii) One or more corresponding new bank or banks with any other corresponding new bank under a scheme into force by the Central Government under section 9 of the Banking companies (Acquisition and Transfer of Undertakings) Act, 1970 or under section 9 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 or both, as the case may be; or
- (iii) One or more Government company or companies with any other Government company under a scheme sanctioned and brought into force by the Central Government under section 16 of the General Insurance Business (Nationalisation) Act, 1972,

Amalgamation of certain cases Section 72AA

Section 72AA substituted W.e.f. A.Y. 2020-21 conti....

- The accumulated loss and the unabsorbed depreciation of such banking company or companies or amalgamating corresponding new bank or banks or amalgamating Government company or companies
- Shall be deemed to be the loss or, as the case may be, allowance for depreciation of such banking institution or amalgamated corresponding new bank or amalgamated Government company for the previous year in which the scheme of amalgamation was brought into force and
- other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.

Reorganisation of co-operative banks Section 72AB

Section 72AB(1) Carry forward and set off of accumulated losses and unabsorbed depreciation

- Amalgamation of a co-operative bank or co-operative banks has taken place during the previous year
- The successor co-operative bank shall be allowed to set off the accumulated loss and the unabsorbed depreciation as predecessor bank as if amalgamation had not taken place
- All the other provisions relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly

Reorganisation of co-operative banks Section 72AB

■ Following conditions are to be satisfied.

(a) The predecessor bank should:

- (i) Have been engaged in the business of banking for three or more years; and
- (ii) Have held at least 75% of the book value of fixed assets as on the date of reorganization, continuously for two years prior to the date of business reorganization.

(b) The successor co-operative bank should:

- (i) Hold at least 75% of the book value of fixed assets of the predecessor co-operative bank acquired through business reorganization. Continuously for a minimum period of five years immediately succeeding the date of business reorganization;
- (ii) Continue the business of the predecessor co-operative bank for a minimum period of five years from the date of business reorganization; and
- (iii) Fulfil such other conditions as may be prescribed to ensure the revival of the business of the predecessor co-operative bank or to ensure that the business reorganization is for genuine business purpose.

Reorganisation of co-operative banks Section 72AB

<p>(a) where the whole of amount of such loss or unabsorbed depreciation is directly relatable to the undertaking transferred to the resulting co-operative bank</p>	<p>The whole of such loss or unabsorbed depreciation</p>	
<p>(b) where such accumulated loss or unabsorbed depreciation is not directly relatable to the undertaking transferred to the resulting co-operative bank</p>	<p>Accumulated loss or unabsorbed depreciation of the demerged co-operative bank before demerger</p>	<p>Assets of the undertaking transferred to resulting co-operative bank</p> <hr/> <p>Assets of the demerged co-operative bank before demerger</p>

Carried forward and set off Loss
Not available due to changes in
constitution of partnership firm and
shareholding of company

Section 78 : change in constitution of firm

- Change occurred in the constitution of a firm,
- The firm shall not be entitled to carry forward and set off so much of the loss proportionate to the share of a retired or deceased partner.
- Do not apply to unabsorbed depreciation or other allowances.
- It applies only to business loss
CIT v Shri Subhalaxmi Mills Ltd (2001) 249 ITR 795 (SC).
CIT v Concord Industries Ltd (2001) 247 ITR 800 (SC)].

Change in profit (loss) sharing ratio amongst the existing partners

- Change in profit and loss sharing ratio does not result into change in the constitution of the firm for the purpose of section 78(1).
- Section 187(2) provides that where all the partners continue with a change in their respective shares or in the shares of some of them, it will be considered as change in constitution of a firm.
- Section 78(1) provides
 - Prohibition of carry forward or proportionate loss
 - In the hands of firm
 - due to change in constitution only when a partner retires or dies only .

Change in shareholding in Company (not being company in which public are substantially interested) Section 79

Notwithstanding anything contained in this chapter,

- a company, not being a company in which the public are substantially interested,
- Change in shareholding has taken place during the previous year
- No loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year,

unless-

- On the last day of the previous year, the shares of the company carrying not less than 51% of the voting power were beneficially held by persons
- Who beneficially held shares of the company carrying not less than 51% of the voting power on last day of the year or years in which the loss was incurred

Start –up Company Section 79

Conditions:

(a) Unless on the last day of the previous year, the shares of the company carrying not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than 51% of the voting power on the last day of the year or years in which the loss was incurred,

or

(b) If , all the shareholders of such company who held shares carrying voting power on the last day of the year or years in which the loss was incurred, continue to hold those shares on the last day of such previous year and such loss has been incurred during the period of seven years beginning from the year in which such company is incorporated.

Company (not being company in which public are substantially interested) Section 79

Shall not apply to a change in the voting power

Consequent upon:

- (a) the death of a shareholder
- (b) on account of transfer of shares by way of gifts to any relative of the shareholder making such gift
- (c) Foreign Company subsidiary :
 - Any change in the shareholding of an Indian company which is subsidiary of a foreign company
 - Arising as a result of amalgamation or demerger of a foreign company
 - Subject to the condition that 51 per cent of the shareholders of the amalgamating or demerged foreign company continue to remain the shareholders of the amalgamated or the resulting foreign company.
 - d) Company where a change is taken place pursuant to a resolution plan approved under the **IBC 2016**. after affording a **reasonable opportunity** of being heard to the jurisdictional **principal commissioner of commissioner**.

Shall not apply conti.....

e) To a company, and its subsidiary and the subsidiary of such subsidiary, where,—
(i) the Tribunal, on an application moved by the Central Government under section 241 of the Companies Act, 2013 (18 of 2013), has suspended the Board of Directors of such company and has appointed new directors nominated by the Central Government, under section 242 of the said Act; and

(ii) a change in shareholding of such company, and its subsidiary and the subsidiary of such subsidiary, has taken place in a previous year pursuant to a resolution plan approved by the Tribunal under section 242 of the Companies Act, 2013 (18 of 2013) after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.

(e) to a company to the extent that a change in the shareholding has taken place during the previous year on account of relocation referred to in the Explanation to clauses (viiac) and (viiad) of section 47. we.f 01.04.2022

Judicial Decisions

1. “beneficially held”

Should be understood as a registered holder and the expression “holder of share” denotes, in so far as the company is concerned, only a person who, as a shareholder, has his/her name entered on the register of members.

A shareholder has been equated with only the registered shareholder and not the beneficial shareholder [*Howrah Trading Co. Ltd v CIT* (1959) 36 ITR 215 (SC)].

2. “unconditionally” and “beneficially”

Voting power arising from the holding of those shares should be free and not within the control of some other shareholder and

the registered holder should not be a nominee of another.

Shree Chang Deo Sugar Mills Ltd v CIT (1961) 41 ITR 667 (SC)

It means that the shares are held by the holders for their own benefit only and without any control of another [*Raghuvanshi Mills Ltd v CIT* (1961) 41 ITR 613 (SC)].

Judicial Decisions

Carry forward of losses cannot be denied on ground of change in shareholding due to merger if management of company continues to remain with same set of people

CIT v. Select Holiday Resorts (P.) Ltd.

[2013] 35 taxmann.com 368/217 Taxman 110 (Mag.) (Delhi).

Tax Audit Information

32. (a) Details of brought forward loss or depreciation allowance, in the following manner, to the extent available:

S. No.	Assessment Year	Nature of loss/allowance (In rupees)	Amount as returned* (In rupees)	All losses/ Allowance not allowed under section 115BAA	Amount as adjusted by withdrawal of additional depreciation on account of opting for taxation under section 115BAA**	Amount as assessed (give reference to relevant order)	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

*If the assessed depreciation is less and no appeal pending than take assessed.

**To be filed in for assessment year 2020-21 only.

- (b) whether a change in shareholding of the company has taken place in the previous year due to which the losses incurred prior to the previous year cannot be allowed to be carried forward in terms of section 79.
- (c) whether the assessee has incurred any speculation loss referred to in section 73 during the previous year, if yes, please furnish the details of the same.
- (d) whether the assessee has incurred any loss referred to in section 73A in respect of any specified business during the previous year, if yes, please furnish the details of the same.
- (e) In case of a company, please state that whether the company is deemed to be carrying on a speculation business as referred in *Explanation* to section 73, if yes, please furnish the details of speculation loss if any incurred during the previous year.

Thanks

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