

'Attributable' Additional Depreciation u/s 115BAA - An Analysis

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INTRODUCTION

1 According to the beneficial tax regime introduced by Finance Act 2019, a corporate assessee can choose to tax itself at a preferred rate, subject to the conditions and mandatory adjustments as are required to be made under Section 115BAA of the Act.

2 One such adjustment as provided under sub section (2) and (3) to Section 115BAA is with reference to claim of unabsorbed depreciation attributable to **additional depreciation** which can neither be carried forward nor allowed to be set off while computing the total income for the purpose of Section 115BAA. However under subsection (3), an adjustment can be made to the WDV of block of assets by way of increasing the amount of WDV by the amount of attributable additional depreciation as derived in the manner prescribed by the Board in this regard. Further such subsection (3) for the purpose of capitalisation of additional depreciation to WDV can be invoked only if the option of choosing the tax regime under S. 115BAA is selected in AY 2020-21 only.

3 Since the introduction of the new regime, CBDT vide clarification dated 2nd October, 2019 numbered 29/2019 has re-iterated that amounts of a domestic company which would exercise option for availing benefit of lower tax rate under S. 115BAA shall not be allowed to claim set off of any brought forward loss on account of additional depreciation for an Assessment Year for which the option has been exercised and for any subsequent Assessment Year. However the said clarification is silent on the aspect as to **how the amount of attributable additional depreciation is to be arrived at.**

Albeit, there is no notification issued by CBDT u/s 115BAA(3) prescribing the manner and methodology of determining the amount attributable to additional depreciation. **In such a scenario corporates which seek to opt for new regime for AY 2020-21 are faced with an ambiguity regarding determination of amounts attributable to additional depreciation in order to make the appropriate adjustments.** The determination of amounts attributable to additional depreciation is of utmost importance for those companies which choose to pay taxes based on provisions of section 115 BAA of the Act in AY 2020-21 itself on account of heavy carry forward losses/ depreciation and lower profitability envisaged in future, MAT liability due to windfall regulatory gains, non-set off of MAT credits due to lower profitability in future etc. In this article, an effort is made to show how such amount of attributable additional depreciation can be arrived at in the schema of the Act.

OUR ANALYSIS

1 The Provisions of Section 115BAA is a beneficial provision introduced in statute books in order to provide benefit of lower tax rates to corporate assessee. In order to provide full benefit to the assessee, the section starts with the clause **'notwithstanding anything contained in any other provision....'**; only to holistically as complete code govern the taxation of corporates opting for this section. It is only where the aspect relating to determination of total income is involved, the other provisions of the act are to be referred to and such provisions are to be read only to the extent they are not contrary to the prescriptions of Section 115BAA of the Act.

2 Since Section 115BAA is beneficial provision as such, it is a trite law that such a letter of law must be liberally interpreted to extend maximum benefits on the assessee and such view must be accorded which saves the rights and extends the benefits rather than a view which takes the benefits away. In a scenario where there are two views possible, a view which is beneficial to the assessee must be adopted. It is a trite law that an Act of law does not selective injustice and equally treats all the assessee forming part of the same group / herd unless there are compelling reasons to extend benefits differently to same category of assessee'. Considering the nature of the provision, **these are the etched rules** of interpretation to be applied while deciding as to in the case facts and in law which of the above options can be applied.

3 **Plain reading of the sub-section 2(ii) it is clear that the said provision bars the set off of losses attributable to additional depreciation and doesn't prescribe for the purpose of S. 115 BAA what is to be regarded as carry forward depreciation let alone its bifurcation in to normal or additional depreciation.** Thus, before making the relevant adjustment, it is first relevant to arrive at the amounts of carried forward [including unabsorbed depreciation and its bifurcation in to additional and normal depreciation] from previous year according to other provisions of the Act and then look to the adjustments required in current AY 2020-21. In this reference the discussion made at para 12 assumes importance.

4 The term 'attributable to' is not defined under section 115BAA of the Act. Generally speaking, in the contextual placement, the term 'Attributable' means obtained to serve an exclusive purpose (cf. "dedicated"). The term attributable used in the section is not preceded by the words **'reasonable', 'proportionate' etc.** and thus one cannot import such a condition while arriving at the quantum of additional depreciation for referred sub section. Further to add, looking to the language used in sub. Sec (2) (ii) where the expressions used are **'if such loss' it is clear that attribution under said sub section is not automatic in nature** and the said sub section needs to be applied only where it is held that the amount of carry forward depreciation comprises of both normal and additional depreciation.

5 Based on the provisions contained in the Act, at first it needs to be decided whether the amount of unabsorbed depreciation comprises of additional depreciation. In the absence of clear rules in law laid down to decide on the order of priority of set off between additional depreciation and normal depreciation then in such a scenario one has to go by assumptions and thereafter only in the next step apply the attribution rules.

6 **The fact finding/ assumption relating to existence of additional unabsorbed depreciation is a precondition to invoke the theory of attribution.** In this regard it is relevant to note that under Section 14 A of the Act where the expressions used are 'in relation to', courts have acknowledged that the said section which lay down the rules of attribution and the same can be applied only where it is held that there is existence of expenditure relating to exempt income. **Delhi High Court** in the Case of **CIT v. Om Prakash Khaitan [(2015) [TS-5386-HC-2015(DELHI)-O]**

7 Further, mere claim of additional depreciation in preceding assessment years cannot be basis to invoke the theory of attribution and its existence in current year carry forward must be established. Such claim can be made based on analogy laid down by **Delhi High Court** in the case of **CIT v. I.P. Support Services India (P.)Ltd. [(2015) [TS-5502-HC-2015(DELHI)-O]** in the context of section 14 A and rule 8 D of the Act.

8 With the above background before discussing the options for the purpose of determining the amount attributable to additional depreciation under section 115BAA (3), also it would be relevant to understand the schema of the Act with reference to very concept of depreciation versus additional depreciation and also the rules of set off as laid down under law within additional and normal depreciation. **This would reveal the amount of unabsorbed depreciation components brought forward for AY 2020-21 under normal provisions of the Act after which the assessee can go forward to make adjustments prescribed under Section 115 BAA(2) and(3).**

(a) Depreciation is the expenditure allocated under the Act year on year basis towards wear and tear of tangible and intangible business assets. Now in order to provide fillip to new investment in plant, for such assessee's an additional allowance of depreciation is allowed in year of installation. The quantum of additional depreciation has the effect of reducing the WDV and as the name suggests is nothing but an 'additional' depreciation provided under year of installation of new plant.

(b) For the purpose of Section 32 and also other provisions including Section 72(2), there is no distinction in the treatment of additional depreciation and depreciation and they are both together indivisibly and inseparably regarded to be depreciation allowance pertaining to a particular assessment year. **There cannot be any order of priority of set off between depreciation and additional depreciation accrued within a particular assessment year because under the Act they are presumed to be one and the latter as subset and indivisible part to former.**

(c) While it is true that the depreciation allowance (normal as well as additional) of current year has priority towards set off as compared to brought forward depreciation which is deemed to be current year depreciation, the catch here is the moment set off of current depreciation is done and the balance from current year is carried to later years it forms a part and parcel of the hotchpotch of unabsorbed depreciation brought forward from earlier years. Thereafter once it forms a part of the common hotchpot, there cannot be any classification possible of such hotchpot in to unabsorbed depreciation year wise, additional, normal etc. Further it is seen that all the provisions of the income tax Act 1961 are equally applicable to both Normal as well as additional depreciation. In the judgement rendered in the context of scope of explanation 5 to S. 32 (1) in the case of Vedanta Ltd. v. Principal Commissioner of Income-tax-9, New Delhi* [2018] (Delhi) it was held by the Hon'ble Court that said explanation applies to even additional depreciation, though the same is in the nature of incentive and Explanation 5 was inserted below S. 32(1)(i) and (ii) and term used therein is 'depreciation'

(d) There is no indication in Section 32 (2) that the unabsorbed depreciation, whether additional or normal, taken to the following year should be treated in any way different from the depreciation which is allowed and deducted in the current year. **The whole object of the proviso is only to enable addition of the unabsorbed depreciation including additional depreciation to the depreciation allowance in the following year and treat it by the deeming provision as part of it. Once that object is achieved, one cannot boggle with one's imagination, but regard the depreciation (additional or normal) in the following year of which the previous year's unabsorbed depreciation is a part as factually a depreciation for the current year and deal with it as such.** In this regards reliance is placed on the decision rendered by Hon'ble Madras HC in the case of Commissioner of Income-tax v. Speed-A-Way (P.) Ltd. [1967] [\[TS-5223-HC-1965\(MADRAS-OJ\)\]](#) Subject to the provisions of S. 72 (2), full effect must be given to the provisions of S. 32 (2) of the Act. There is nothing in the Act which splits the value of carry forward depreciation further into additional depreciation and normal depreciation. **As a matter of fact, even in the Tax Returns applicable to the assessee's, the amount of depreciation allowance carried forward refers to total depreciation allowance and there is no bifurcation as additional or normal depreciation.**

(e) It is noteworthy that the provisions of S. 72(2) do not run contrary to the construction of section 32 (2) as discussed hereinabove. Said section is merely concerned with priorities and does not have the effect of nullifying or modifying the provision for allowing carried-forward depreciation which includes additional depreciation, so to speak, as a loss to be set off against other heads of income, profits or gains. All that it provides for is that business losses other than carried-forward depreciation should be first set off and they will have priority over depreciation within the scope of proviso (b) to S. 32(2).

9 Thus, all in all since Section 32 (2) peculiarly clubs the entire unabsorbed depreciation of current year, whether additional / normal, in to carry forward depreciation allowance and this is where the distinction between additional and normal depreciation allowance is lost. Just as in block of assets, an individual asset loses its identity, similarly owing to operation of S. 32 (2) of the Act, the nomenclature of distinction between additional depreciation and normal depreciation is dwindled once it is carry forward to later years. Thus, even if in a year, the amount of profits are offset against additional depreciation and thereby one can effectively determine the amount of additional depreciation balance available for that particular year, once such amount is carry forward the same within the meaning of S. 32 (2) becomes a normal depreciation allowance and ceases to remain additional depreciation. Such an analogy is also discernible from the judgement rendered by Hon. Apex Court in the case of Jaipuria China Clay Mines (P.) Ltd.* [1966] [\[TS-10-SC-1965-O\]](#).

10 Now coming to the application of S. 115 BAA(3) in light of above understanding about depreciation. Albeit there is no notification issued by CBDT under sub Section (3) of S. 115BAA prescribing the manner and methodology of determining the amount attributable to additional depreciation for the limited purpose of making adjustments under subsection 3 of S. 115 BAA. **On the other hand, as per the provisions of S. 32 (2) and S. 72, the amount of unabsorbed additional depreciation is no different from normal depreciation. The Income Tax Act 1961 is silent on the aspect relating to priority of set off between normal and additional depreciation.**

11 In such a scenario, It may also be claimed that until the formula has been prescribed by CBDT under S. 115 BAA (2) (ii), the said sub clause is being rendered redundant and inapplicable because in the absence of prescriptions in the code, the proximations cannot be basis to determine the disallowances. **Reliance** in this regard is placed on Decision of honourable Supreme Court in the Case of Principal CIT v. Nalwa Sons Investment Ltd., (2010)

12 **Alternatively it may also be claimed that since the law is silent with reference to in such a scenario, before applying the theory of attribution one must decide and assume whether at all in the amount of unabsorbed depreciation as carried forward from previous years there is component of additional depreciation and thereafter the** amounts of additional depreciation of the total amount of unabsorbed depreciation can be derived by using different models and formulae so applied on the amount of unabsorbed depreciation carry forward to AY 2020-21.

13 In the absence of any specific guidelines, one may by way of different methodologies and permutations arrive at the quantum of unabsorbed additional depreciation. For the sake of better understanding we have work out the quantum of unabsorbed additional depreciation and normal depreciation based on following methods/ formulae. **[Please note that the options mentioned hereunder are illustrative and not exhaustive. Depending on facts of each case there could be variety of permutations / combinations possible] -**

v Option 1 - year on year basis in the year of set off against profits, it is assumed that profits are first set off against additional depreciation and balance against normal depreciation accordingly the resultant carry forward amount normal and additional depreciation is arrived at.

v Option 2 - year on year basis in the year of set off against profits, it is assumed that profits are first set off against normal depreciation and balance against additional depreciation accordingly the resultant carry forward amount normal and additional depreciation is arrived at.

v Option 3- year on year basis the amount of carry forward depreciation is split on proportionate basis in to additional and normal depreciation

v Option 4 - totality basis - Of the total amount of unabsorbed depreciation, it is assumed the amounts so absorbed comprises of additional depreciation only and thus whole amount of unabsorbed depreciation is attributable to normal depreciation

v Option 5 - Totality basis - Of the total amount of unabsorbed depreciation, it is assumed the amounts so absorbed comprises of normal depreciation only and thus whole amount of unabsorbed depreciation is attributable to additional depreciation

v Option 6 - on totality basis the amount of carry forward depreciation is split on proportionate basis in to additional and normal depreciation

Options are worked out in the following example -

| FY | Additional Depreciation as per ITR [A] | Normal Depreciation as per ITR [B] | Total Tax Depreciation as per ITR [A+B] | Unabsorbed Depreciation c/f as per ITR [X] | Profit before depreciation | Amount of Additional depreciation | | | | | |
|---------|--|------------------------------------|---|--|----------------------------|-----------------------------------|----------|----------|----------|----------|----------|
| | | | | | | Option 1 | Option 2 | Option 3 | Option 4 | Option 5 | Option 6 |
| 2012-13 | 600 | 800 | 1,400 | 1,200 | 200 | 400 | 600 | 514.29 | | | |
| 2013-14 | 1,600 | 1,600 | 3,200 | 2,800 | 400 | 1,200 | 1,600 | 1,400 | | | |
| 2014-15 | 400 | 1,700 | 2,100 | 1,500 | 600 | - | 400 | 286 | | | |
| 2015-16 | 350 | 1,700 | 2,050 | 1,350 | 700 | - | 350 | 230 | | | |
| 2016-17 | 10 | 1,450 | 1,460 | 1,160 | 300 | - | 10 | 8 | | | |
| 2017-18 | 100 | 1,170 | 1,270 | 20 | 1,250 | - | 20 | 2 | | | |
| 2018-19 | 70 | 1,030 | 1,100 | 600 | 500 | - | 70 | 38 | | | |
| Total | 3,130 | 9,450 | 12,580 | 8,630 | 3,950 | 1,600 | 3,050 | 2,478 | - | 3,130 | 2,147 |

Note: It is assumed that there are no business loss other than depreciation.

14 Considering the lacuna in the section, it is an open and plausible view for the assessee to take the most beneficial claim and assume that whole amount of carry forward depreciation loss pertains to normal depreciation, in a scenario where on the quantum of unabsorbed depreciation up to AY 2020-21 exceeds the total amount of unabsorbed normal depreciation as carried forward year on year basis and as can be arrived at by screening past tax returns. In the absence of specific guidelines and if it is possible to claim in case facts it may choose to take a beneficial view and claim that the entire amount of unabsorbed depreciation is attributable to normal depreciation and not unabsorbed depreciation. This would be the just and equal treatment in the eyes of law considering the fact that the provision is beneficial as such and also because even those assessee's who have claimed the benefit under various sections in earlier years and enjoyed paying taxes at net income are eligible to preferred tax regime prescribed under S. 115BAA. The assessee's who have unabsorbed depreciation cannot be put to prejudice simply because in the earlier year's profits weren't enough to subsume the amount of depreciation allowance.

15 Now a question arises as to whether a formula so applied to arrive at the amount attributable to additional depreciation be ruled out by the authorities on the ground that the same is un-realistic, un-reasonable, aggressive etc.? The term attributable used in the section is not preceded by the words 'reasonable', 'proportionate' etc. and thus one cannot import such a condition while arriving at the quantum of additional depreciation. Further on a beneficial view taken by business house, department cannot sit in to the arm chair of business and take a decision on behalf of the assessee about the formula that one ought to choose in their respective cases. When in the provisions of the Act there is no machinery prescribed to derive at the actual amount of unabsorbed additional depreciation and in substance considering the language of S. 32 it is clear that the same is nothing else but a depreciation itself, it is not possible for the department to claim that the amount so derived by the assessee is not 'correct' or 'real' or 'actual' as the same doesn't exist at all.

16 Here one may also claim that of all the options considering the order of priority of set off between current year depreciation claim and unabsorbed carry forward depreciation, one may claim that the balance of brought forward depreciation and brought forward depreciation must be arrived at taking year on year basis rather than total basis. Here again one must understand that effectively for AY 2020-21 one is concerned with deciding the formula to derive the quantum of normal and additional depreciation though under law as per the effect of S. 32 (2) brought forward depreciation is fully regarded to be normal depreciation simpliciter for referred year. **Here when one is concerned with application of formula** since law doesn't prescribe for a modus operandi to arrive at such amounts and deeming fiction presumes the whole amount to be normal depreciation, one need not get in to hyper technicalities of finding such amount assessment year wise.

17 Another issue relevant to understand is whether the schedules in the ITR -6 applicable to the assessee is indicative that the amount of additional depreciation is to be attributed year on year basis. In this regards at the outset it is relevant to point out that tax forms merely contain presentation to various items of incomes, expenses, losses etc. which are considered while arriving at chargeable total income. Such forms cannot override the law on the subject as explained hereinabove. Further to add, it is noteworthy that even in the tax forms applicable up to AY 2019-2020 in schedule relating to carry forward depreciation there is no distinction made between a carry forward depreciation in to additional or normal depreciation. This in line with the view taken hereinabove that once an amount of depreciation is carry forward to later year, it loses its identity as additional / normal and as an indivisible bundle owing to the operation of S. 32 (2) regarded to be depreciation simpliciter.

18 For the sake of exhaustiveness it would be relevant to discuss the implications relating to levy of penalty in a scenario where the department works out a different amount of on the amount of additional depreciation and normal depreciation arrived at for the purpose of section 115BAA(3) of the Act. In this regards, it would be relevant to highlight that in terms of exceptions to section 270 A of the Act, no amount of penalty can be levied in a scenario where the claim is bonafide and all the material facts relating to same is disclosed in tax returns and other supporting documents. Penalty cannot be levied in a scenario where there are two views possible. Also, once CBDT brings out notification with regard to determination of amount attributable to additional depreciation, the querist must revise the return according to the prescriptions contained therein.

CONCLUSION

While choosing a particular method, an assessee must be mindful about the fact choosing any method doesn't deny the amount of claim but merely defers the claim of expenditure in the form of depreciation allowance in further years. It is only a matter of timing difference and the assessee is otherwise also eligible to claim such depreciation on the amount of additional depreciation as capitalised to WDV. Thus selection of a particular option by a particular assessee could be government by commercial considerations.

In the absence of specific guidelines and if it is possible to claim in case facts it may choose to take a beneficial view and claim that the entire amount of unabsorbed depreciation is attributable to normal depreciation and not unabsorbed depreciation. Further such a view doesn't run contrary

to other provisions of the Act.

No amount of penalty can be levied in a scenario where the claim is bonafide all the material facts relating to same is disclosed in tax returns and other supporting documents. Penalty cannot be levied in a scenario where there are two views possible.

At last in the scenario where actual method for determining the bifurcation for unabsorbed depreciation is notified assessee's must mandatorily revise the return under S. 139 (5) of the Act if the time limit for revising the return has not elapsed. If such a revision is not made despite the available time limit, authorities may consider the claim to be malice, though the same was justified in law at the time of filling the return of income.