

What's New

Tax Insights



14 December 2022

Tribunal holds that brought forward business loss and unabsorbed depreciation would be set-off against foreign dividend income

In brief

The Income-tax Appellate Tribunal (Tribunal)¹ held that the taxpayer would be entitled for set-off of current year loss, brought forward business losses and unabsorbed depreciation of earlier years with foreign dividend income. Moreover, the taxpayer would be eligible for deduction under section 80G of the Income-tax Act, 1961 (the Act) from the gross total income.

In detail

Facts and issue

- The taxpayer, being an Indian company, was engaged in the business of providing investment and finance along with the promotion of new companies. It received dividend from its wholly owned foreign subsidiary company.
- The taxpayer had set-off current-year business loss and claimed deduction under section 80G (Chapter VI-A) of the Act against the foreign dividend income.

Revenue's contentions

- Foreign dividend income should be taxed on gross basis in view of the provisions of section 115BBD of the Act, without allowing any deduction or set-off of any loss.
- The aforesaid foreign dividend income should be taxed at the rate of 15% on gross basis under section 115BBD of the Act without allowing any set-off of losses and deduction under section 80G of the Act given the following:
 - Section 115BBD of the Act (15% rate on dividends) was inserted with a view to provide tax incentive to taxpayers. Earlier, the dividend received from foreign companies was taxed at a normal corporate tax rate.
 - Section 115BBD of the Act starts with a 'non-obstante' clause, which means that irrespective of any

¹ ITA No. 217/Mum/2020

other provision of the Act, the tax on dividend received from foreign companies is taxed at the rate of 15%.

- Resort cannot be made to the provisions of set-off of losses as per the Act because general provisions govern the set-off of losses, whereas a special provision has been inserted by way of section 115BBD of the Act (Generalis Specialibus non Derogant and Generalibus Specialia Derogant).
- With regard to the claim of deduction under section 80G of the Act, no deduction is available due to the provisions of section 115BBD(2) of the Act, which does not allow deduction of any expenditure or allowance in computing income by way of dividends referred to in section 115BBD(1) of the Act.
- Moreover, the foreign dividend income is the major source of income for the taxpayer during the year under consideration, and no expenses would be allowed as deduction for earning such foreign dividend income in view of the express prohibition provided in section 115BBD(2) of the Act.

Taxpayer's key contentions

- Section 115BBD of the Act uses the expression 'total income' which has to be computed after making adjustments for deductions, losses, depreciation, etc.
- Accordingly, the taxpayer should be entitled to set-off the losses and claim the deduction under Chapter VI-A of the Act while computing the 'total income', which includes foreign dividend income.

Tribunal's ruling and observations

- The taxpayer company is engaged in the business of making investment in various companies and promotion of companies in various fields. Hence it could be construed as an investment company. Accordingly, the resultant income in the form of dividend would partake the character of business receipts, though it is taxed under the head 'income from other sources' pursuant to specific provision contained in section 56(2)(i) of the Act. Accordingly, the taxpayer would be entitled to set-off of brought forward business loss and unabsorbed depreciation of earlier years against the said dividend income.
- The Mumbai bench of the Tribunal also examined the restrictions in section 115BBD of the Act. A plain reading of section 115BBD of the Act reveals that the starting point of the applicability of the said section is the determination of 'total income'. It is clear that only after determination of total income as per the provisions of the Act that the remaining foreign dividend income included in the said total income would be taxed at the rate of 15%, and the remaining income would be taxed at the normal rate of tax.
- The Tribunal found that the same issue in dispute was adjudicated by the Mumbai co-ordinate bench of the Tribunal in the case of Essar Shipping Limited². In this case it was held that the total income (as defined under section 2(25) of the Act) is required to be computed in the manner laid down in the Act, and it is to be computed independently, as per the provisions guiding the same as per Chapter IV of the Act. The set-off and carry forward of losses are required to be computed as provided under Chapter VI of the Act before setting-off any deductions from the total income as provided under Chapter VIA of the Act.
- Furthermore, the Mumbai bench of the Tribunal held that nowhere is there any restriction or curb provided in section 115BBD(2) of the Act that foreign dividend income cannot be set-off against the current year loss while computing the total income. On the contrary, there is another section 115BBDA of the Act, which deals with dividend received from domestic companies, wherein there is a specific restriction not only for the allowance of expenditure deduction or allowance but there is also a restriction on the set-off of loss.
- If sub section (2) of section 115BBD and sub section (2) of section 115BBDA of the Act are juxtaposed, then it is clear that in so far as dividend is received from a domestic company, not only is there restriction for not allowing the deduction of any expenditure or allowance but also the set-off of loss is also not allowable. On the contrary, there is no such restriction in the set-off of loss in sub section (2) of section 115BBD of the Act. Thus, it clearly shows that the intention of the legislature in putting restrictions in both the sections is different.
- In view of the above the following was held:

² DCIT v. Essar Shipping Limited ITA No. 821/Mum/2022

- The taxpayer would be entitled for set-off of current year loss with the foreign dividend income.
- The taxpayer would be entitled for set-off of brought forward business losses and unabsorbed depreciation of earlier years with the foreign dividend income.
- The taxpayer would be eligible for deduction under section 80G of the Act from the gross total income subject to the restrictions provided in that relevant section.

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