IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
Ms. PADMAVATHY S.(ACCOUNTAT MEMBER)

I.T.A. No.3201/Mum/2014
(Assessment year : 2007-08)

United Spirits Limited, Bangalore (Successor to SW Finance Co Limited – formerly known as Shaw Wallace Breweries Limited), UB Tower, 6th Floor, No.24, Vittal Mallya Road, Bangalore-560 001 **PAN aaccm8043J**	vs	The Joint Commissioner of Income Tax, Special Range-7, Bangalore – (Present Jurisdiction) / Addl CIT-2(3) Mumbai – (Earlier jurisdiction of amalgamating company)
APPELLANT		**RESPONDENT**

Present for the Assessee	Shri Nikhil Tiwari
Present for the Department	Shri Ujjawal Kumar Chavan SR DR

Date of hearing	01/01/2024
Date of pronouncement	02/01/2024

O R D E R

Per PADMAVATHY S (AM):

This appeal has been preferred by the assessee against the order dated 18/02/2013 impugned herein passed by the Commissioner of Income-tax(A)-III,

Bangalore [in short, CIT(A)] under section 250 of the Income-tax Act, 1961 (in short, the Act) for the A.Y. 2007-08.

2. The assessee raised the following grounds of appeal:-

"1. That the order of the authorities below in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity, without jurisdiction, bad in law and all other known principles of law.

2. That the total income and the total tax liability computed is hereby disputed.

3. That the authorities below erred in disallowing merger expenses to the extent of Rs.31,25,792/-.

4. That the authorities below erred in not allowing MAT credit as per section 115JAA of the Act.

5. The appellant denies the liability for interest u/s.234B. Further interest u/s 234B if any can be levied only the returned income.

6. No opportunity has been given before levy of interest u/s.234B of the I.T. Act.

7. Without prejudice to the appellant's right of seeking waiver before appropriate authority the appellant begs for consequential relief in the levy of interest u/s.234BoftheAct.

8. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."

3. The assessee has also raised the following additional grounds of appeal:-

"ADDITIONAL GROUND OF APPEAL # 9
"Without prejudice to Ground No. 3, if Ground No. 3 is decided against the appellant, then the appellant may please be allowed 1/5th of the merger expenses in AY 2011-12 (if AY 2007-08 is considered as first year for the

purpose of sec 35DD) and the Learned AO may be directed to allow the same in AY2011-12.

4. The assessee is a public limited company. For the assessment year 2007-08, the assessee filed the return of income declaring a total income of Rs.21,14,36,451/- on 29/10/2007. The case was selected or scrutiny and the statutory notices were duly served on the assessee. The Assessing Officer completed the assessment by making a disallowance under section 14A to the tune of Rs.97,54,435/- and disallowance of merger expenses under section 35DD of the Act to the tune of Rs.31,25,792/-. Aggrieved, the assessee filed the appeal before the CIT(A). The CIT(A) gave partial relief to the assessee with regard to the disallowance under section 14A and confirmed the disallowance made under section 35DD of the Act. Aggrieved, the assessee is in appeal before the Tribunal.

5. Shaw Wallace Financial Services Ltd (SWFSL) and Shaw Wallace Breweries Ltd (SWBL) was merged by the order of Calcutta High Court dated 26.10/2006 and Bombay High Court dated 01/12/2006. The merger was effective from 01/04/2005. SWBL changed the name as 'Shaw Wallace Finance & Company Limited (SWFCL) which subsequently merged with United Spirits Ltd i.e. the present assessee in appeal. The assessee has incurred merger expenses of Rs.1,56,28,965/- and during the year under consideration claimed 2/5th of the said expenses under section 35DD which amounted to Rs.62,51,585/- in the computation of income. The Assessing Officer called on the assessee to explain why 2/5th of the expenses are claimed under section 35DD during the year under consideration when only 1/5th allowable. The assessee submitted before the Assessing Officer that the merger though was effective from 01.04.2005, the order approving the Scheme of merger was received in October 2006 and December,

2006 from the Hon'ble High Courts. The assessee further submitted that since the assessee could not claim the deduction in AY 2006-07, the assessee has claimed 2/5th i.e. 1/5th for A.Y. 2006-07 & 2/5th A.Y.2007-08. The Assessing Officer did not accept the submissions of the assessee and held that as per the provisions of section 35DD of the Act only 1/5th of the total expenses can be amortised in each for the years and accordingly, the Assessing Officer disallowed 1/5th of the expenses claimed additionally to the tune of Rs.31,25,793/-. On further appeal, the CIT(A) confirmed the disallowance.

6. With regard to admission of additional grounds, the Ld.AR submitted that the assessee has raised additional ground as a without prejudice plea to ground No.3 for the reason that if ground 3 is not allowed, the assessee should be allowed to treat AY 2007-08 as the first year of claim of the merger expenses. The Ld.AR submitted that the additional ground is purely legal and does not warrant verification of any new facts and, therefore, the same may be admitted for adjudication.

7. The Ld.DR, on the other hand, vehemently argued that the assessee has not raised this alternate plea for claiming 1/5th for 5 years beginning A.Y. 2007-08 before lower authorities and it has been claimed for the first time before the Tribunal. The Ld.DR, therefore, argued that the additional ground cannot be admitted.

8. We heard the parties with regard to the admission of additional grounds. The alternate plea raised by the assessee through the additional ground raised is pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon’ble Apex Court in the case of National

Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds..

9. The Ld.AR submitted that the orders of the High Courts were received during the financial yea relevant to A.Y. 2007-08 and, therefore, the assessee could not have claimed 1/5th of the merger expenses in AY 2007-08 though the merger was effected from 01/04/2005. The Ld.AR further submitted that the assessee is entitled to claim the expenses for a period of 5 years and therefore, the assessee has claimed 2/5th of the merger expenses during the year under consideration for 2 years and for the rest of the three assessment years has claimed only 1/5th. On the additional ground raised, the Ld.AR submitted that in case, the claim of 2/5th of the merger expenses is held against the assessee, then the assessee, alternatively should be allowed to treat AY 2007-08 as the first year of claim the expenses under section 35DD since the amalgamation has taken place in the financial year relevant AY 2007-08. The Ld.AR further submitted that if the alternate plea is not allowed, then the assessee would end up claiming only 4/5th of the merger expenses which is not in accordance with the provisions of section 35DD of the Act which allows the entire expenses.

10. The Ld.DR on the other hand submitted that there is no provision for the assessee under section 35DD to claim 2/5th of expenses since the provisions are very clear that the assessee should be allowed to claim only 1/5th of the merger expenses in each year. With regard to the additional ground, the Ld.DR submitted that if A.Y. 2007-08 is allowed to be treated as the first year of claim, then the last of 1/5th of the expenses would have to be allowed in AY 2011-12 which is not permissible since the assessee would not have made the claim in the said year

while filing the return of income. Therefore the ld DR submitted that the alternate plea of the assessee the assessee should not be entertained.

11. In rebuttal, the ld AR submitted that the issue raised through additional ground is with regard to whether AY 2007-08 could be allowed to be treated as first year for the purpose of claim of deduction under section 35DD and the treatment in AY 2011-12 is not the issue before the Tribunal in the current appeal.

12. We heard the parties and perused the materials on record. Before proceeding further, we will look into the provisions of section 35DD of the Act.

> ***"Amortisation of expenditure in case of amalgamation or demerger.***
>
> ***35DD.*** *(1) Where an assessee, being an Indian company, incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for* ***each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place****.*
>
> *(2) No deduction shall be allowed in respect of the expenditure mentioned in sub-section (1) under any other provision of this Act."*
>
> *(emphasis supplied)*

Section 35DD is unambiguous wherein it is provided that the expenses incurred wholly and exclusively for the purpose of amalgamation is to be allowed as a deduction in 5 equal installments *beginning from the year in which the amalgamation or demerger takes place*. Therefore the claim of 2/5th of the merger expenses by the assessee during the year under consideration cannot be allowed for the reason that there is no provision under section 35DD to claim 2/5th of the expenditure incurred towards amalgamation / demerger. Accordingly we dismiss Ground no.3 raised by the assessee in this regard.

13. The alternate prayer of the assessee through additional ground is to treat AY 2007-08 as the first year from which the merger expenses are claimed under section 35DD and allow the assessee to claim the expenses in next 4 assessment years subsequent to AY 2007-08. In assessee's case the Hon'ble High Courts of Calcutta and Bombay have approved the Scheme of merger on 26.10.2006 and on 01.12.2006 respectively i.e. during the financial year relevant to AY 2007-08. The appointed date of amalgamation as per the scheme of amalgamation is 01.04.2005 i.e. the financial year relevant to AY 2006-07 (page 77 of paper book). So the issue before us is whether the first year from which the assessee is entitled to claim deduction under section 35DD is the year relevant to appointed date of amalgamation or the year in which the court orders approving the scheme is passed. Section 35DD provides that the assessee is entitled to claim the deduction from the year in which the amalgamation takes place. On perusal of the Scheme of Amalgamation as approved by the Hon'ble High Courts, we notice that the appointed date is 01.04.2005 whereas the effective date is the date of last of approvals is received. Clause 3 of the Scheme (page 79 of the paper book) further provides that the Scheme shall be effective from the appointed date but shall be operative from the effective date. A combined reading of these clauses leads to the conclusion that though the amalgamation is effective from 01.04,2005, the amalgamation became operative only post the approvals from the Hon'ble High Court which happened during the financial year relevant to AY 2007-08. Therefore we see merit in the contention that AY 2007-08 should be the first of claim under section 35DD since the said year is when the amalgamation has taken place. A careful reading of language used section 35DD would support this view for the reason that the section does not mention that claim should begin from the year in

which the amalgamation is effective but uses the words from the previous year in which the amalgamation or demerger takes place. Given the facts and circumstances of the present case, we are of the considered view that the amalgamation has taken place in AY 2007-08 since the amalgamation is operational only after the approval of Hon'ble High Court which is received during the previous year relevant to AY 2007-08. We therefore tend to agree with the alternate plea of the assessee that AY 2007-08 be treated as the first year of claim of merger expenses for the purpose of section 35DD of the Act. Accordingly the additional ground is allowed in favour of the assessee.

14. Ground no.4 pertains to lower authorities not allowing the MAT credit as per section 115JAA. For AY 2006-07 the assessee has paid tax under section 115JB of the Act and accordingly claimed the credit for MAT during the year under consideration. The credit was denied for the reason that for AY 2006-07 the assessed income as per the normal provisions of the Act was more than the income as per section 115JB of the Act and therefore the assessing officer held that there was no MAT credit available to be setoff during the year under consideration.

15. The ld AR in this regard submitted that the assessee has opted for Vivad se Vishwas Scheme (VSVS) for AY 2006-07 and as per the Scheme, the assessees are given option to - (i) include the amount by which MAT credit to be carried forward is reduced in disputed tax and carry forward the MAT credit by ignoring such amount of reduction or alternatively (ii) carry forward the reduced MAT credit. The ld AR further submitted that the assessee has chosen the first option (ii) and therefore the MAT credit was allowed to be carried forward to be setoff during the year under consideration. The ld AR drew our attention to clarifications issued by

the Central Board of Direct Taxes (CBDT) on VSVS, where while answering Question No.53, the CBDT has clarified option (i) as under –

> *If loss is not allowed to be adjusted while calculating disputed tax, will that loss be allowed to be carried. Forward?*
>
> *As per the amendment proposed in Vivad se Vishwas, in a case where the dispute in relation to assessment year relates to reduction of Minimum Alternate Tax (MAT) credit or reduction of loss or depreciation, the appellant shall have an option either to (i) include the amount of tax related to such MAT credit or loss or depreciation in the amount of disputed tax and carry forward the MAT credit or loss or deprecation or (ii) to carry forward the reduced tax credit or loss or depreciation. CBDT will prescribe the manner of calculation in such cases.*

16. The ld AR in this regard also drew our attention to the relevant clauses in Form 1as submitted by the assessee under VSVS (pages 133 to 143 of paper book), Form 4 & Form 5 of VSVS (page 144 & 145 of paper book) to evidence the claim that the assessee has opted for (i) above and accordingly submitted that the assessee is entitled to claim credit for MAT in the year under consideration.

17. The ld DR submitted that the issue contended has not been factually examined by the lower authorities and accordingly prayed that the issue may be remitted back to the assessing officer for verification.

18. We heard the parties and perused the material on record. We notice from the above extracted relevant clauses & clarifications of VSV Scheme it is clear that the if the assessee chooses to include the amount of tax related to such MAT credit in the amount of disputed tax then the assessee shall be allowed to carry forward the MAT credit. It is the submission of the assessee that the assessee has chosen the said option. It is important to verify based on evidences and supporting documents relating submitted under VSVS by the assessee before allowing the MAT credit to be adjusted in the tax for the year under consideration. We notice that the lower

authorities have denied the claim of the assessee for the reason that the claim is not adequately substantiated. Therefore we remit the issue back to the assessing officer with a direction to verify the claim of the assessee based on the documentary evidences and allow the claim in accordance with law. Needless to say that the assessee be given an opportunity of being heard. It is ordered accordingly.

19. Ground No.1, 2 and 8 are general. Ground No.5 to 7 are consequential. These grounds therefore do not need separate adjudication.

20. In result the appeal of the assessee is partly allowed.

Order pronounced in the open court on 02/ 01/2024

(VIKAS AWASTHY)	(PADMAVATHY S.)
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt : 02nd January, 2024
Pavanan

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on	01/01/24		Sr.PS
2.	Draft placed before author	01/01/24		Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed	Yes		