IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 25.02.2025

\+ **W.P.(C) 399/2022**

CARGILL INDIA PRIVATE LIMITED ..... Petitioner

versus

CENTRAL BOARD OF DIRECT TAXES. ..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr. Kamal Sawhney, Mr. Nikhil Agarwal, Mr. Puru Medhira& Mr. Nishank Vashistha, Advocates.

For the Respondents : Mr. Indruj Singh Rai, SSC, Mr. Sanjeev Menon, Mr. Rahul Singh JSCs & Mr. Anmol Jagga, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia,* impugning a communication dated 30.06.2021 (hereafter **the impugned communication**) whereby the petitioner was informed that its request for reconsideration of an order dated 25.10.2019 (hereafter **the impugned order**) was considered and rejected.

2. The petitioner had earlier filed an application dated 21.06.2018 seeking relaxation of the conditions prescribed under Rule 9C of the

Income Tax Rules 1962 (hereafter **the Rules**) read with Section 72A of the Income Tax Act, 1962 (hereafter **the Act**) seeking permission to carry forward all losses of the companies that had amalgamated with the petitioner, for an extended period of three years. The said application was rejected by the impugned order. The petitioner had, thereafter, requested for reconsideration of the petitioner's request for relaxation, which was also rejected and the same was communicated to the petitioner by the impugned communication dated 30.06.2021. Thus, essentially, the petitioner seeks to assail the impugned order dated 25.10.2019 rejecting the petitioner's requests for relaxation of the conditions as prescribed under Rule 9C of the Rules.

3. The only controversy that requires to be considered is whether the impugned order rejecting the petitioner's request for relaxation of the conditions under Rule 9C of the Rules is arbitrary, unreasonable, and contrary to law.

FACTUAL CONTEXT

4. This court had, by an order dated 13.08.2008 in Company Petition No.139/2008, sanctioned a scheme of arrangement (hereafter **the Scheme**) under Section 391-394 of the Companies Act, 1956 involving the petitioner. In terms of the Scheme, four separate companies, namely, (i) Cargill Foods India Ltd. (**CFIL**); (ii) Global Oils and Facts Ltd. (**GOFL**); (iii) Duckworth Flavours (India) Pvt. Ltd. (**DFIPL**); and (iv) Cargill Matrix Feeds Pvt. Ltd. (**CMFPL**) were

amalgamated with the petitioner company with effect from the appointed date, which was fixed as 01.04.2007.

5. As on the appointed date, the accumulated losses and unabsorbed depreciation of the four amalgamated companies amounted to ₹141 crores. The breakup of the said accumulated losses is reproduced below:

Name of entity	**Accumulated Losses (INR)**
Cargil Foods India Limited (CFIL)	874,076,607
Global Oils and Fats Limited (GOFL)	447,986,447
Cargill Matrix Feeds Private Limited (CMFPL)	86,715,084
Duckworth Flavors India Private Limited (DFIPL)	2,609,034
Total	**1,411,387,172**

6. In terms of Section 72A of the Act, the accumulated losses and unabsorbed depreciation of the amalgamated companies are deemed to be unabsorbed depreciation and losses of the amalgamated company for the previous year in which the amalgamation was effected. The provisions relating to set off and carry forward of depreciation allowance and losses under the Act are applicable accordingly.

7. However, in terms of sub-section (1) of Section 72A of the Act, set off and carry forward of losses is not permissible unless certain conditions are satisfied. One of the said conditions is that the amalgamated company ensures the revival of the business of the amalgamating company and is for a genuine business purpose.

8. The petitioner did not satisfy the conditions as set out in Rule 9C of the Rules read with Section 72A(2)(b)(iii) of the Act and accordingly sought relaxation of the said conditions. For the said purpose, the petitioner made an application on 21.06.2018, which was rejected by an order dated 25.10.2019. The petitioner's request for reconsideration was also rejected and communicated by a letter dated 30.06.2021, which is impugned in the present petition.

9. On 29.03.2011, the petitioner filed an application seeking extension of the period as stipulated under Rule 9C of the Rules read with Section 72A of the Act. The conditions as prescribed under Rule 9C(a) of the Rules require the amalgamated company to achieve a level of production of at least 50% of the existing installed capacity of amalgamating entity before the expiry of four years from the date of the amalgamation. Further, it requires that the said minimum level of production be maintained at least for a year, that is, till the end of five years from the date of amalgamation.

10. In the petitioner's case, the said 50% of the installed capacity was achieved by three of the amalgamating companies, *namely*, (i) GOFL (ii) DFIPL and (iii) CMFPL. However, the industrial undertaking of CFIL located at Kurkumbh did not achieve the prescribed level of production. In the given circumstances, by the aforementioned letter dated 29.03.2011, the petitioner sought extension of three years for achieving the prescribed level of production.

11. The petitioner was called upon to approach the respondent after filing of the return for the financial year (FY) ending 31.03.2012.

12. Thereafter, the respondent sent a letter dated 20.01.2014 seeking (i) details of the production achieved for FYs 2011-12 and 2012-13; and, (ii) efforts taken for achieving the production level of 50% of the installed capacity and the circumstances under which the same was not achieved. The said communication was sent, in the context of the petitioner's request, for extension of three years, that is, upto 31.03.2014 for achieving the threshold level of 50% of the capacity utilization of the undertakings of the amalgamated companies.

13. Thereafter on 10.02.2014, the petitioner sent a letter providing certain details and modifying its request. The petitioner reiterated that the production capacity utilization had increased from 23.5% as on 01.04.2007 to 42.16% as on 31.03.2013 but due to circumstances beyond its control, the threshold minimum level of 50% of the installed capacity was not achieved. The petitioner now sought that; (a) that the conditions of achieving the level of production be relaxed to 40%; and (b) the time for meeting the said condition be extended from 31.03.2011 to 31.03.2012.

14. On 21.06.2018, the petitioner once again made an application seeking relaxation of the conditions as stipulated under Rule 9C of the Rules. The petitioner requested that the stipulated condition of achieving minimum level of capacity utilization of 50% be reduced to 36% as on 31.03.2011 or in the alternative that the same be relaxed from

50% to 42% and the time for achieving the same be extended from 31.03.2011 to 31.03.2012.

15. The petitioner's request for relaxation of the conditions was declined by the impugned order on the ground that the petitioner had failed to achieve the 50% capacity even upto FY 2015-16, which is beyond the prescribed period. The competent authority did not find the petitioner's application fit for grant of relaxation of the prescribed conditions.

RIVAL CONTENTIONS

16. Mr. Kamal Sawhney, the learned counsel appearing for the petitioner has assailed the impugned order on several fronts. First, he submitted that the impugned order rejecting the petitioner's application for relaxation of the conditions as stipulated in Rule 9C of the Rules is unreasoned and therefore liable to be set aside. He submitted that the present case is a fit case for directing the respondent to relax the conditions under Rule 9C of the Rules as sought for by the petitioner. He referred to the decision of the Supreme Court in ***Commissioner of Income-tax, Bombay and Ors. v. Mahindra & Mahindra Ltd. & Ors.***[1] in support of his contention that the power to relax should be exercised liberally. Second, he submitted that the application for relaxation of the stipulated conditions was required to be considered having regard to the genuine efforts made by the amalgamated company to achieve the prescribed the level of production, and the circumstances which

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[1] (1983) 4 SCC 392

prevented the achieving of such prescribed level. He submitted that in the present case, the petitioner had submitted overwhelming material to establish that it had made genuine efforts to achieve the prescribed production capacity. He submitted that the petitioner had invested a sum of ₹176.95 crores in CFIL, which was twice the amount of the likely incentive considering that the brought forward loss and unabsorbed depreciation of CFIL was only ₹87 crores. He submitted that the said investment also exceeded 100% of the gross block of CFIL. He stated that the investments made were for increasing the overall efficiency and productivity and to remove bottlenecks, which were set out in detail in the communications sent by the petitioner. Further, he submitted that the petitioner had also provided sufficient material to establish that it was prevented from achieving the stipulated minimum level of capacity utilization due to various circumstances such as shortage of water, deteriorating power condition in the region, scarcity of primary fuel (sugarcane bagasse) and higher transportation cost. He submitted that there were other factors including reduction in the import duty on refined oil, thus, making the imported refined oil cheaper than the domestically manufactured refined oil. Additionally, he stated that the currency fluctuations and volatility of crude oil in the international market and further delays in granting approval for use of alternate fuels also prevented the petitioner from achieving the desired production levels.

17. He submitted that the capacity utilization had doubled from 23.5% in FY 2006-07 to 45.56% in FY 2014-15. However, the

aforesaid facts had been disregarded. He contended that there was no finding that the petitioner had not made genuine efforts or that the mitigating factors as pointed out by the petitioner were not genuine. He also submitted that the Revenue did not contest that the petitioner had invested ₹176 crores, which clearly established petitioner's *bona fide* efforts to achieve a higher capacity utilization and revival of CIFL's undertaking. He referred to the decision of the Karnataka High Court in the case of ***Commissioner of Income-tax, Bangalore v. KBD Sugars & Distilleries Ltd.***[2] and on the strength of the said decision contended that the question of relaxation is to be considered liberally and from a businessman's point of view.

18. Lastly, he submitted that there was no dispute that the amalgamation was for a genuine business purpose and for revival of the business and therefore conditions for relaxation, as stipulated under Rule 9C of the Rules, were established.

19. Mr Rai, the learned counsel appearing for the Revenue countered the aforesaid submissions. First of all, he submitted that the Central Government had wide discretion in entertaining an application for relaxation of the conditions as stipulated under Rule 9C of the Rules. He also referred to the decisions of the Supreme Court in ***State of Uttar Pradesh v. Vikash Kumar***[3] and in ***Council of Scientific and Industrial***

[2] (2016) 66 taxmann.com 84 (Karnataka)
[3] (2022) 1 SCC 347

Research & Ors. V. Ramesh Chandra Agrawal & Anr.[4] in support of his contentions.

20. Next, he submitted that the proviso to Rule 9C of the Rules requires that relaxation of the conditions may be considered on an application made to the Central Government. He submitted that the petitioner had not made any fresh application but had only sought reconsideration of its application, which was rejected by the impugned order. He submitted that although there was no requirement for the competent authority to consider the same, nonetheless, the competent authority had considered and rejected the same. He contended that the letter dated 30.06.2021 merely conveyed the response of the Revenue to the petitioner's request for reconsideration of its application which was already rejected in terms of the impugned order.

RELEVANT STATUTORY PROVISIONS

21. At the outset, it is relevant to refer to the relevant provisions of Section 72A of the Act as were in force at the material time. Reference to Section 72A of the Act in this order, unless the context indicates otherwise, is to the said Section as was in force on 01.04.2007 (the Appointed Date under the Scheme). Section 72A of the Act was amended by virtue of Act 14 of 2010, but the said amendments are not material to the controversy. The said Section was amended thereafter by the Finance Act 2023, (Act 8 of 2023). But the said amendments are inapplicable to the present case.

[4] (2009) 3 SCC 35

22. Section 72A of the Act allows set off and carry forward of losses of an amalgamating company subject to certain conditions being satisfied. The relevant extract of Section 72A of the Act as in force at the material time, is set out below:

> **"72A.** (1) Where there has been an amalgamation of—
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> *(a)* a company owning an industrial undertaking or a ship or a hotel with another company; or
>
> *(b)* ……….; or
>
> *(c)* …..…….
>
> then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for unabsorbed depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.
>
> (2) Notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless—
>
> (*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**.

(3) In a case where any of the conditions laid down in sub-section (2) are not complied with, the set off of loss or allowance of depreciation made 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…………"

[emphasis added]

23. The conditions as are required to be fulfilled in terms of sub-clause (iii) of Section 72A(2)(b) of the Act are prescribed under Rule 9C of the Rules. The said Rule is set out below:

"**9C. Conditions for carrying forward or set-off of accumulated loss and unabsorbed depreciation allowance in case of amalgamation.**

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 per cent 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 of 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 account 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."

NON OBSTANTE CLAUSE – SECTION 72A AND RULE 9C

24. It is relevant to note that Section 72A (2) of the Act contains a *non obstante* clause. Thus, if the conditions as specified in Section 72A (2) of the Act are not satisfied, the benefit of Section 72A (1) of the Act are not available. Under Clause (b) of sub-section (2) of Section 72A of the Act, it is necessary for an amalgamated company to hold at least three-fourth of the book value of the assets of the amalgamating company acquired under a scheme of amalgamation and to continue the

business of the amalgamating company, for a minimum period of five years from the date of amalgamation.

25. In addition to the above, other conditions as may be prescribed by the Central Government to (a) ensure revival of the business of the amalgamating company; or (b) to ensure that the amalgamation is for a genuine business purpose are required to be satisfied. Such additional conditions as referred to in sub-clause (iii) of Section 72A(2)(b) of the Act are prescribed under Rule 9C of the Rules.

26. Rule 9C of the Rules requires that the production of at least 50% of the installed capacity of the undertaking of the amalgamating company, which is required by the amalgamated company be achieved before the end of four years from the date of amalgamation. Further, the said minimum threshold level of production is required to be maintained till the end of five years from the date of amalgamation.

PROVISO TO RULE 9C(a) – POWER TO RELAX

27. However, in terms of proviso to Rule 9C(a) of the Rules, the Central Government may, on an application, relax the said condition of achieving the level of 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.

28. As is apparent from the above, the proviso to Rule 9C(a) of the Rules is an enabling provision that empowers the Central Government to relax the stipulated conditions. This power is not unbridled but its exercise is guided by the considerations as set out in the proviso – (i) genuine efforts made by the amalgamated company to attain the prescribed level of production; and, (ii) the circumstances preventing such efforts from achieving the same.

29. As contended by the learned counsel appearing for the Revenue, the Central Government has a wide discretion in considering whether the conditions as stipulated under Rule 9C(a) of the Rule ought to be relaxed. However, it is also necessary to bear in mind that every power is coupled with duty to exercise the same. Thus, an application to the Central Government to relax the conditions as stipulated is required to be considered bearing in mind the object of Section 72A (2) of the Act as well as the guiding factors as expressly indicated in the proviso itself.

30. The limited aspect to be examined in the present case is whether the decision of the Central Government to reject the petitioner's application for relaxation of the conditions as stipulated in Rule 9C(a) of the Rules is manifestly arbitrary or unreasonable.

THE OBJECTIVE OF SECTION 72A OF THE ACT

31. Plainly, the discretionary power is required to be exercised to further the object of the statutory provision. It is thus necessary to briefly examine the objective of Section 72A of the Act.

32. Section 72A of the Act was inserted by virtue of Finance (2) Act of 1997 with effect from 01.04.1998. The object and purpose of Section 72A of the Act can be discerned by the legislative history of the said provision. Prior to 01.04.2000, carry forward of losses by an amalgamated company was permissible only if the specified authority so recommended and the Central Government was satisfied, on such recommendation, that the conditions as set out in Section 72A of the Act, as in force at the material time, were complied with. We consider it apposite to reproduce sub-section (1) to (3) of Section 72A of the Act, as in force prior to 01.04.2000. The same are set out below:

> "**72-A. Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in certain cases of amalgamation.** – (1) Where there has 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, is satisfied that the following conditions are fulfilled, namely:-
>
> (a) the amalgamating company was not, immediately before such amalgamation, financially viable by reason of its labilities, losses and other relevant factors;
>
> (b) the amalgamation was in the public interest; and
>
> (c) such other conditions as the Central Government may, try notification in the Official Gazette, specify, to ensure that the benefit under this section is restricted to amalgamations which would facilitate the rehabilitation or revival of the business of the amalgamating company,
>
> then, the Central Government may make a declaration to that effect, and thereupon, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the 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 the other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.

(2) Notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carry forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless the following conditions are fulfilled, namely:-

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

(ii) the amalgamated company furnishes, along with its return of income for the said assessment year, a certificate from the specified authority to the effect that adequate steps have been taken by that company for the rehabilitation or revival of the business of the amalgamating company.

(3) where a company owning an industrial undertaking or a ship purposes to amalgamate with any other company and such other company submits the proposed scheme of amalgamation to the specified authority and that authority is satisfied, after examining the scheme and taking into account all relevant facts, that the conditions referred to in sub-section (1) would be fulfilled if such amalgamation is effected in accordance with such scheme or, as the case may be, in accordance with such scheme as modified in such manner as that authority may specify, it shall intimate such other company that, after the amalgamation is effected in accordance with such scheme or, as the case may be, such scheme as so modified, it would make

> (unless there is any material change in the relevant facts) a recommendation to the Central Government under sub-section (1)."

33. It is seen from the above that the benefit of carry forward of losses was available only in cases where the specified authority was satisfied that the conditions as set out in sub-section (1) of Section 72A of the Act would be fulfilled, if the amalgamation is effected. The benefit of the said provision was available only in the cases where (i) the amalgamating company was not immediately prior to amalgamation financially viable on account of its liabilities, losses and other relevant factors; (ii) the amalgamation was in public interest; and (iii) other conditions as notified by the central government, were satisfied. The Central Government was empowered to impose such other conditions to ensure that the benefit of the Section 72A of the Act is restricted to amalgamation, which would facilitate rehabilitation or revival of the business of the amalgamating company. The object was thus clearly to encourage schemes, which would result in revival of companies owning industrial undertaking(s) or a ship(s), which were otherwise not financially viable. The benefit of this provision was available only in the cases where such amalgamation would facilitate the rehabilitation and revival of the business.

34. Section 72A of the Act was substituted with effect from 01.04.2000. The scope of industrial undertaking was expanded to also include undertakings carrying on the business of telecommunication services, manufacturing computer software as well as generation and

distribution of electricity and other forms of power. The benefit was also extended to a company owning hotel as well as to a banking company. However, the condition that the benefit be restricted only for revival of the business of amalgamating company, continued to be the substratal theme. The benefit was restricted to those cases where the amalgamated company fulfilled the condition, as may be prescribed; (i) to ensure revival of business of the amalgamating company; and (ii) to ensure that the amalgamation is for a genuine purpose.

35. Sub-section (2) of Section 72A of the Act, as substituted with effect from 01.04.2000, continues to read the same as in force at the material time[5]. There were other amendments to Section 72A of the Act, which were legislated subsequently. However, it is not necessary to examine the said amendments. Suffice, it is to state that the object of Section 72A of the Act continues to remain the same, that is to serve as an incentive for undertaking schemes for rehabilitating and reviving companies owning industrial undertakings or engaged in other specified business.

36. We consider it relevant to refer to the following extract from the decision of the Supreme Court in ***Commissioner of Income-tax, Bombay and Ors. v. Mahindra & Mahindra Ltd. and Ors.***[1], which sets out the purpose and object of introduction of Section 72A of the Act:

> "**13.** Before undertaking a scrutiny of these reasons for ultimately deciding whether the impugned conclusion of the Specified Authority and the Central Government is liable to be

[5] (that is prior to the Finance Act, 2025 coming into force)

interfered with or not it will be useful to indicate briefly the object with which this new provision of Section 72-A was introduced in the Act as it will throw light on what was the mischief or situation that was intended to be remedied by its introduction as also the true concept of financial non-viability. From the budget speech of the Finance Minister, the Notes on Clauses of the Finance Bill (No. 2) of 1977 and the Memorandum explaining the provisions of the said Bill it will appear clear that sickness among industrial undertakings was regarded as a matter of grave national concern inasmuch as 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, and experience had shown that taking over of such sick units by Government was not always a satisfactory or economical solution; 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 which 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 such objective in view, in order to facilitate the merger of sick industrial units with sound ones and as and by way of offering an incentive in that behalf Section 72-A was introduced in the Act whereunder by a deeming fiction the accumulated loss or unabsorbed depreciation of the amalgamating company is treated to be a loss or, as the case may be, allowance for depreciation of the amalgamated company in the previous year in which the amalgamation was effected; but the amalgamated company, although a successor in interest, would be entitled to carry forward and set-off the accumulated loss and unabsorbed depreciation of the amalgamating company only where the amalgamating company was not, immediately before such amalgamation , financially viable and the amalgamation was in public interest. The expression “financial non-viability” has not been defined in the Act but the Finance Minister's speech, the Notes on Clauses of the Bill and the Memorandum explaining the provisions thereof make it clear that the financial non-viability of an undertaking has been equated with

> the "sickness" of such undertaking and obviously in the context of its revival by a sound undertaking the sickness must be of a temporary character and not any basic or permanent sickness. An undertaking which is basically or potentially non-viable will ordinarily be incapable of revival and would face a closure; in other words, the financial non-viability spoken of by the section must refer to sickness brought about by temporary adverse financial circumstances that disables the unit to stand and work on its own. This is also made clear by the provision contained in clause (*a*) of sub-section (1) which states that the financial non-viability of the amalgamating company has to be judged by reference to "its liabilities, losses and other relevant factors".

EXERCISE OF POWER TO RELAX

37. As noted above, Rule 9C(a) of the Rules sets out an objective parameter for availing the benefit of Section 72A of the Act – achievement of 50% of the installed capacity of the industrial undertaking of the amalgamating company and maintaining the same till the end of five years from the date of amalgamation. The petitioner claims that it is entitled to relaxation of the said condition under the proviso to Rule 9C(a) of the Rules.

38. In terms of Rule 9C(a) of the Rules, the Central Government can relax (i) the capacity utilisation to be achieved; or (ii) the time period to achieve the same; or both. Such relaxation can be granted by Central Government having regard to the two factors: (i) the genuine efforts made by the amalgamated company to attain the prescribed level of production; and (ii) the circumstances preventing such efforts from achieving the same. However, these two factors are by no means exhaustive. The use of the expression "having regard to" as used in Rule

9C(a) of the Rules merely indicates that these two factors are relevant for considering relaxation of the stipulated conditions.

39. The meaning of the expression "having regard to" was examined by the Supreme Court in ***India Cement Ltd. v. Union of India & Ors.***[6] in the context of Clause 12 of the Cement Control Order. In the aforesaid context, the Supreme Court held as under:

> "15. A brief reference to clause 12 of the Cement Control Order, 1967 may also be made. Clause 12 reads as under:
>
> > "12. *Power to vary the prices and to alter the schedule*.— The Central Government may, having regard to any change in any of the factors relevant for the price of cement, such as an increase or decrease in the cost of production or distribution, by notification in the official Gazette, vary the price fixed in this Order or alter the Schedule to this Order as appear to it to be necessary."
>
> We are unable to appreciate how clause 12 in any manner restricts the Central Government's power to fix a uniform retention price for all the units specified in the Schedule to the Order, even though different prices were specified in the Schedule as initially enacted. The Central Government's power to refix the price can be exercised 'having regard to any change in any of the factors relevant for determination of price of cement'. The meaning of the expression 'having regard to' is well settled. It indicates that in exercising the power, regard must be had also to the factors enumerated together with all factors relevant for exercise of that power. One such factor specified in clause 12 is "such as an increase or decrease in the cost of production or distribution". Admittedly, the fixation of the uniform retention price at Rs 100 per tonne was made on the industry's demand for revision of the price as a result of increase in the cost of production, the only dispute between the industry and the Central Government being with regard to

[6] (1990) 4 SCC 356

> the extent of increase and not to the effect of increase or the mode of increase by fixation of a uniform price. It is, therefore, difficult to appreciate the support that the learned counsel for the appellants seek from Clause 12."

40. It is also relevant to bear in mind that by its very nature the power to relax a Rule or a condition is by way of an exception and the scope of such power cannot be construed in an expansive manner. In ***West Bengal State Electricity Board v. Patel Engineering Co. Ltd. & Ors.***[7], the Supreme Court had observed that "where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules". It is further necessary that the power is exercised reasonably and objectively. It is also well settled that the power to relax a Rule or a condition is required to be exercised only to the extent it is necessary.[8] The necessity for using such power must obviously be dictated by the object of the Rules or condition sought to be relaxed.

JUDICIAL REVIEW OF EXERCISE OF DISCRETIONARY POWER

41. Bearing the aforesaid principles in mind, we may now proceed to examine whether the impugned order or the subsequent decision to reject the petitioner's application for reconsideration (communicated by the impugned communication) warrants any interference by this court.

42. The proviso to Rule 9C(a) of the Rules confers a discretionary power, which is to be exercised in terms of the guidelines as indicated

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[7] (2001) 2 SCC 451

[8] Ref:Union of India v. Narendra Singh, (2008) 2 SCC 750; J.C. Yadav and others v. State of Haryana and others, (1990) 2 SCC 189.

in the said proviso as well as bearing in mind all the relevant factors. It is trite law that exercise of such discretionary power is not amenable to judicial review unless the court finds that exercise is capricious, *malafide*, arbitrary and/or unreasonable. The court can interfere only if the decision is perverse and no reasonable body of persons, properly informed could arrive at such a decision. The decision is also amenable to judicial review if the concerned authority has misdirected itself and the decision is based on irrelevant or extraneous considerations or in disregard of relevant consideration.

ANALYSIS – IN THE GIVEN FACTS

43. In the present case, the impugned order indicates that the petitioner's request for relaxation of the conditions under Rule 9C of the Rules has been declined on the ground that the petitioner had failed to achieve the requisite level of production capacity even during the extended period of three years as was sought by the petitioner.

44. According to the petitioner, the said decision is vitiated by illegality as it disregards the relevant considerations as set out in the proviso to Rule 9C(a) of the Rules, namely, the efforts made by the petitioner to achieve the reasonable capacity utilization and the reasons that prevented the petitioner from achieving the same.

45. Whilst the contentions advanced on behalf of the petitioner appear to be attractive at the first blush, a closer examination of the same would indicate that the same are unmerited. This is so because in the first instance, the petitioner had sought for relaxation of the requisite

Rule by citing various reasons to buttress its claim that it had made genuine efforts for revival of the industrial undertaking of the amalgamating company but was prevented by mitigating circumstances. But, the condition as specified – that is, achieving production equivalent to at least 50% of the installed capacity of the undertaking of the amalgamating company – was not satisfied even if the extended time for satisfying the same was taken into account. Thus, the impugned order/decision to deny relaxation of the stipulated condition is not in disregard of the petitioner's claim regarding the efforts taken to achieve the minimum level of production capacity and the circumstances that prevented achievement of such capacity. But a decision that makes allowance for the same.

46. The petitioner claimed that it had made substantial investments for meeting the efficiency of operations and for removing constraints that had hindered the production level. It claimed that during the period from 13.08.2008 till January, 2011, it had invested an amount of ₹22.27 crores in Kurkumbh plant alone and the same constituted 24% of the gross block on the date of the merger. The petitioner had set out the expenditure incurred by it in removing the bottlenecks and for upgrading and improving the efficiency and productivity of the plant in question.

47. The petitioner had also set out the reasons that prevented it from achieving the requisite threshold installed capacity. First, it stated that there was paucity of time. It stated that there was time lapse of almost one and half years between the appointed date and the effective date of

amalgamation. This, according to the petitioner, was a constraint that prevented it from achieving the prescribed level of production. Second, the petitioner stated that Kurkumbh plant was set up at a location to take use of the sugarcane bagasse and the petitioner had set up a co-generating power plants for use of sugarcane bagasse. The petitioner lamented that there was an increase in the cost of bagasse, which is used as a primary fuel to generate steam for the refining process, which made the production unviable. It also claimed that it was unable to increase the price on account of stiff competition in the market for refined oils. The petitioner claims that in order to overcome the said issue, the petitioner has to make investment for alternate fuel like coal in place of bagasse.

48. Additionally, the petitioner also claimed that there was deteriorating power situation in the state. Apart from the above, the petitioner stated that there was structural disadvantage coupled with reduction in import duty.

49. Undeniably, the petitioner had sought further relaxation of Rule 9C(a) of the Rules by extending the time for achieving the threshold level of production by three years, after examining the aforesaid factors – which essentially were in the nature of business vagaries. It is also material to note that petitioner's application dated 29.03.2011 was filed with the CBDT on 30.03.2011, that is, one day prior to the expiry of period of four years during which threshold capacity was required to be achieved.

50. The petitioner's application was rejected on the ground that it had failed to achieve the production level even after considering the extended period of three years as sought by the petitioner. Thus, the contention that the Central Government had rendered a decision in disregard of the relevant factors, namely, the efforts made by the petitioner to achieve the requisite level of production capacity and the circumstances that prevented it from doing so is clearly unmerited. The impugned order is premised on the basis that even if the conditions as mentioned by the petitioner are accepted, it had failed to achieve the requisite level of production capacity. The impugned order does not indicate that the two factors as stated above were disregarded. The impugned order was passed after the extended period of three years – the relaxation as sought by the petitioner – had expired. The concerned authority thus had the benefit of hindsight. The petitioner's application for relaxation of the conditions on the basis of two guiding factors as indicated in proviso to Rule 9C(a) of the Rules would be of little relevance after the extended period had expired.

51. It is also relevant to bear in mind the overall arching purpose of Section 72A of the Act, which as discussed above, is to ensure that the industrial undertakings of the amalgamating companies are revived.

52. As indicated in the proviso to Rule 9C(a) of the Rules, the Central Government may either relax the time period within which the production capacity is to be achieved or the threshold level of capacity utilization is achieved or both.

53. The petitioner's application was confined to seeking relaxation of the period for achieving the minimum capacity utilization. The petitioner had thereafter entered into correspondences seeking to modify its earlier request. By a communication dated 10.02.2014, the petitioner sought relaxation of the minimum level of production capacity from 50% to 40%. It further expanded its requests by seeking the relaxation in the level of production from 50% to 40% with extension of one-year upto 31.03.2012[9]. The said request was also modified subsequently by requesting that the requirement for achieving production capacity be reduced from 50% to 36% as on 31.03.2011 or in the alternative from 50% to 42% coupled with extension of time till March, 2012. Its request to modify the extent of relaxation was made based on the production capacity achieved.

54. There is no averment that the petitioner had achieved the threshold capacity of 50% of the installed capacity of the industrial undertaking of the amalgamating companies till the filing of the present petition.

55. The Central Government has the power to relax the Rule 9C(a) of the Rules. However, it is erroneous to suggest that the power is required to be exercised liberally. Since, it is a power to relax a rule, the relaxation can only be done as an exception and the power is not required to be exercised liberally but has to be exercised in exceptional cases keeping in view the overall objective to ensure the revival of the

[9] By communication dated 09.04.2014.

industrial undertakings of the amalgamating companies. The purpose of providing the benefit of carry forward of losses is for providing incentive to achieve revival of the unviable industrial undertakings.

56. Mr. Sawhney, the learned counsel for the petitioner had referred to the decision of the Supreme Court in ***Commissioner of Income-tax v. Mahindra & Mahindra Ltd.***[1] and on the strength of the said decision submitted that the power to grant exemption must be construed liberally and from a businessman point of view. It is relevant to note that the said decision was rendered in the context of Section 72A of the Act as introduced by Finance Act, 1997. The discussion was in the context of granting such benefit by the Central Government keeping in view the guidelines and the object of introducing Section 72A of the Act. The said objective being to incentivize revival of financially unviable industrial undertakings. The Supreme Court noting the objective of introducing Section 72A of the Act had made observations to the effect that the Central Government must extend the benefit by construing the financial unviability from a businessman's perspective and in a commercial sense. The sweep of the main section – which is to provide incentive to encourage revival of financially unviable industrial undertaking – is required to be interpreted expansively so as to cover all intended cases. But the provision to carve out an exception to the stipulated standard cannot be interpreted expansively. The principles of interpretation of a main rule and an exception to the rule are not necessarily the same.

57. The observations made by the court in ***Commissioner of Income-tax v. Mahindra & Mahindra Ltd.***[1] have little application after introduction of an objective criteria of achievement of 50% of the installed capacity of the industrial undertakings of the amalgamating companies. The question that arises in the present petition is not one of the stipulating conditions for the grant of benefit of Section 72A of the Act but the exercise of power to relax the Rule prescribing an objective criterion for availing the benefit of Section 72A of the Act.

58. As noted above, the power of relaxation cannot be exercised liberally but must be exercised only to the extent it is necessary and keeping in view the relevant factors and the objective of the main statute.

59. At this stage, it is relevant to note that the Scheme was sanctioned by an order dated 13.08.2008 and in terms of the Scheme, the transferred companies dissolved without undergoing the process of winding up from the appointed date, that is from 01.04.2007. The Scheme was not framed with the object of revival of the amalgamating companies but was framed with the object of simplifying the corporate structure of the Cargill Group in India. The said rationale is articulated in the Scheme as under:

> "**B. Rationale for the Scheme**
>
> (a) The Scheme of Arrangement provides for amalgamation of Transferor Companies into the Transferee Company (CIPL), with the objective of simplifying the corporate structure of Cargill Group in India, with a view to maximize shareholders value.

(b) The Board of Directors of all the five companies of Cargill in India, are of the opinion that the Scheme would be beneficial to the shareholders, creditors and employees."

60. Section 72(1) of the Act provides for carry forward of losses under the head of "Profits and gains of business or profession". In terms of sub-section (3) of Section 72 of the Act, no losses can be carried forward under the section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed. By virtue of Section 72A of the Act, in a case of amalgamation of certain companies (including company owning an industrial undertaking), the accumulated loss and unabsorbed depreciation is deemed to be a loss or allowance of the amalgamated company for the previous year in which the amalgamation is affected. According to the petitioner, it is permissible to carry forward the unabsorbed losses, depreciation allowance of an amalgamated company for further eight assessment years notwithstanding that the amalgamating company could not have carried forward the loss if it was not dissolved on account of amalgamation with the amalgamated company.

61. However, as noted above, this benefit is subject to the amalgamated company complying with certain conditions as stipulated in Sub-section (2) of Section 72A of the Act. A plain reading of the said conditions clearly indicates that the said conditions have been stipulated to preclude abuse of the said provision by profit making companies amalgamating with loss making companies solely to avoid

tax without any intention of continuing the business. It is also apparent that the rationale is to ensure that the business of amalgamating company continues and sustains. In terms of Clause (a) and (b) of Sub-section (2) of Section 72A of the Act, the benefit of carry forward of losses of an amalgamating company would be available only if the amalgamating company is engaged in the business in which accumulated losses have occurred or depreciation remains unabsorbed for three or more years and the amalgamating company continues to hold three-fourth of the book value of fixed assets held by it two years prior to the date of amalgamation. In terms of clause (b) of Section 72A (2) of the Act, the amalgamated company is required to hold the three-fourths of the book value of fixed assets of the amalgamating company for a minimum period of five years from the date of amalgamation and to continue the business for a minimum period of five years from the date of amalgamation.

62. In a case such as the present one where the objective of the Scheme was "simplifying the corporate structure of Cargill Group in India, with a view to maximize shareholders value", it would be all the more imperative for the petitioner to achieve the requirement of achieving the stipulated threshold capacity utilization. The objective of Section 72A of the Act is not to extend the benefit of carryforward of unabsorbed losses to the amalgamated company for the purposes of encouraging simplification of corporate structure; it is to extend the benefit to encourage scheme for genuine business purpose and only in

cases where the industrial undertakings of the amalgamating company are revived and/or continued.

63. In the present case, the petitioner had not sought any relaxation of the said conditions either at the time of amalgamation or immediately thereafter.

64. The petitioner had made its first application seeking relaxation of the conditions under proviso to Rule 9C of the Rules, one day prior to the expiry of period of four years from the date of amalgamation, that is, on 30.03.2011. It is material to note that on that date, the petitioner had sought an extension of three years to achieve the installed capacity of 50% production. In other words, the petitioner now sought seven years' time to achieve 50% of the installed capacity of one of the amalgamated company (CIFL). Admittedly, the threshold capacity was not achieved within the extended period, that is within 31.03.2014. However, the petitioner's application for relaxation continued to be pending and was not disposed of.

65. The petitioner once again sent a communication modifying its request to relax the condition regarding achieving the level of production to 40% instead of 50% as required and sought extension of further one year, that is, till 31.03.2012. It is material to note that the said request was made by a separate application in response to proceedings/communications in relation to the petitioner's earlier application for extension of time for achieving the threshold production level of 50% of the installed capacity.

66. The petitioner subsequently modified the said request by a letter dated 21.06.2018 which was sent in continuation of its application dated 31.03.2011, *inter alia,* praying that the condition regarding the level of production be reduced from 50% to 36% or in the alterative, relax the production level from 50% to 42% with extension of time from March, 2011 to March, 2012.

CONCLUSION

67. We are unable to accept that the decision to reject the petitioner's request is perverse or based on extraneous considerations. The petition is unmerited and is, accordingly, dismissed.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

FEBRUARY 25, 2025
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