

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA
[Virtual Court Hearing]**

**Before Shri P.M. Jagtap, Vice-President
&
Shri A.T. Varkey, Judicial Member**

**I.T.A. No. 304/KOL/2020
Assessment Year: 2015-2016**

***Infinity Infotech Parks Limited,..... Appellant
Plot A3, Block-GP, Sector-V, Salt Lake,
Kolkata-700091
[PAN:AABCI0692]]***

-Vs.-

***Deputy Commissioner of Income Tax,..... Respondent
Circle-2(1), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069***

Appearances by:

*Shri Akkal Dhudhewala, A.R., appeared on behalf of the assessee
Shri Imokaba Jamir, CIT, appeared on behalf of the Revenue*

Date of concluding the hearing : October 15, 2020
Date of pronouncing the order : December 18, 2020

O R D E R

Per Shri P.M. Jagtap, Vice-President:-

This appeal filed by the assessee is directed against the order of ld. Principal Commissioner of Income Tax-1, Kolkata dated 04.02.2020 passed under section 263 of the Income Tax Act, 1961.

2. The assessee in the present case is a Company, which is engaged in the business of development of I.T. Parks and related infrastructural facilities. In the assessment completed under section 143(3) of the Act vide an order dated 18.12.2017, the total income of the assessee was

determined by the Assessing Officer as per the normal provisions of the Act at Rs. NIL after allowing set off for the unabsorbed depreciation and brought forward losses of the earlier years including the brought forward business loss of Rs.3,99,13,429/- pertaining to A.Y. 2009-10. The book profit of the assessee-company under section 115JB of the Act was computed by the Assessing Officer at Rs.2,57,78,146/- as declared in the return of income. The record of the assessment completed by the Assessing Officer was examined by the concerned Id. Principal CIT and on such examination, he found that a loss of Rs.19,10,76,892/- was declared by the assessee-company in its return of income for A.Y. 2009-10 including the unabsorbed depreciation of Rs.15,11,63,463/- and in the assessment completed under section 147/143(3) of the Act vide an order dated 19.03.2016, the claim of the assessee for unabsorbed depreciation was disallowed by the Assessing Officer to the extent of Rs.8,43,55,803/- thereby determining the loss of the assessee-company for A.Y. 2009-10 at Rs.10,67,21,089/-. He also noted that the loss so determined for A.Y. 2009-10 was fully set off against the income of the assessee for A.Y. 2011-12 and 2012-13 and there was no loss for A.Y. 2009-10 that was available to be carried forward and set off against the income of the assessee for A.Y. 2014-15. He accordingly found that the order passed by the Assessing Officer for A.Y. 2015-16 under section 143(3) allowing the set off of business loss for A.Y. 2009-10 amounting to Rs.3,99,13,429/- was erroneous as well as prejudicial to the interest of the Revenue. A show-cause notice was accordingly issued by him to the assessee under section 263 and in reply to the same, the following submission in writing was made by the assessee on 09.01.2020:-

"We are in receipt of the notices dated 27.11.2019 and 03.01.2020 informing us that in your opinion assessment Order u/ s 143(3) for AY 2015-16 was erroneous in so far, as it was prejudicial to the interest of the revenue. It is claimed in the SCN that in arriving at the assessed income for the AY 2015-16 the AO wrongly allowed set-off for brought forward business loss of Rs 3,99,13,429/- pertaining to AY 2019. On scrutiny of the Assessment Orders for the AYs 2009-10 to 2012-13 it was noted by you that such business loss was not available for set off in AY 2015-16 because the loss was

entirely set off in the earlier years i.e. in AYs 2011-12 and 2012-13. In this regard we place on your record our following objections.

Before dealing with the specific issue, it is relevant to place on record the following facts for correct appreciation of the issue at hand. For AY 2009-10, return u/s 139(1) was filed declaring loss of Rs.19, 10,76,892/ -. Such negative income comprised of unabsorbed depreciation of Rs.15,11,63,463/- and business loss of Rs.3,99,13,429/-. In the order u/s 143(3) total income was assessed as (-) Rs.16,26,22, 649/ -. On appeal the CIT(A) deleted the adjustments made in order u/s 143(3) and therefore in the order u/ s 251 total income assessed was (-)Rs.19,10,76,892/ - i.e. the loss as was returned. On further appeal by the Revenue, the ITAT Kolkata upheld the order of the CIT(A).

Subsequent to ITAT's order, an order of reassessment u/s 147 dated 19.03.2016 was passed by the AO in which he disallowed Rs.8,43,55,803/- out of the claim for depreciation and thereby total income was assessed at (-) Rs.10,67,21,089/-. As result of the order u/s 147 dated 19.03.2016 no loss is found, available for set off for the AY 2015-15. It is on this premise you have initiated the impugned revision proceedings u/s 263.

It is however submitted that the premise on which you have considered the AO's order to be erroneous is factually wrong as a result of events which happened subsequent to passing of the order u/ s 147 dated 19.03.2016. Against the order u/s 147/143(3) dated 19.03.2016 the company had filed an appeal before CIT(A). The CIT(A)-10, Kol in his order dated 30.10.2019 in Appeal No. 10164/CIT(A)- 10/Cir-2(1)/2009-10/2018-19/Kol allowed full relief to the company and depreciation disallowance of Rs.8, 43, 55, 803/ - was fully deleted by him. Consequent to giving effect to the CIT(A)'s order dated 30.10.2019 the revised assessed income is (-) Rs.19,10,76,892/- which inter-alia includes business loss of Rs.3,99,13,429 and for which no setoff has been allowed till AY 2014-15. As such the business loss assessed in AY 2019-20 was rightly allowed to be set off by the AO in AY 2015-16 while passing the Assessment Order u/ s 143(3).

It is therefore submitted that the assessment order for AY 2015-16 is neither erroneous nor prejudicial to the interest of the revenue for the reasons set out in your SCN”.

3. The ld. Principal CIT did not find merit in the submission made on behalf of the assessee for the following reasons given in paragraph no. 5 of his impugned order:-

"5. I have carefully considered the facts of the case and gone through submission of the assessee and details available on record. On perusal of assessment records and assessment order, it is observed that the A.O determined total income of Rs.10,72,51,271/- and thereafter allowed set off unabsorbed depreciation and business losses pertaining to A.Y 2009-10, 2010-11, 2013-14 and 2014-15. After setting off unabsorbed depreciation and business losses pertaining to earlier A.Ys, assessed income was worked out at NIL. It is further found from the assessment records for A.Y 2011-12 and 2012-13, the brought forward loss of Rs.8,57,42,940/- were set off in A.Y 2011-12 and 2012-13. The brought forward loss was pertaining to A.Y 2009-10. The available brought forward loss was Rs.19,10,76,892/- related to A.Y 2009-10. The assessment was made u/s 147/143(3) with a income of Rs.10,67,21,089/- for A.Y 2009-10. It is evident from the record that after adjustment of brought forward losses of Rs.19,10,76,892/- against income of Rs.10,67,21,089/-, the available brought forward loss was arrived at Rs.8,43,55,803/- (Rs.19,10,76,892 - Rs.10,67,21,089). From the records it is further found that the assessee has got relief of Rs.2,53,45,109/- vide ITAT order No. 1317/ko1/2012 dated 14.05.2018 for A.Y 2009-10. The A.O wrongly allowed excess set off of loss of Rs.5,90,10,694/-".

4. For the reasons given above and by relying on certain judicial pronouncements referred to in his impugned order, the Id. Principal CIT set aside the order dated 18.12.2017 passed by the Assessing Officer under section 143(3) of the Act vide his order dated 04.02.2020 passed under section 263 of the Act with a direction to the Assessing Officer to pass a fresh assessment order after taking into consideration the observations made by him. Aggrieved by the order of the Id. Principal CIT passed under section 263, the assessee has preferred this appeal before the Tribunal.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. The Id. Counsel for the assessee has submitted that the order passed by the Assessing Officer under section 143(3)/147 of the Act on 19.03.2016 disallowing the assessee's claim for depreciation to the extent of Rs.8.43.55.803/- for A.Y. 2009-10 was challenged by the assessee in the appeal filed before the Id. CIT(Appeals)

and the ld. CIT(Appeals) vide his appellate order dated 30.10.2019 deleted the entire disallowance of Rs.8,43,55,803/- made by the Assessing Officer on account of depreciation. He has submitted that the Assessing Officer while giving effect to the said order of the ld. CIT(Appeals) dated 30.10.2019 has recomputed the loss of the assessee-company for A.Y. 2009-10 at Rs.19,10,76,892/-, which, inter alia, includes business loss of Rs.3,99,13,429/-, which was available for set off against the income of the assessee for the year under consideration, i.e. A.Y. 2015-16. He has contended that there was thus no mistake in the order of the Assessing Officer dated 18.12.2017 passed under section 143(3) allowing the set off of brought forward loss amounting to Rs.3,99,13,429/- pertaining to A.Y. 2009-10 and the ld. Principal CIT is not justified in revising the said order by his impugned order passed under section 263. We are unable to accept this contention of the ld. Counsel for the assessee. It is observed that the assessment for A.Y. 2015-16 was completed by the Assessing Officer vide an order passed on 18.12.2017 and even though the set off of business loss pertaining to A.Y. 2009-10 was claimed by the assessee to the tune of Rs.3,99,13,429/- against the income for A.Y. 2015-16, it was incumbent upon the Assessing Officer to allow such set off only to the extent of loss as determined in the assessment. The undisputed fact in this regard is that the total loss of the assessee for A.Y. 2009-10 was determined in the assessment completed under section 143(3)/147 vide an order dated 19.03.2016 at Rs.10,67,21,089/- as against the loss of Rs.19,10,76,892/- declared by the assessee and since the entire loss so determined was already set off against the income of the assessee for A.Y. 2011-12 and 2012-13, no loss as determined in the assessment for A.Y. 2009-10 was available for set off against the income of the assessee for A.Y. 2015-16 when the assessment order under section 143(3) for A.Y. 2015-16 came to be passed by the Assessing Officer on 18.12.2017. In our opinion, there was thus an error in the order of the Assessing Officer passed under section 143(3) in allowing the set off of loss of Rs.3,99,13,429/- pertaining to A.Y. 2009-10

and the same being prejudicial to the interest of the Revenue, the order passed by the Assessing Officer under section 143(3) dated 18.12.2017 was liable to be revised as rightly held by the Id. Principal CIT in his impugned order passed under section 263. We, however, find that the working made by the Id. Principal CIT regarding the excess set off of loss pertaining to A.Y. 2009-10 alleged to be wrongly allowed by the Assessing Officer is not correct and this matter should have been left open by him to the Assessing Officer for making the working on the basis of actual loss pertaining to A.Y. 2009-10 as determined in the relevant assessment. We accordingly modify the impugned order of the Id. Principal CIT passed under section 263 to this extent. As regards the appellate order dated 30.10.2019 passed by the Id. CIT(Appeals) for A.Y. 2009-10 allowing the entire claim of the assessee for depreciation and the effect given by the Assessing Officer to the said order finally determining the loss of the assessee-company for A.Y. 2009-10 at Rs.19,10,76,892/- on which a strong reliance was placed by the Id. Counsel for the assessee at the time of hearing before us, we may clarify that the Assessing Officer after having given the effect to the order of the Id. Principal CIT and determined the loss of the assessee for A.Y. 2009-10 at Rs.19,10,76,892/-, which, inter alia, included business loss of Rs.3,99,13,429/-, which was available for set off against the income of the assessee for A.Y. 2015-16 as claimed by the assessee, is duty bound to allow such set off by passing a consequential order.

6. In the result, the appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open Court on December 18th, 2020.

**Sd/-
(A.T. Varkey)
Judicial Member**

**Sd/-
(P.M. Jagtap)
Vice-President)**

Kolkata, the 18th day of December, 2020

- Copies to :
- (1) **Infinity Infotech Parks Limited,
Plot A3, Block-GP, Sector-V, Salt Lake, Kolkata-700091**
 - (2) **Deputy Commissioner of Income Tax,
Circle-2(1), Kolkata, Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069**
 - (3) *Principal Commissioner of Income Tax-1, Kolkata;*
 - (4) *The Departmental Representative*
 - (5) *Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.