

CARRY FORWARD OF LOSS

Carry forward of loss is a valuable right, which requires to be monitored. Such adjustment is available not only for business losses but also for loss under the head property as well as capital gains subject to limitations.

Cash loss v. depreciation

- Excess of depreciation over operating profits is unabsorbed depreciation. Loss before depreciation is operating loss known as cash loss.
- Depreciation is admissible to the extent of available profits during the year with balance being carried forward indefinitely.
- Current operating losses including current depreciation can be set off in the same year against other income including capital gains except income from speculation.
- Right to unabsorbed depreciation unlike carried forward business loss is available against any income from any other source barring speculation even as ruled in the case of CIT v. Virmani Industries Pvt. Ltd. (1995) 216 ITR 607 (SC). But carried forward business loss can be set off only against business income, though not necessarily against the income from same business, while carried forward depreciation can be set off against any other income.

Period of set off

- Depreciation can be carried forward indefinitely
- Business loss and loss from property can be carried forward for set off for eight years against the income under the respective heads.
- Loss in speculation business which is not set off in the current year can be carried forward and set off for four assessment years.
- Loss under the head capital gains can be carried forward for eight assessment years to be set off only against capital gains. But long term capital losses cannot be set off against a short term capital gains, but short term capital loss can be set off against long term capital gains.
- In the case of losses under other sources, such losses can be set off against other heads of income, except speculation, in the same year, but it cannot be carried forward with the exception only for income from horse racing, which can be carried forward in the case of owner of the horses for four years.
- Extension in period of set off is available for sick industrial undertakings.

Restrictions and relaxations

There are restrictions in respect of carried forward losses for firms and companies.

- In the case of firms, reconstitution will lose the proportionate loss pertaining to the partner, who does not continue in the firm during the year of profit.
- Similarly in the case of unlisted companies, the benefit of set off of loss may be lost, if the shareholding pattern does not continue to the extent of 51% as between the year of loss and year of set off.
- But these conditions have no application for depreciation loss.

There are special provisions giving the benefit of set off for successors to carry forward losses and depreciation in consequence of amalgamations, demergers and takeover of business by a company from an individual or a firm subject to conditions set out in section 72A, but limited only to losses from industrial undertaking narrowly defined under the section.

There are special provisions for banks on their merger. There is, therefore, a compendious law relating to conditions for availing the valuable right of set off.

Beware of time limit for return

The most important condition for having to avail past losses is timely filing of voluntary return. However, if the loss is solely on account of depreciation, there is a Board Instruction taking the view that the right is not affected because of delayed return vide Instruction No.F.No.13/8/69-IT(A2) dated 28th June 1969. Though this circular was in the context of reference to loss under section 80 for return filed under Sec 139, the present expression covers loss return under section 139(3) making cross references to Sections 72,73, 74 and 74A. Even so, the sections referred do not relate to carried forward depreciation, which is continued to be governed by Sec 32(2).

One more important fact to be remembered is the draconian section 80AC, which bars deduction for incentives under sections 80IA, 80IAB and 80IB, 80IC, 80ID and 80IE for delayed returns. One may also remember the interest that may become payable under Sec 234A for delayed returns. Timely return is, therefore, important even for these reasons.

If the accounts could not be compiled in time or accounts are not audited or such other contingencies, which makes computation of income impossible then in view of the valuable right to have the loss carried forward and to avail incentives, which may be lost by delayed return, it is advisable to file estimated loss return, where loss is anticipated, though such return may be both defective and incorrect. If the original return filed in time is a loss return, revision of such loss return even of a larger loss beyond the time limit would be in order.

Section 139(9) provides for substitution of a defective return by a proper return on intimation from the Assessing Officer. This subsection should have equal application for *suo motu* substitution of a valid return for defective return. Where there has been omission even to file defective return, there is scope for application to the Board for relaxation of the time limit upto the date on which the delayed return is filed on assessee showing that there has been genuine hardship and the delay had occurred in spite of due diligence on the part of the assessee. Karnataka High Court in *Associated Electro Ceramics v. Chairman, CBDT* (1993) 201 ITR 501 (Kar) has also specifically pointed out, that the Board has the power to condone the delay in filing return, so as to avail carried forward losses. The Board has decided after reference to the Ministry of Law to accept the decision of the High Court vide Circular No. 8 of 2001 dated 16th May 2001 (2001) 249 ITR (St.) 112.

Conclusion

The Direct Taxes Code Bill has shifted the provisions in line with the new arrangement of sections, but the law will substantially remain the same, so that the complexities under the present law will be carried over to the new law. There is responsibility on the part of professionals to caution their clients as to the need for ensuring timely return and for observing other conditions relating to this valuable right of set off, so that a loss suffered does not become a dead loss and is available for set off offering some comfort in a succeeding year.

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