

**ARTICLE**  
**INCENTIVES FOR BUSINESS RE-ORGANISATION**  
**BY WAY OF AMALGAMATION UNDER SECTION 72A**  
**OF THE INCOME TAX ACT, 1961**

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**1. Introduction**

Section 72A of the Income-Tax Act, 1961, contains provisions relating to carry-forward and set-off of accumulated loss and unabsorbed depreciation allowance in case of re-organisation of business by way of amalgamation or demerger, etc. Section 72A has undergone a number of amendments since the year it was inserted in the Income-Tax Act, vide Finance (No.2) Act, 1977, with effect from 1.4.1978. Originally, the heading of S.72A was, “Provisions relating to carry-forward and set-off of accumulated loss and unabsorbed depreciation allowance in certain cases of amalgamation.”

From the Budget speech of the Finance Minister, the Notes on Clauses of the Finance (No.2) Bill of 1977 and the Memorandum explaining the provisions of the said bill, it would appear that sickness among industrial undertakings was regarded as a matter of grave national concern. The reason for the same was that closure of any sizable manufacturing unit in any industry entailed social costs in terms of loss of production and unemployment, as also waste of valuable capital assets. In this context, it may be stated that it was seen through experience that taking over of such sick units by the Government was not always a satisfactory or economical solution. On the other hand, it was felt that a more effective method would be to facilitate amalgamation of sick industrial units with sound ones by providing incentives and removing impediments in the way of such amalgamation. Such a course of action would not merely relieve the Government of uneconomical burden of taking over and running sick units but save the Government from social costs in terms of loss of production and unemployment. With the aforesaid objective in view, in order to facilitate the merger of sick industrial units with sound ones by offering an incentive in respect thereof, S.72A was brought into the Income-Tax Act, 1961.

Before the introduction of S.72A, under the existing provisions of the Income-Tax Act, the benefit of carry-forward of business loss and set-off of the same against the profits of the following years from any business carried on by the assessee, was allowed. Such loss can be carried forward for a period of eight assessment years (A.Ys) immediately succeeding the assessment year for which the loss was first computed. The benefit of carry-forward and set-off of business loss is, however, not available unless the assessee continued to carry on some business.

Besides, only the assessee who incurred the loss has the right to carry-forward the same, so that the successor in business cannot claim to carry-forward the loss incurred by his predecessors. Similarly, if a business carried on by one assessee is taken over by another, the unabsorbed depreciation allowance due to the predecessor in business cannot be carried forward by the successor in business and set-off against his profits in subsequent years.

The erstwhile provisions of S.72A provided that the accumulated loss or unabsorbed depreciation allowance of the amalgamating company was treated to be a loss or allowance for depreciation of the amalgamated company, although a successor-in interest, would be entitled to carry forward and set off the accumulated loss and unabsorbed depreciation allowance of the amalgamating company, only where the amalgamating company was not, immediately before such amalgamation, financially viable and the amalgamation was in public interest – *CIT Vs. Mahindra and Mahindra Ltd.*[1983] 144 ITR 225(SC).

The erstwhile S.72A(1) provided that where there had been an amalgamation of a company owning an industrial undertaking or a ship with another company and the Central Government, on the recommendation of the specified authority, was satisfied that the conditions specified in this behalf were fulfilled, **the Central Government would make a declaration to that effect** and thereupon the accumulated loss on unabsorbed depreciation allowance of the amalgamating company was deemed to be the loss or the unabsorbed depreciation of the amalgamated company for the previous year in which amalgamation was effected.

## 2. Declaration to be made by the Central Government

The declaration referred to in the preceding paragraph was to be made by the Central Government only if the following conditions were fulfilled:-

- (a) the amalgamating company was not, immediately before such amalgamation, financially viable by reason of its liabilities, losses and other relevant factors;
- (b) the amalgamation was in the public interest;
- (c) such other conditions as the Central Government, by notification in the Official Gazette, specified to ensure that the benefit under this section was restricted to amalgamations, which would facilitate rehabilitation or revival of the business of amalgamating company.

Even after a **declaration** had been made by the Central Government under the sub-section (1) of section 72A, the accumulated loss would not be set off and the unabsorbed depreciation would not be allowed in the assessment of the amalgamated company unless the following further conditions were fulfilled:-

- (i) during the previous year relevant to the assessment year for which such set-off or allowance was claimed, the business of the amalgamating company was carried on by the amalgamated company without any modification or reorganization or with such modification or reorganization as was approved by the Central Government to enable the amalgamated company to carry on such business more economically or more efficiently;

- (ii) the amalgamated company furnished, along with its return of income for the assessment year for which such set-off or allowance was claimed, a certificate from the specified authority to the effect that adequate steps had been taken by that company for the rehabilitation or revival of the business of the amalgamating company.

### 3. Amendments of Section 72A

The provisions of S.72A were subjected to a number of amendments, which may be summarized as follows:-

- (i) *Finance Act 1978, with effect from 1.4.1978*

This Act inserted a new sub-section (3) in S.72A, enabling the companies concerned to obtain an advanced ruling from the specified authority.

- (ii) *The Finance(No.2) Act, 1998*

By this Act, two new sub-sections (4) and (5) were inserted with effect from 1.4.1999, in S.72A before the Explanation.

- (iii) *Finance Act, 1999*

The erstwhile S.72A was **substituted** by the Finance Act, 1999, with effect from 1.4.2000. This was done with a view to enabling the Indian Industry to restructure itself in order to become globally competitive.

The erstwhile heading of S.72A was also changed to – “Provisions relating to carry-forward and set-off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.” **Vide the aforesaid amendment, with effect from 1.4.2000, S.72A was drastically amended.** The aforesaid amendments have been explained, vide Circular No.779, dated 14.9.1999.

- (iv) *Finance Act 2003*

Vide Finance Act, 2003, sub-sections (1) and (2) of S.72A were substituted with effect from 1.4.2004. Besides, after existing S.72A(7)(b), another clause (c) was inserted, providing the definition of “Specified Bank”.

### 4. Changes brought about by Finance Act 1999, with effect from 1.4.2000

As already pointed out, provisions of erstwhile S.72A were drastically amended vide Finance Act, 1999, with effect from 1.4.2000. In this context, it would be appropriate to reproduce the relevant part of the Explanatory Notes on Finance Bill 1999, relating to amendment S.72A[103 Taxman(St.)79]. The same are reproduced as follows:-

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 Clause 38 seeks to substitute S.72A of the Income-Tax Act relating to carry-forward and set-off of accumulated loss and unabsorbed depreciation in certain cases of amalgamation.

Under the existing provisions, the set-off of carry-forward loss and unabsorbed depreciation are subject to the following conditions, namely:-

- (i) the amalgamation is in respect of a company owning an industrial undertaking or a ship with another company and the specified authority recommends to the Central Government that the amalgamating company was not financially viable by reason of liabilities, losses, etc. immediately before amalgamation;
- (ii) the amalgamation was in public interest.

The Central Government have power to ensure that amalgamation would facilitate the rehabilitation or revival of the amalgamating company. The loss or unabsorbed depreciation is not allowed to be set off unless the business of the amalgamating company is carried on by the amalgamated company without any modification or reorganization or with such modification or reorganization as approved by the Central Government. The amalgamated company is also required to furnish a certificate from a specified authority about adequate steps having been taken to rehabilitate the business of amalgamating company. The company is also required to submit a proposed scheme of amalgamation to the specified authority for the satisfaction of the latter in regard to various conditions laid down in the section.

It is proposed to amend the said provisions relating to carry-forward of loss or unabsorbed depreciation in cases of amalgamation. The new provisions, inter alia, provide for the following:-

- (a) the amalgamated company holds at least three-fourths in value of assets of the amalgamating company acquired as a result of amalgamation for five years from the effective date of amalgamation;
- (b) the amalgamated company continues the business of the amalgamating company for at least five years. The Central Government may notify such other conditions as may be necessary. It is further proposed to provide that in case, the above specified conditions are not fulfilled that part of carry-forward of loss and unabsorbed depreciation remaining to be utilized by the amalgamated company shall lapse and such loss or depreciation as has been set-off shall be treated as the income in the year in which the failure to fulfil the conditions occurs.

It is further proposed that where there has been a demerger of an undertaking, the accumulated loss and unabsorbed depreciation directly relatable to the undertaking transferred by the demerged company to the resulting company shall be allowed to be carried forward and set off in the hands of the resulting company.

*If the accumulated loss or unabsorbed depreciation is not directly relatable to the undertaking, the same will be apportioned between the demerged company and the resulting company in the same proportion in which the value of the assets have been transferred.*

*It is also proposed to confer powers upon the Central Government to notify such conditions as it considers necessary to ensure that the demerger or amalgamation is for genuine business purpose.*

*The existing conditions regarding carry-forward and set-off of accumulated loss and unabsorbed depreciation in the case of a reorganization of business whereby a firm or proprietary concern is succeeded by the company will continue along with the definition of accumulated loss and unabsorbed depreciation.*

*This amendment will take effect from 1<sup>st</sup> April, 2000 and will, accordingly, apply in relation to the assessment year 2000-01 and subsequent years.*

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It may be seen from the aforesaid amendment that a very stringent and difficult condition relating to declaration by the Central Government on the recommendation of the specified authority, for claiming the benefit of carry-forward and set-off business loss and unabsorbed depreciation allowance, has been done away with. In other words, the conditions in this respect have now been made simpler and easily workable.

## 5. Amendments brought about by Finance Act, 1999, explained

The amendments brought about by the Finance Act, 1999, in S.72A have been explained vide Circular No.779, dated 14.9.1999. Para (56) of the aforesaid Circular deals with “**Business reorganization – Extensive amendments in relation to amalgamation, demerger and slump sale**”. The relevant parts of the aforesaid para(56) are reproduced as follows:-

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### **Business re-organization – Extensive amendments in relation to amalgamation de-merger and slump sale.**

**56.1** The business and economic environment of the country has thrown up the need for simplification and rationalisation of laws relating to business re-organization for rationalisation of the production system and better utilization of resources, which have become necessary with a view to enabling the Indian industry to restructure itself to become globally competitive. It was in this background that the tax concessions to conversion of firms into companies or proprietary concerns into companies were provided in Finance (No.2) Act, 1998 and were widely welcomed. Following this up, the Act has carried out a number of amendments for the entire gamut of business reorganization. These include rationalisation of the existing provisions relating to amalgamation of companies, new provisions

relating to de-merger of companies and sale or transfer of business as a going concern through slump sale.

**56.2** Amalgamation in relation to the companies has been defined under the existing provisions of the Income-Tax Act to mean the merger of one or more companies with another company or the merger of two or more companies to form one company. There are a number of provisions in the Income-Tax Act having bearing on amalgamation. Demerger is relatively a new phenomenon in the Indian corporate sector. A de-merger is a reorganization of a company where all the existing assets and liabilities are divided into one or more additional entities leading to resulting companies. While there are no specific provisions under the Companies Act governing de-mergers, some transactions of this nature do take place through schemes of compromise or arrangement under sections 391 to 3 of the Companies Act and these are sanctioned by the High Courts. A slump sale is a form of reorganization where an undertaking or a division is transferred from one person to another for a lump sum consideration without values being assigned to the individual assets and liabilities transferred.

**56.3** Extensive amendments in the Income-Tax Act have been carried out on the basis of the following broad principles:- (a) The restructuring shall not attract additional liability to tax and also not result in the withdrawal of relief and concessions available to the existing unit. (b) The tax benefits and concessions available to an undertaking of a company shall continue to be available to the undertaking on transfer of the same while concessions and benefits that are available to the transferor company as an entity and not to the undertaking of the company proposed to be transferred, should remain with the transferor company. (c) Tax benefits to such business reorganizations should be limited to the transfer of business as a going concern and not to the transfer of specific assets, which would amount to sale of assets and not a business reorganization.

**56.4** The amendments inserted by the Act to the Income-Tax Act on the above subject are discussed individually as under:-

(i) Clause (1B) of section 2, which defines amalgamation in relation to companies and provides for the manner in which the amalgamation will take place has been amended to provide that instead of shareholders holding nine-tenths in value of shares, shareholders holding three-fourth in the value of shares shall be required to become shareholders of the amalgamated company.

(ii) to (vii) ....

(viii) Section 32 of the Income-Tax Act has been amended substituting the fourth proviso to clause (ii) of sub-section (1), The existing provisions provided that the aggregate depreciation allowable to predecessor and successor business entities in the case of succession or amalgamation shall not exceed in any previous year, the deduction allowable at prescribed rates, as if succession or

amalgamation has not taken place. Further, the deduction on account of depreciation shall be apportioned between the predecessor and the successor entities in the ratio of number of days for which the assets were used by them. These provisions have now been extended to a de-merger involving de-merged and resulting companies.

(ix) to (xxi) .... ..

**(xxii) The Act has substituted section 72A of the Income-Tax Act relating to carry forward and set off of accumulated loss and unabsorbed depreciation in certain cases of amalgamation. According to the new provisions, the carry forward of loss or unabsorbed depreciation in cases of amalgamation will be allowed subject to the following conditions. The amalgamated company shall hold at least three-fourths in the value of assets of the amalgamating company acquired as a result of amalgamation for at least five years. The amalgamated company shall continue the business of the amalgamating company for at least five years. The Central Government has been empowered to notify such other conditions as may be necessary to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose. It has also been provided that if the specified conditions are not complied with, set-off of carried forward loss or allowance of depreciation already availed will be treated as income of the year in which the conditions are not complied.** It has also provided that in the case of de-merger, the accumulated loss and unabsorbed depreciation directly relatable to the undertaking being transferred shall be allowed to be carried forward and set off in the hands of the resulting company. If the accumulated loss or unabsorbed depreciation is not directly relatable to the undertaking, the same shall be apportioned between the de-merged company and the resulting company in the same ratio in which the value of the assets have been transferred. Power has also been conferred on the Central Government to notify such conditions, as it considers necessary to ensure that the de-merger is for genuine business purposes.

**The cumulative conditions of holding of assets and the continuance of same business for a period of five years for the amalgamation suggest that assets in question would be fixed assets only as the continuance of business would necessarily entail change of inventories etc. The term "value" connotes "book value".**

The existing conditions regarding the carry forward and set off of accumulated losses or unabsorbed depreciation in the case of reorganization of business whereby a firm or proprietary concern is succeeded by the company has been retained along with the definition of accumulated loss or unabsorbed depreciation.

(xxiii) to (xxv).... ..

**56.5** These amendments will take effect from 1st day of April, 2000 and will, accordingly, apply to Assessment Year 2000-2001 and subsequent years.

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## 6. **Amendment of S.72A vide Finance Act, 2003**

As already explained that certain amendments were brought about in S.72A vide Finance Act, 2003, with effect from 1.4.2004. The aforesaid amendments have been explained in the Notes on Clauses of Finance Bill, 2003, 127 Taxman (Statute) p.144. The same are reproduced as follows:-

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*Clause 30 seeks to amend S.72A of the Income-Tax Act relating to carry-forward and set-off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.*

*Under the existing provision contained in sub-section(1) of the said section, when a company owning an industrial undertaking or a ship amalgamates with another company, the amalgamated company will be allowed to carry forward and set off accumulated losses and unabsorbed depreciation of the amalgamating company. Sub-section (2) of the said section specifies certain conditions required to be fulfilled for availing of the benefit under sub-section (1).*

*It is proposed to substitute sub-sections (1) and (2) of the said section.*

*The proposed new sub-section (1) provides that where there has been an amalgamation of a company owning an industrial undertaking or a ship or a hotel with another company or an amalgamation of a banking company referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 with a specified bank, then, notwithstanding anything contained in any other provision of the Income-Tax Act, the accumulated loss and unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of the Income-Tax Act relating to set-off and carry-forward of loss and allowance for depreciation shall apply accordingly.*

*The proposed new sub-section(2) provides that the accumulated loss, notwithstanding anything contained in sub-section (1), shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless the conditions specified in that sub-section are fulfilled by the amalgamating company and amalgamated company, i.e. the amalgamating company (a) has been engaged in the business for at least three years during which the accumulated loss has occurred or the unabsorbed depreciation has accumulated; (b) has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation and the amalgamated company (i) holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation; (ii) continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation; (iii) fulfils such other conditions as may*

*be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose. The conditions to be fulfilled by the amalgamated company are on the lines of existing provisions contained in sub-section (2).*

*It is also proposed to define the expression "specified bank" used in new sub-section (1).*

*These amendments will take effect from 1<sup>st</sup> April, 2004 and will, accordingly, apply in relation to the assessment year 2004-05 and subsequent years.*

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From the aforesaid Explanatory Notes, it may be seen that the benefit of provisions S.72A has been extended to the amalgamation of a company owning a hotel with another company or an amalgamation of a banking company with a specified bank. This is as per the amended provisions of S.72A(1).

Similarly, provisions of S.72A(2) have also been amended vide Finance Act, 2003. Section 72A (2) lays down conditions for the aforesaid benefit of carry-forward and set-off of business loss and unabsorbed depreciation allowance. These conditions are as follows:-

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(a) *the amalgamating company—*

- (i) has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years;*
- (ii) has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation;*

(b) *the amalgamated company—*

- (i) holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation;*
  - (ii) continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation;*
  - (iii) fulfils such other conditions as may be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.*
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## **7. Conditions prescribed under section 72A (2) (b) (iii)**

As per the provisions of S.72A(2)(b)(iii), the Central Government has prescribed some additional conditions in this behalf under Rule 9C of the I.T. Rules, 1962, which are reproduced as follows:-

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9C The conditions referred to in clause (iii) of sub-section (2) of section 72A shall be the following, namely:

- (a) the amalgamated company, owning an industrial undertaking of the amalgamating company by way of amalgamation, shall achieve the level of production of at least fifty percent 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:

Provided that the Central Government, on an application made by the amalgamated company, may relax the condition of achieving the level production or the period during which the same is to be achieved or both in suitable cases having regard to the 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) the amalgamated company shall furnish to the Assessing Officer a certificate in Form No.62, duly verified by an accountant, with reference to the books of accounts and other documents showing particulars of production, along with the return of income for the assessment year relevant to the previous year during which the prescribed level of production is achieved and for subsequent assessment years relevant to the previous years falling within five years from the date of amalgamation.

*Explanation* – For the purposes of this rule, -

- (a) “installed capacity” means the capacity of production existing on the date of amalgamation; and  
 (b) “accountant” means the accountant as defined in the Explanation below sub-section (2) of section 288 of the Income-Tax Act, 1961.

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Thus, as per Rule 9C(a), the amalgamated company shall achieve the level of production of at least fifty per cent of the installed capacity of the said industrial 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, to ensure the revival of the business of amalgamating company or to ensure that the amalgamation is for genuine business purpose.

As per Rule 9C(b), the amalgamated company has to furnish to the AO, a certificate in Form No.62, duly verified by an Accountant, with reference to the books of accounts and other documents, showing particulars of production, along with the return of income for the AY relevant to the previous year, during which, the prescribed level of production is achieved and for subsequent AYs relevant to the previous years, falling within five years from the date of amalgamation.

**8. Withdrawal of benefit, if the condition under section 72A (2) are not fulfilled – S.72A(3)**

As per the provisions of S.72A(3), if the conditions prescribed under section 72A (2), are not complied with, the set-off of carried forward loss or allowance of depreciation in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company chargeable to tax for the year in which such conditions are not complied with.

In other words, if the conditions under section 72A(2), are not complied with then the benefit in the form of set-off of carried forward loss or allowance of depreciation, already availed of, will be withdrawn in the year in which the conditions are not complied with and the aforesaid benefit will be treated as the income of such year.

**9. Summary of the provisions for availing of the benefit under section 72A in respect of amalgamation**

In the light of the aforesaid discussion, the conditions for the carry-forward and set-off of accumulated loss and unabsorbed depreciation in case of amalgamation may be summarized as follows:-

I. In case of amalgamation of an industrial undertaking or a ship or a hotel with another company or an amalgamation of a banking company with a specified bank, the accumulated loss and unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or depreciation of the amalgamated company for the previous year, in which the amalgamation is effected and the other provisions relating to the set-off and carry-forward of loss and allowance of depreciation shall apply accordingly – S.72A(1)

II. The aforesaid benefit relating to carry-forward and set-off of accumulated loss and unabsorbed depreciation in case of amalgamation will be allowed subject to the following conditions:-

- (A) The amalgamated company has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years – S.72A (2) (a) (i).
- (B) The amalgamating company has held continuously as on the date of amalgamation, at least three-fourth of the book value of fixed assets by it two years prior to the date of amalgamation – S.72A(2)(a)(ii).
- (C) The amalgamated company holds continuously for a minimum period of five years from the date of amalgamation, at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation – S.72A(2) (b) (i).
- (D) The amalgamated company continues the business of amalgamating company for a minimum period of five years from the date of amalgamation – S.72A(2) (b) (ii).

- (E) The amalgamated company shall achieve the level of production of at least 50% of the installed capacity of the said industrial 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, to ensure the revival of the business of amalgamating company or to ensure that the amalgamation is for genuine business purpose- S.72A(2)(iii)r.w.Rule 9C(a).
- (F) Further the amalgamated company has to furnish to the AO, a certificate in Form No.62, duly verified by an Accountant, with reference to the books of accounts and other documents, showing particulars of production, along with the return of income for the AY relevant to the previous year, during which the prescribed level of production is achieved and for subsequent AYs relevant to the previous years, falling within five years from the date of amalgamation- S.72A(2)(iii) r.w. Rule 9C(b).

III. If the specified conditions are not complied with, the set-off of carried forward loss or allowance of depreciation already availed of, will be treated as income of the amalgamated company for the year in which the conditions are not complied with – S.72A(3).

## 10. Provisions of S.72A regarding demerger

Section 72A(4), deals with the benefit of carry-forward and set-off of loss and unabsorbed depreciation in case of demerger.

This provision provides incentive in case of demergers necessitated for the reorganization of business. It may also be stated here that such demerger should be for genuine business purposes.

## 11. Conclusion

The discussion in the aforesaid paras lay down clear guidelines in respect of amalgamation of companies etc. in the interest of business reorganization, so as to avail of the benefit of carry-forward and set-off of business loss or unabsorbed depreciation in the hands of the resultant entity after such amalgamation or demerger.

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