

[2019] 111 taxmann.com 10 (Mumbai - Trib.)/[2019] 179 ITD 436 (Mumbai - Trib.)

**INCOME TAX: Assessee amalgamated company is entitled to claim set off of carried forward MAT credit of its amalgamating company**

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**[2019] 111 taxmann.com 10 (Mumbai - Trib.)**

**IN THE ITAT MUMBAI BENCH 'A'**

**Ambuja Cements Ltd.**

**v.**

**Deputy Commissioner of Income-tax, LTU-1, Mumbai\***

SAKTIJIT DEY, JUDICIAL MEMBER  
AND G. MANJUNATHA, ACCOUNTANT MEMBER  
IT APPEAL NO. 3643 (MUM.) OF 2018  
[ASSESSMENT YEAR 2007-08]  
SEPTEMBER 5, 2019

**Section [115JAA](#), read with section [263](#), of the Income-tax Act, 1961 - Minimum alternate tax - Tax credit (Scope of) - Assessment year 2007-08 - Whether, assessee-amalgamated company is entitled to claim set off of carried forward MAT credit of its amalgamating company - Held, yes [Para 10] [In favour of assessee]**

## **FACTS**

- The assessee-company was engaged in the manufacture and sale of cement. For the assessment year under consideration, the assessee filed its return of income declaring total income of certain amount under normal provisions of the Act and book profit of certain amount. The assessee had claimed set off of carried forward Minimum Alternate Tax (MAT) credit of Rs. 20.12 crores pertaining to the assessment year 2006-07. However, while computing tax on book profit under section 115JB, the Assessing Officer allowed MAT credit under section 115JAA for an amount of Rs. 6.99 crores.
- The assessee challenged the reduction of MAT credit in an appeal filed before the first appellate authority. The Commissioner (Appeals) while deciding the issue of allowability of MAT credit directed the Assessing Officer to allow MAT credit as per law. In pursuance to the directions of the Commissioner (Appeals), the Assessing Officer passed order giving effect to the order of the Commissioner (Appeals) wherein he allowed MAT credit of Rs. 20.12 crores.
- The Commissioner, in exercise of power under section 263 examined the assessment records of the assessee. After examining the assessment records, she found that MAT credit of Rs. 6.99 crores pertained to ACEL which was amalgamated with the assessee. The Commissioner was of the view that MAT credit of the amalgamating company was not admissible for deduction at the hands of the assessee under section 115JAA as section 115JAA did not specifically provide for carry forward and set-off MAT credit of an amalgamating company. Accordingly, she directed the Assessing Officer not to grant the MAT credit of Rs. 6.99 crores.
- On appeal :

## **HELD**

- As could be seen from the facts on record, during the year under consideration, the assessee claimed set-off of carried forward MAT credit pertaining to the assessment year 2006-07. While completing the assessment originally under section 143(3) *vide* order, the Assessing Officer allowed MAT credit of Rs. 6.99 crores under section 115JAA. However, while challenging various additions/disallowances made in the assessment order before the Commissioner (Appeals), the assessee also raised a ground, claiming MAT credit of Rs. 58.10 crores, pertaining to the assessment year 2006-07. While deciding the aforesaid ground, the Commissioner (Appeals) has observed that there is no discussion in respect of this issue in the assessment order of the Assessing Officer. However, the Assessing Officer is directed to verify facts from records and allow credit as per Law. [Para 8]
- It is further evident, while giving effect to the aforesaid order of the Commissioner (Appeals), the Assessing Officer, in order dated 13-4-2015, has allowed MAT credit of Rs. 20.12 crores paid for the assessment year 2006-07. Admittedly, the aforesaid MAT credit comprises of Rs. 6.99 crores relating to ACEL, which amalgamated with the assessee by virtue of order passed by the Gujarat High Court and MAT credit of Rs. 13.13 crores, relating to the assessee. Therefore, the assessee's contention that the limitation should be counted from the original assessment order passed on 22-12-2010, is unacceptable. As regards the contention of the assessee that the order giving effect to passed by the Assessing Officer cannot be revised since it was passed as per the directions of the Commissioner (Appeals), such argument could not be sustained. As could be seen from the facts narrated above, before the Commissioner (Appeals) the assessee had raised a ground claiming MAT credit of Rs. 58 crores pertaining to the assessment year 2006-07. While deciding the said ground, the Commissioner (Appeals) has clearly observed that in the original assessment order, the Assessing Officer has not made any discussion on the issue. Accordingly, he directed the Assessing Officer to allow credit as per law. It is further seen, as against the MAT credit of more than Rs. 58 crore claimed by the assessee before the Commissioner (Appeals), the Assessing Officer allowed credit for Rs. 20.12 crores. In these circumstances, it cannot be said that the order giving effect to is nothing but an implementation of direction of the Commissioner (Appeals). In view of the aforesaid, exercise of jurisdiction under section 263 does not suffer on account of either limitation or merger with the Commissioner (Appeals)'s order. [Para 9]
- Having held so, it is now necessary to examine whether the order giving effect to passed by the Assessing Officer can be held to be erroneous and prejudicial to the interests of revenue so as to enable the Commissioner to exercise power under section 263. Undisputedly, the Commissioner has exercised the power under section 263 on the issue of allowance of MAT credit of Rs. 6.99 crores, relating to ACEL which amalgamated with the assessee company. It is the reasoning of the Commissioner that the provisions of section 115JAA allows set off of MAT credit only in respect of company in whose case such MAT credit has arisen. According to her, carry forward of MAT credit of amalgamating company cannot be allowed in case of amalgamated company. On a reading of the provisions of section 115JAA, there is no any such restriction with regard to allowance of MAT credit of an amalgamating company at the hands of the amalgamated company. Rather, a plain reading of the aforesaid provision reveals that MAT credit is allowed to be carried forward for a specific period. Carried forward MAT credit of the amalgamating company can be claimed by the amalgamated company. There cannot be two opinions that the assessee is entitled to claim carried forward MAT credit of the amalgamating company ACEL. It is necessary to observe, while completing the assessment in case of the amalgamating company ACEL in assessment year 2006-07, the Assessing Officer has also concluded that carried forward MAT credit of ACEL would be available in the hands of the present assessee. Keeping in view the assessment order passed in case of amalgamating company, the principle which emerges is, the carried forward MAT credit of amalgamating company can be taken credit of by amalgamated company. Viewed in the aforesaid perspective, the decision of the Assessing Officer in allowing set off of carried forward MAT credit of Rs. 6.99 crores at the hands of the assessee cannot be considered to be erroneous. Therefore, one of the conditions of section 263 is not satisfied. That being the case, the exercise of power under section 263 to revise such an order is invalid. Accordingly, the impugned order passed by the Commissioner is quashed. [Para 10]

## CASE REVIEW

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*Skol Breweries Ltd. v. Asstt. CIT* [ITA No. 2313 of 2017] (Mum.) (Trib.) (para 10) and *Adani Gas Ltd. v. Asstt. CIT* [ITA No. 2241 of 2011, dated 18-1-2016] (Ahd.) (Trib.) (para 10) *followed*.

## CASES REFERRED TO

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*CIT v. Alagendran Finance Ltd.* [2007] 162 Taxman 465/293 ITR 1 (SC) (para 4), *CIT v. ICICI Bank Ltd.* [2013] 212 Taxman 130/[2012] 19 taxmann.com 142/343 ITR 74 (Bom.) (para 4), *CIT v. Lark Chemicals Ltd.* [2015] 55 taxmann.com 446/230 Taxman 305/[2014] 368 ITR 655 (Bom.) (para 4), *CIT v. Dena Bank* [IT Appeal No. 2412 of 2013] (para 4), *CIT v. Infosys Technologies Ltd.* [2012] 18 taxmann.com 68/205 Taxman 53 (Mag.)/341 ITR 290 (Kar.) (para 4), *Skol Breweries Ltd. v. ACIT* [IT Appeal No. 2313 of 2017] (para 5), *Adani Gas Ltd. v. ACIT* [IT Appeal No. 2241 of 2011, dated 18-1-2016] (para 5), *Asstt. CIT v. Caplin Point Laboratories Ltd.* [IT Appeal No. 667 (Mds) of 2013, dated 31-1-2014] (para 5) and *Dy. CIT v. Caplin Point Laboratories Ltd.* [IT Appeal No. 889 (CHNY.) of 2014, dated 25-11-2016] (para 5).

**Yogesh Thar, Ms. Vidhi Doshi and Hardik Nirmal** for the Appellant. **Anadi Verma** for the Respondent.

## ORDER

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**Saktijit Dey, Judicial Member.** - Captioned appeal has been filed by the assessee challenging order dated 27th March 2018, passed by the learned Commissioner of Income Tax (LTU), Mumbai, for the assessment year 2007-08.

2. Brief facts are, the assessee company is engaged in the manufacture and sale of cement. For the assessment year under consideration, the assessee filed its return of income on 30th October 2007, declaring total income of Rs. 1311,74,12,026, under normal provisions of the Act and book profit of Rs. 1853,57,44,722. In course of assessment proceedings, the Assessing Officer while verifying the return of income and computation of income filed by the assessee found that the assessee had claimed Minimum Alternate Tax (MAT) credit of Rs. 20,12,95,237, pertaining to the assessment year 2006-07. However, while computing tax on book profit under section 115JB of the Act, the Assessing Officer allowed MAT credit under section 115JAA of the Act for an amount of Rs. 6,99,46,873. The assessee challenged the reduction of MAT credit in an appeal filed before the first appellate authority.

3. The learned Commissioner (Appeals) while deciding the issue of allowability of MAT credit directed the Assessing Officer to allow MAT credit as per law. In pursuance to the directions of learned Commissioner (Appeals), the Assessing Officer passed order dated 13th April 2015, giving effect to the order of learned Commissioner (Appeals) wherein he allowed MAT credit of Rs. 20,12,95,237. When the matter stood thus, learned CIT, in exercise of power under section 263 of the Act called for and examined the assessment records of the assessee. After examining the assessment records, she found that MAT credit of Rs. 6,99,46,873 (wrongly shown at Rs. 13,13,48,364 in the show cause notice issued under section 263 of the Act) pertains to Ambuja Cement Eastern Ltd. which amalgamated with the assessee. Being of the view that MAT credit of the amalgamating company is not admissible for deduction at the hands of the assessee under section 115JAA of the Act, learned CIT issued notice dated 23rd February 2018, requiring the assessee to explain why the assessment order allowing MAT credit of the amalgamating company should not be held as erroneous and prejudicial to the interests of revenue. In response to the aforesaid show cause notice, the assessee filed a detailed reply on 12th March 2018, stating that as per the provision of section 115JAA of the Act, there is no restriction in allowing the carried forward MAT credit of the amalgamating company, since, by virtue of amalgamation, the assessee steps into the shoes of amalgamating company. Thus, it was submitted, carried forward MAT credit of amalgamating company i.e., Ambuja Cement Eastern Ltd., was rightly allowed to the assessee. Of course, the assessee also raised various jurisdictional issues relating to exercise of power under section 263 of the Act. After considering the submissions of the assessee, however, learned CIT was not impressed and held that the carried forward MAT credit of amalgamating company i.e., Ambuja Cement Eastern Ltd. amounting to Rs. 6,99,46,873, cannot be set-off against the tax computed on the book profit of the assessee, as, section 115JAA of the Act does not specifically provide for carry forward and set-off MAT credit of an amalgamating company. Accordingly, she directed the Assessing Officer not to grant the MAT credit of Rs. 6,99,46,873. Of course, while doing so, she also rejected assessee's submissions challenging the exercise of jurisdiction under section 263 of the Act.

4. Shri Yogesh Thar, learned Counsel for the assessee submitted, exercise of power under section 263 of the Act to revise the order dated 13th April 2015, passed by the Assessing Officer giving effect to the order of the learned Commissioner (Appeals) is invalid as it was not an issue in dispute before learned Commissioner (Appeals). He submitted, in the order passed under section 143(3) of the Act, the Assessing Officer had allowed MAT credit of Rs. 6.99 crore relating to amalgamating company. Hence, it was not a subject matter

of dispute before learned Commissioner (Appeals). Therefore, if at all, the order which could have been revised by the learned CIT is the assessment order passed under section 143(3) of the Act and not the order passed by the Assessing Officer giving effect to the order of learned Commissioner (Appeals). Thus, he submitted, the order passed by the learned CIT is barred by limitation as the original assessment order which was passed on 22nd December 2010. Without prejudice, the learned Counsel submitted, the issue relating to MAT credit was subject matter of appeal before learned Commissioner (Appeals). He submitted, in the order giving effect to the learned Commissioner (Appeals)'s order, the Assessing Officer has simply implemented the directions of learned Commissioner (Appeals) with regard to the set-off of MAT credit. Therefore, the order giving effect to having been passed in pursuance to the directions of learned Commissioner (Appeals) cannot be revised under section 263 of the Act. In support of the aforesaid contention, the learned Counsel relied upon the following decisions:—

- (i) *CIT v. Alagendran Finance Ltd.* [\[2007\] 162 Taxman 465/293 ITR 1 \(SC\)](#);
- (ii) *CIT v. ICICI Bank Ltd.* [\[2013\] 212 Taxman 130/\[2012\] 19 taxmann.com 142/343 ITR 74 \(Bom.\)](#);
- (iii) *CIT v. Lark Chemicals Ltd.* [\[2015\] 55 taxmann.com 446/230 Taxman 305/\[2014\] 368 ITR 655 \(Bom.\)](#);
- (iv) *CIT v. Dena Bank* [IT Appeal No. 2412 of 2013]; and
- (v) *CIT v. Infosys Technologies Ltd.* [\[2012\] 18 taxmann.com 68/205 Taxman 53 \(Mag.\)/341 ITR 290 \(Kar.\)](#).

5. Further, the learned Counsel for the assessee submitted, there is no error in the decision of the Assessing Officer in allowing MAT credit of amalgamating company. Therefore, one of the conditions of section 263 of the Act is not satisfied. The learned Counsel drawing our attention to section 115JAA of the Act submitted, there is no restriction in the said provision to not allow MAT credit relating to amalgamating company. He submitted, even various judicial precedents have also held the aforesaid view. In this context, he drew our attention to the following decisions of the Tribunal:—

- (i) *Skol Breweries Ltd. v. ACIT* [IT Appeal No. 2313 of 2017] (Mum.) (Trib.);
- (ii) *Adani Gas Ltd. v. ACIT* [IT Appeal No. 2241 of 2011, dated 18-1-2016];
- (iii) *Asstt. CIT v. Caplin Point Laboratories Ltd.* [IT Appeal No. 667 (Mds) of 2013, dated 31-1-2014]; and
- (iv) *DCIT v. Caplin Point Laboratories Ltd.* [IT Appeal No. 889 (CHNY.) of 2014, dated 25-11-2016].

6. Thus, he submitted, exercise of power under section 263 of the Act to revise the assessment order is invalid, as assessee's claim of MAT credit relating to amalgamating company is also allowable on merit.

7. The learned Departmental Representative submitted, once the assessee had filed appeal against the original assessment order, it merges with the order passed by the learned Commissioner (Appeals), hence, ceases to be in existence. Therefore, the only surviving order of the Assessing Officer is the order giving effect to the order of learned Commissioner (Appeals). Thus, assessee's contention that proceedings under section 263 of the Act is barred by limitation cannot be accepted as it was completed within a period of two years from the date of order giving effect to the order of the learned Commissioner (Appeals). The learned Departmental Representative submitted, even assessee's contention that the order giving effect to passed by the Assessing Officer cannot be revised as it was as per direction of learned Commissioner (Appeals), is not acceptable since the issue was not decided by learned Commissioner (Appeals). As regards the merits of the issue, the learned Departmental Representative strongly relied upon the observations of learned CIT.

8. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. As could be seen from the facts on record, during the year under consideration, the assessee claimed set-off of carried forward MAT credit pertaining to the assessment year 2006-07. While completing the assessment originally under section 143(3) of the Act vide order dated 22nd December 2010, the Assessing Officer allowed MAT credit of Rs. 6,99,46,873, under section 115JAA of the Act. However, while challenging various additions/disallowances made in the assessment order before learned Commissioner (Appeals), the assessee also raised a ground, being ground no.26, claiming MAT credit of Rs.

58,10,53,744, pertaining to the assessment year 2006-07. While deciding the aforesaid ground, learned Commissioner (Appeals), in Para-27.1 of order dated 22nd August 2013, has observed as under:—

"There is no discussion in respect of this issue in the assessment order of the AO. However, AO is directed to verify facts from records and allow credit as per Law."

**9.** It is further evident, while giving effect to the aforesaid order of learned Commissioner (Appeals), the Assessing Officer, in order dated 13th April 2015, has allowed MAT credit of Rs. 20,12,95,237 paid for the assessment year 2006-07. Admittedly, the aforesaid MAT credit comprises of Rs. 6,99,46,873 relating to Ambuja Cement Eastern Ltd., which amalgamated with the assessee by virtue of order dated 21st November 2006, passed by the Hon'ble Gujarat High Court and MAT credit of Rs. 13,13,48,364, relating to the assessee. Therefore, assessee's contention that the limitation should be counted from the original assessment order passed on 22nd December 2010, in our view, is unacceptable. As regards the contention of learned Authorised Representative that the order giving effect to passed by the Assessing Officer cannot be revised since it was passed as per the directions of the learned Commissioner (Appeals), we are unable to sustain such argument. As could be seen from the facts narrated above, before learned Commissioner (Appeals) the assessee had raised a ground claiming MAT credit of Rs. 58,10,53,744, pertaining to the assessment year 2006-07. While deciding the said ground, learned Commissioner (Appeals) has clearly observed that in the original assessment order, the Assessing Officer has not made any discussion on the issue. Accordingly, he directed the Assessing Officer to allow credit as per law. It is further seen, as against the MAT credit of more than Rs. 58 crore claimed by the assessee before the learned Commissioner (Appeals), the Assessing Officer allowed credit for Rs. 20,12,95,237. In these circumstances, it cannot be said that the order giving effect to is nothing but an implementation of direction of learned Commissioner (Appeals). In view of the aforesaid, we hold that exercise of jurisdiction under section 263 of the Act does not suffer on account of either limitation or merger with learned Commissioner (Appeals)'s order.

**10.** Having held so, it is now necessary to examine whether the order giving effect to passed by the Assessing Officer can be held to be erroneous and prejudicial to the interests of Revenue so as to enable learned CIT to exercise power under section 263 of the Act. Undisputedly, learned CIT has exercised the power under section 263 of the Act on the issue of allowance of MAT credit of Rs. 6,99,46,873, relating to Ambuja Cement Eastern Ltd. which amalgamated with the assessee company. It is the reasoning of learned CIT that the provisions of section 115JAA of the Act allows set off of MAT credit only in respect of company in whose case such MAT credit has arisen. According to her, carry forward of MAT credit of amalgamating company cannot be allowed in case of amalgamated company. On a reading of the provisions of section 115JAA of the Act, we do not find any such restriction with regard to allowance of MAT credit of an amalgamating company at the hands of the amalgamated company. Rather, a plain reading of the aforesaid provision reveals that MAT credit is allowed to be carried forward for a specific period. In case of *Skol Breweries Ltd. (supra)*, the Tribunal, Mumbai Bench, while deciding identical issue has held that carried forward MAT credit of the amalgamating company can be claimed by the amalgamated company. Similar view has been expressed by the Tribunal, Ahmedabad Bench, in *Adani Gas Ltd. (supra)*. If we consider the issue in the light of the ratio laid down in the aforesaid decisions, there cannot be two opinions that the assessee is entitled to claim carried forward MAT credit of the amalgamating company Ambuja Cement Eastern Ltd. It is necessary to observe, while completing the assessment in case of the amalgamating company Ambuja Cement Eastern Ltd. in Assessment Year 2006-07, the Assessing Officer has also concluded that carried forward MAT credit of Ambuja Cement Eastern Ltd. would be available in the hands of the present assessee. Keeping in view the assessment order passed in case of amalgamating company as well as the decisions referred to above, the principle which emerges is, the carried forward MAT credit of amalgamating company can be taken credit of by amalgamated company. Viewed in the aforesaid perspective, the decision of the Assessing Officer in allowing set off of carried forward MAT credit of Rs. 6,99,46,873, at the hands of the assessee cannot be considered to be erroneous. Therefore, one of the conditions of section 263 of the Act is not satisfied. That being the case, the exercise of power under section 263 of the Act to revise such an order is invalid. Accordingly, we quash the impugned order passed by the learned CIT. Grounds no.1 and 2 are dismissed and ground no.3 is allowed.

**11.** In the result, appeal is allowed as indicated above.

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\*In favour of assessee.