



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"I" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA no.1670/Mum./2019  
(Assessment Year : 2008-09)

Boskalis International – Dredging  
International C.V., 702, 7<sup>th</sup> Floor  
Trade Centre, Bandra Kurla Complex  
Bandra (East), Mumbai 400 51  
PAN – AADFB4877B

..... Appellant

v/s

Dy. Commissioner of Income Tax  
International Taxation  
Range-1(3)(1), Mumbai

..... Respondent

Assessee by : Shri Madhur Agarwal  
Revenue by : Shri Avneesh Tiwari

Date of Hearing – 16.09.2019

Date of Order – 06.12.2019

**ORDER**

**PER SAKTIJIT DEY. J.M.**

The captioned appeal by the assessee is against the order dated 27<sup>th</sup> December 2018, passed by the learned Commissioner of Income Tax (Appeals)-55, Mumbai, for the assessment year 2008-09.

2. In grounds no.1 to 5, the assessee has challenged the disallowance of set-off of brought forward business loss against the

income computed under section 44BB of the Income Tax Act, 1961 (for short "*the Act*").

3. Brief facts are, the assessee, a non-resident company, is engaged in providing services relating to capital and maintenance dredging. For the assessment year under consideration, the assessee filed its return of income on 31<sup>st</sup> July 2008, declaring total income of ₹ 42,96,11,089. Subsequently, the assessee filed a revised return of income on 31<sup>st</sup> March 2010. Assessment in case of the assessee was originally completed under section 143(3) of the Act vide order dated 27<sup>th</sup> December 2010, disallowing the claim of set-off of brought forward unabsorbed depreciation and brought forward business loss. Against the assessment order so passed, the assessee preferred appeal before learned Commissioner (Appeals) and being unsuccessful, went in further appeal before the Tribunal. After considering the submissions of the assessee, the Tribunal while upholding the disallowance of unabsorbed depreciation restored the issue relating to claim of set-off of brought forward business loss to the Assessing Officer for fresh adjudication. In pursuance to the directions of the Tribunal, the Assessing Officer took up the assessment proceedings again. As could be seen from the facts on record, in the return of income filed for the assessment year 2001-02 and 2002-03, the assessee had claimed certain business loss. While completing the

assessment for the said assessment years, the Assessing Officer not only accepted assessee's claim of business loss, but also allowed carried forward of such loss to future assessment years for set-off against the income. In the return of income filed for the impugned assessment year, the assessee claimed set-off of carry forward business loss against the income computed under section 44BB of the Act. In the course of assessment proceedings, the Assessing Officer on the basis of material on record found that the loss pertaining to the assessment year 2001-02 to 2002-03, were determined and carried forward till the assessment year 2004-05. However, from assessment year 2005-06, the assessee did not have any operation in India, hence, it did not file any return of income. The Assessing Officer observed, since the assessee did not have any business operation and did not file any return of income for the assessment years 2005-06 to 2007-08, there is no mechanism of making any assessment to either determine the loss or allow carry forward of such loss to the future years. Referring to the provisions of sections 72, 80 and 139(3) of the Act, the Assessing Officer ultimately concluded that assessee's claim of carry forward and set-off of business loss of earlier assessment years against the deemed income computed under section 44BB of the Act, in the impugned assessment year is not allowable. Accordingly, he disallowed the claim of set-off of business loss. The assessee challenged the aforesaid disallowance before the first appellate

authority, however, learned Commissioner (Appeals) also concurred with the view expressed by the Assessing Officer.

4. The learned Authorised Representative submitted, while deciding assessee's appeal earlier for the very same assessment year, the Tribunal, in order dated 14<sup>th</sup> December 2015, has held that assessee's claim of set-off of brought forward business loss against the income computed under section 44BB of the Act is allowable. Only for quantification purpose, the issue was restored back to the file of the Assessing Officer. The learned Authorised Representative submitted, by disallowing assessee's claim of set-off of brought forward business loss, the Assessing Officer has not only failed to comply with directions of the Tribunal, but has exceeded his jurisdiction. The learned Authorised Representative submitted, the fact that the Tribunal has accepted assessee's claim of carry forward loss and only the quantification aspect was restored to the Assessing Officer is evident from the observations of the High Court while deciding assessee's appeal in ITA no.1327 of 2016, dated 21<sup>st</sup> February 2019. Thus, he submitted, the Assessing Officer should be directed to carry out the directions of the Tribunal and only quantify the brought forward business loss to be set-off against the income computed under section 44BB of the Act.

5. The learned Departmental Representative strongly relied upon the observations of the learned Commissioner (Appeals) and the Assessing Officer.

6. We have considered rival submissions and perused the material on record. The short issue arising for consideration before us is, whether assessee's claim of set-off of brought forward business loss against the income computed under section 44BB of the Act, is permissible in law or not. It is evident, the Departmental Authorities have rejected assessee's claim of set-off basically for the reason that in between the assessment years 2004-05 to 2008-09, the assessee had stopped its business operation in India and has not filed any return of income in assessment years 2005-06, 2006-07 and 2007-08. It is the stand of the Revenue that due to non-filing of return of income for the aforesaid assessment years, carried forward business loss pertaining to the assessment year 2001-02 and 2002-03, as was determined as accumulated business loss in assessment year 2004-05, could not have been determined and carried forward to the subsequent assessment years in the absence of any return of income filed by the assessee. It is to be noted, for the very same reason assessee's claim of set-off of brought forward business loss was rejected while completing the original assessment under section 143(3) of the Act. However, when the dispute ultimately reached the

Tribunal, vide order dated 14<sup>th</sup> December 2015, passed in ITA no.4938/Mum./2014, the Tribunal, after considering rival submissions and more particularly the reasoning of the Revenue that in the absence of return of income filed for the assessment year 2005–06 to 2007–08, carry forward of business loss could not have been allowed, has held that after removal of proviso to section 72(1) of the Act w.e.f. 1<sup>st</sup> April 2000, the restriction imposed earlier in set-off of carry forward of business loss has been removed. Thus, the Tribunal held that due to such amendment to section 72(1) of the Act, which is applicable to the impugned assessment year, the law laid down by the Hon'ble Bombay High Court in *Hiralal Jeramdas v/s CIT*, [1965], 58 ITR001 (Bom.) would not be applicable. Further, the Tribunal has also referred to CBDT Circular no.779, dated 14<sup>th</sup> September 1999, providing for carry forward and set-off of business loss even in a case where there is discontinuance of the business. Further, the Tribunal has also referred to the decision of the Tribunal, Nagpur Bench, in *ITO v/s Tinwan Builders Pvt. Ltd.*, [1999] 64 TTJ 253 (Nag.), wherein it is held that irrespective of the fact whether the return of income of the subsequent years are filed under section 139(1) of the Act or not, the assessee would be eligible to claim set-off of carried forward business loss if such loss has been determined in any earlier assessment year and has been allowed to be carried forward. Though, the Tribunal has ultimately restored the issue to the Assessing Officer for deciding

afresh in terms of the observations made in the order, however, there is enough indication in the order to demonstrate that the Tribunal has taken a favorable view with regard to the assessee's claim of set-off of carried forward business loss. Therefore, the contention of the assessee that the restoration to the Assessing Officer is only for the purpose of quantification is acceptable. This view of our gets further strengthened from the following observations of the Hon'ble Bombay High Court while deciding assessee's appeal against the order of the Tribunal cited supra.

*"(iii) In the return of income filed for Assessment Year 2008–09, the assessee had declared its total income of ₹ 42.96 Crore (rounded of). In such return, the assessee had computed the income in terms of Section 44BB of the Act, after claiming set-off of unabsorbed depreciation and unabsorbed business loss for the earlier years. The Assessing Officer rejected both the claims. The issue eventually reached the Tribunal. The Tribunal by the impugned judgment, accepted the assessee's contention with respect to carry forward of business loss but remanded the proceeding before the Assessing Officer, for fresh computation.*

*(iv) The assessee, is therefore, aggrieved by this direction of the Tribunal for remand. Question (2) raised by the assessee in this appeal, relates to this portion of the Tribunal's order.*

*3. Having heard the learned Counsel for the parties and having perused the documents on record, we notice that in relation to the assessee's contention of permissibility of set-off of carried forward business loss of earlier years, the Tribunal accepted the assessee's stand. The Tribunal merely remanded the issue of computation of the assessee's income on such basis. Under the circumstances, we see no reason to interfere with the directions of the Tribunal, in this respect."*

7. Thus, from the fact on record, it becomes clear that insofar as assessee's claim that brought forward business loss has to be set-off

against the income computed under section 44BB of the Act was accepted by the tribunal and only the quantification aspect of set-off of loss against the income was restored back to the Assessing Officer for verification. That being the case, in the assessment proceedings, in pursuance to the directions of the Tribunal, the Assessing Officer cannot again re-visit the allowability of assessee's claim of set-off of brought forward business loss on the reasoning that the assessee had not filed any return of income for the intervening assessment years i.e., 2005-06 to 2007-08. In view of the aforesaid, we direct the Assessing Officer to verify assessee's computation relating to set-off of brought forward loss against the income computed under section 44BB of the Act and allow the claim accordingly. Grounds are allowed subject to factual verification by the Assessing Officer.

8. In the result, appeal stands allowed in terms indicated above.  
Order pronounced in the open Court on 06.12.2019

**Sd/-**  
**M. BALAGANESH**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 06.12.2019**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury  
Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai