

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE**

Before Shri George George K, JM & Shri B.R.Baskaran, AM

ITA No.1911/Bang/2018 : Asst.Year 2005-2006

ITA No.1912/Bang/2018 : Asst.Year 2006-2007

ITA No.1913/Bang/2018 : Asst.Year 2007-2008

ITA No.1914/Bang/2018 : Asst.Year 2008-2009

M/s.Mistral Solutions Pvt.Ltd. No.60, Adarsh Regent, 100 Feet Ring Road, Domlur Extension Bangalore - 560 071. PAN : AABCM8832C.	v.	The Dy.Commissioner of Income-tax, Circle 4(1)(2) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Padamchand Khincha, CA.
Respondent by : Sri.Kannan Narayanan, JCIT-DR

Date of Hearing : 05.11.2020	Date of Pronouncement : 09.11.2020
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ORDER

Per George George K, JM :

These appeals at the instance of the assessee are directed against four orders of the CIT(A), all dated 28.03.2018. The impugned orders of the CIT(A) are arising out of the Assessing Officer's order while giving effect of the CIT(A)'s order in the first round of litigation. The relevant assessment years are 2005-2006 to 2008-2009.

2. Common issue is raised in these appeals, hence, they were heard together and are being disposed of by this consolidated order. Identical grounds are raised in all the appeals except for assessment year 2005-2006, where an additional ground is raised, wherein the assessee challenges limiting of set off of brought forward losses / unabsorbed

depreciation against business income only and not income from other sources.

3. The solitary issue raised is whether the A.O. and the CIT(A) have erred in not allowing set off of brought forward losses / unabsorbed depreciation relating to assessment years 2002-2003 to 2004-2005 against the total income declared in the assessment years under consideration.

4. Since facts in these cases are more or less similar, we shall narrate the facts pertaining to assessment year 2005-2006 and adjudicate the issue raised. The decision rendered for assessment year 2005-2006 would apply *mutatis mutandis* for the other assessment years also.

5. The brief facts of the case are as follow:

The assessee is a private limited company engaged in the business of software development. For the assessment year 2005-2006, the return of income was filed on 31.10.2005. The total income comprised of business income of `NIL' which has arrived after claiming deduction u/s 10A of the I.T.Act and thereafter, set off of earlier years losses against the remaining business income of Rs.4,88,322. The income of other sources of Rs.8,19,043 was offered to tax. In the said return of income filed, the assessee had inadvertently omitted to set off earlier years unabsorbed depreciation with the income of other sources of Rs.8,19,043. In this context, it is relevant to mention in respect of earlier assessment years, viz., assessment years 2002-2003, 2003-2004 and 2004-2005, the assessee had

business losses and unabsorbed depreciation which was not set off with the income from other sources for those respective years. The income under the head “income from other sources” for these assessment years were offered to tax and business losses and unabsorbed depreciation were carried forward to subsequent years for set off. It was stated that these losses and unabsorbed depreciation were properly claimed in the return of income and the said returns were filed within the due date of the respective assessment years. The details of business losses / unabsorbed depreciation for assessment years 2002-2003 to 2004-2005, we shall narrate in the course of the order.

5.1 The assessment order u/s 143(3) of the I.T.Act was passed vide order dated 28.11.2008. In the said order, deduction u/s 10A of the I.T.Act was restricted to Rs.40,89,052 as against the claim of Rs.41,75,245. The remaining sum of Rs.89,193 was brought to tax along with income from other sources as declared in the return of income. Against the said order, an appeal was filed before the first appellate authority. The assessee also filed an application for rectification u/s 154 of the I.T.Act before the Assessing Officer. In the said application, the assessee had provided the details of earlier years business losses and depreciation (page 61 to 72 of the paper book filed by the assessee for assessment year 2005-2006). The assessee also brought to the notice of the A.O. that such earlier years losses were not allowed or set off against the total income, which included the reduced exemption u/s 10A of the I.T.Act. The assessee had requested in rectification that

it may be allowed set off of earlier years losses against the total income for assessment year 2005-2006.

5.2 An order u/s 154 of the I.T.Act was passed on 28.11.2008. In the said order, the Assessing Officer had allowed only part of the assessee's request to set off earlier years losses against the total income. The amount of excess exemption u/s 10A of the I.T.Act amounting to Rs.89,193, was set off from the brought forward losses, whereas, in the application for rectification, the assessee had requested to allow set off of earlier years unabsorbed losses against the total income. In other words, the benefit of set off of brought forward losses was restricted only to the business income and not income from other sources.

5.3 In appeal proceedings before the CIT(A), the assessee had raised a ground seeking the benefit of set off of brought forward losses. However, the same was not pressed since the assessee was in receipt of rectification order u/s 154 of the I.T.Act, which gave the benefit of set off of brought forward losses. Further, the assessee filed an application dated 07.03.2014 and had requested the A.O. to pass order giving effect to the CIT(A)'s order. In the said application, the assessee had worked out the revised computation of total income wherein it had set off unabsorbed losses / depreciation with the total income. The A.O. gave effect to the CIT(A)'s order vide order dated 28.03.2017, wherein he had not given the benefit of set off of brought forward losses against the total income. It was claimed by the assessee that there was unabsorbed depreciation /

losses, which ought to have been set off with the income from other sources while passing the order giving effect to the CIT(A)'s order. The assessee on receipt of A.O.'s order dated 28.03.2017, filed another 154 application on 19.06.2017 (refer page 97 to 105 of the paper book). It was submitted by the learned AR that the rectification application was not disposed of.

6. In the meanwhile, aggrieved by the order of the Assessing Officer (order giving effect dated 28.03.2017), the assessee has filed appeal before the first appellate authority. The CIT(A) rejected the appeal of the assessee and confirmed the view of the Assessing Officer. The CIT(A) held, since the set off of brought forward losses / unabsorbed depreciation was not the subject matter of the decision by the appellate authority, the A.O. has rightly not entertained the plea of the assessee. It was further held by the CIT(A) that though the assessee has filed an application u/s 154 of the I.T.Act, praying for set off of unabsorbed business losses /unabsorbed depreciation against the total income, the assessee ought to have pursued the rectification application

7. Aggrieved by the order of the CIT(A), the assessee has filed this appeal before the Tribunal. The assessee has filed a paper book of 138 pages enclosing therein audited financial statements for the year ending 31.03.2005, the computation of total income for the assessment year 2005-2006, applications filed u/s 154 of the I.T.Act on 13.01.2009, 07.03.2014 and 19.06.2017, Income Tax Return and computation for

assessment years 2002-2003 to 2004-2005, submissions made before the Income Tax Authorities etc. The learned AR reiterated the submissions made before the Income Tax Authorities.

8. The learned Departmental Representative, on the other hand, supported the orders of the A.O. and the CIT(A).

9. We have heard the rival submissions and perused the material on record. The only issue raised in these appeals is whether the assessee is entitled to set off of unabsorbed losses / unabsorbed depreciation relating to assessment years 2002-2003 to 2004-2005 against the total income declared by the assessee for these assessment years under consideration. Admittedly, in the instant case, the assessee is having unabsorbed business losses / unabsorbed depreciation for assessment years 2002-2003 to 2004-2005. The details of the business loss, business income, unabsorbed depreciation, deduction claimed u/s 10A of the I.T.Act and income from other sources for assessment years 2002-2003 to 2008-2009, are as under:-

Assessment year	Business income / (Business loss) (Rs.) A	(Unabsorbed depreciation) (Rs.) B	Total C = A+B	Deduction claimed u/s 10A (Rs.) D	Remaining business income E	Set off of business loss F	Income from other sources (Rs.) G	Total income as per ROI H
2002-03	(25,13,709)	(87,40,568)	(1,12,54,277)	-	-	-	80,04,872	80,04,872
2003-04	-	(73,16,524)	(73,16,524)	-	-	-	29,74,058	29,74,058
2004-05	(99,35,330)	(1,08,54,567)	(2,07,89,897)	-	-	-	11,40,822	11,40,822
2005-06	46,66,667	-	46,66,667	41,78,345	4,88,322	4,88,322	8,19,043	8,19,043
2006-07	4,58,86,633	-	4,58,86,633	4,01,72,120	57,14,513	-	7,48,850	64,63,363
2007-08	6,83,62,057	-	6,83,62,057	6,12,54,692	71,07,365	-	24,32,487	95,39,852
2008-09	3,73,66,826	-	3,73,66,826	2,07,16,012	1,66,50,814	-	63,59,649	2,30,10,463

9.1 The return of income for assessment years 2002-2003 to 2004-2005 are filed within the due date u/s 139(1) of the I.T.Act. The details of return of income filed for assessment years 2002-2003 to 2004-2005 are placed on record at pages 63 to 71 of the paper book filed by the assessee for assessment year 2005-2006. The details of the same are as follows:-

Assessment year	Due date u/s 139(1)	ROI filed on
2002-03	31.10.2002	31.10.2002
2003-04	30.11.2003 [extended from 31.10.2003 vide order u/s 119(2)(a) dt. 16.10.2003]	27.11.2003
2004-05	1.11.2004 [extended from 31.10.2004 vide order u/s 119(2)(a) dt. 20.10.2004]	1.11.2004

9.2 The Assessing Officer has not disputed the fact that the returns of income for assessment years 2002-2003 to 2004-2005 declaring business loss and unabsorbed depreciation was filed within the due dates as explained above. The Assessing Officer has only held that since the assessee has not claimed the set off of brought forward losses while filing the original return of income, the fresh claim made by the assessee to consider the set off of brought forward losses cannot be considered. It is pertinent to note that the assessee had filed application u/s 154 of the I.T.Act, immediately after the assessment order, praying for set off of business losses / unabsorbed depreciation against the total income for the assessment year 2005-2006. Further the assessee filed

application u/s 154 pursuant to the order of the CIT(A) [order dated 08.12.2011] requesting the A.O. to set off unabsorbed depreciation against income from other sources. By virtue of section 154(1A) of the I.T.Act, a new claim can be considered by the A.O. while passing order u/s 154 of the I.T.Act.

9.3 As per section 72(1)(i) of the IT Act, 1961, business loss of an earlier year, if it cannot be set off against income under other same head or different head, as per section 70 and 71, shall be carried forward and set off against the profits and gains of any business in the subsequent year. Relevant portions of section 72(1)(i) is reproduced hereunder.

“72. (1) Where for any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of [section 71](#), so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year ;

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:”

9.4 Thus, section 72(1)(i) mandate set off of business loss with business income of a subsequent year. It is a statutory compulsion. It does not give any option to assessee to set off or not to set off. In other words, whether or not the assessee has set off the losses in the return of income, the income tax authorities are required to give effect to section 72(1)(i) and set off such losses.

9.5 Similarly, it is a settled principle that unabsorbed depreciation forms part of current year depreciation under section 32(2) and consequently unabsorbed depreciation should also be set off against any income of a subsequent year under any head. Further, the restriction of eight years for carry forward and set off of business loss is not applicable to unabsorbed depreciation, thereby meaning that the unabsorbed depreciation is eligible for carry forward and set off for any number of years without any restriction. The following judicial pronouncements in *CIT v. Jaipuria China Clay Mines (P.) Ltd.* [1966] 59 ITR 555 (SC), *CIT Vs Mother India Refrigeration Inds (P) Ltd* 155 ITR 711 (SC), *CIT v Mangalore Chemicals and Fertilizers Ltd* (1991) 191 ITR 0156 (Kar) explains the above principles.

9.6 The Hon'ble Supreme Court in the case of *CIT v Yokogawa India Ltd* [2017] 391 ITR 274 has held that deduction under section 10A should be computed and allowed while computing the income of the eligible undertaking under Chapter IV of the Act. Relevant observations from the judgment of the Hon'ble Apex Court are extracted hereunder.

“17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total

income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly."

9.7 Thus, in view of section 72(2)(i), 32(2) and the aforesaid judgment of the Hon'ble Supreme Court, the business loss and unabsorbed depreciation of AY 2002-03 to AY 2004-05 ought to have been set off against the business income remaining after claiming deduction under section 10A and against the Income from other sources of the subsequent years.

9.8 The CBDT Circular No.14 dated 11.04.1955 states that the income tax authorities are required to bring to the notice of the assessee any claim of relief, exemption, deduction etc. to which the assessee is legally entitled and allow the same even though the assessee may not have claimed the said relief, exemption, deduction etc. for any reason. It was further stated that the Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing relief and in this regard the officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. In the light of the above CBDT

Circular No.14 dated 11.04.1955, the fact that the assessee inadvertently did not set off the business losses and unabsorbed depreciation of AY 2002-03 to AY 2004-05 against the remaining business income (after claiming deduction u/s 10A) and Income from other sources of the subsequent years does not obviate the duty of the assessing officer in rectifying the said mistake and allowing set off for the same. If an assessee makes a mistake in submitting to be assessed on a particular income before the assessing authority, he is not estopped or precluded by law from preferring an appeal and showing to the appellate authority that the income is, in fact, either wholly or partly, not exigible to tax. If such a contention is taken, it is the duty of the appellate authority to examine the matter and determine the proper tax leviable.

9.9 The Hon'ble Karnataka High Court in *Wipro Limited v DCIT 382 ITR 179* had held that claims not made in the return of income are also allowable by the assessing officer. The Hon'ble High Court had placed reliance of the CBDT Circular No.14 dated 11.04.1955, for holding so. The relevant extracts from the judgment of the jurisdictional High Court are as under:-

“71. It was contended on behalf of the Revenue that, no revised return was filed by the assessee under section 139(5) of the Act claiming the relief under section 90 of the Act read with double taxation avoidance agreement. Only a letter claiming the said relief was filed before assessment and the same cannot be taken into consideration.

72. Section 139(5) of the Act provides that, if any person, having furnished a return under sub-section (1), or in pursuance of a notice issued under sub-section (1) of section 142, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion

of the assessment, whichever is earlier. The said provision refers to a return under sub- section (1). Sub-section (1) of section 139 provides for filing of a return of income on or before the due date, furnishing a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. If in such return the assessee discovers any omission or any wrong statements therein which has to be necessarily with reference to his income and if it is sought to be corrected, then it could be done only by resorting to a revised return under section 139(5) of the Act. The income contemplated by section 139(1) of the Act can only be the income which the assessee bona fide believes to be his income and not the income as finally assessed by the Assessing Officer. On the discovery of omission or wrong statement in the earlier return filed by the assessee he can safely file a revised return without recourse to the Assessing Officer in any way. Once such a revised return is filed under section 139(5), the effective return for the purpose of the assessment is thus the return which is ultimately filed by the assessee on the basis of which he wants his income to be assessed. In this context one should notice the issue on hand is not with regard to a claim that would vary the income of the assessee. The issue is with regard to allowing a credit on account of tax paid outside India in respect of which particulars were furnished to the assessing authority during the course of assessment proceedings before the assessment is passed. It is bound to be entertained and dealt with on the merits. Once the return is filed and the Income-tax Officer commences the assessment proceedings, the assessing authority is not the taxpayer's opponent, in the strictly procedural sense of the term. The assessment functioning involves the adjustment of the tax liability of the assessee in accordance with the facts on record and in accordance with the law laid down by the Legislature. The assessment is nothing but another name for adjustment of the tax liability to accord with the taxable event in the particular taxpayer's case. While determining the tax liability of the assessee, the assessing authority shall allow the credit for all prepaid taxes referred to in section 234B.

73. The Central Board of Direct Taxes Circular No. 14 (XL-35), dated April 11, 1955 states to the effect that it is the duty of the Assessing Officer to make available to the assessee any legitimate and legal tax relief to which the assessee is entitled, but has omitted to claim for one reason or another. Merely because the assessee in the return filed under section 139(1) has not put forth a claim for relief, he cannot be estopped from getting the tax relief if he is entitled to in law. The omission in the return filed under section 139(1) of the Act is not about non-disclosing of income. Income is disclosed. The omission in claiming tax relief out of the income which the assessee is entitled to under section 10A of the Act. Realising this mistake before the assessment proceedings concluded, the assessee has filed a letter putting forth such claim. Therefore, the assessing authority is legally bound to take into consideration the said letter where the assessee is claiming tax creditor relief and decide whether the assessee is entitled to such relief out of the tax liability on the total income in respect of which he has filed the return under section 139(1) of the Act. As the tax liability is fastened on the assessee on the basis of the statutory provisions, if any

statutory provision gives the assessee the tax benefit, the assessing authority is legally bound to consider the same and grant him relief. In the course of assessment the said claim cannot be rejected on the ground that the same is not made in the return filed under section 139(1) and on the ground that no revised return is filed under section 139(5) of the Act. What the assessee is claiming by way of a letter is to bring to notice of the assessing authority the statutory provisions as well as the provisions of the double taxation avoidance agreement under which the assessee is entitled to claim tax benefit, as the said benefit of tax was not claimed in the return filed under section 139(1) of the Act. Once the assessee files the necessary particulars and claims relief under the provisions of the double taxation avoidance agreement, the limitation placed by domestic law would yield to the tax relief provided for under the double taxation avoidance agreement. Therefore, the assessing authority was not justified in rejecting the said claim on the ground that no revised return is filed under section 139(5) of the Act. In fact, probably the assessing authority was conscious that it is not a valid ground to reject the claim, he proceeded to consider the claim of the assessee on the merits and has rejected the claim on the merits also.

9.10 In the light of the aforesaid reasoning and the judgment of the Hon'ble jurisdictional High Court, we are of the view that the matter needs to be considered afresh by the A.O. The A.O. is directed to consider the assessee's claim of set off of unabsorbed losses / depreciation against the declared income for assessment year 2005-2006. The A.O. shall afford an opportunity of hearing to the assessee. The A.O. shall not reject the assessee's case solely for the reason that the assessee had not made the claim of set off of unabsorbed losses / depreciation in the original return filed. It is ordered accordingly.

10. In the result, the appeal in ITA No.1911/Bang/2018 is allowed for statistical purposes.

11. Since the facts pertaining to other assessment years are more or less similar, the decision rendered by us for

assessment year 2005-2006 will hold good for the other assessment years as well. It is ordered accordingly.

12. In the result, the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced on this 09th day of November, 2020.

Sd/-
(B.R.Baskaran)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 09th November, 2020.
Devadas G*

Copy to :

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2. The Respondent.
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4. The Pr.CIT-4, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore