

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
DR. B. R. R. KUMAR, ACCOUNTANT MEMBER**

I.T.A. No. 1087/DEL/2018 (A.Y 2015-16)

(THROUGH VIDEO CONFERENCING)

ACE Infracity Developers P. Ltd. B-47, Surya Nagar, Ghaziabad Ghaziabad Uttar Pradesh AAKCA8693E (APPELLANT)	Vs	DCIT Central Circle Noida, Uttar Pradesh (RESPONDENT)
--	----	--

Appellant by	Sh. V. K. Agarwal, AR
Respondent by	Sh. Satpal Gulati, CIT DR

Date of Hearing	16.02.2021
Date of Pronouncement	05.03.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against order dated 29/12/2017 passed by CIT(A)-IV, Kanpur for assessment year 2014-15.

2. The grounds of appeal are as under:-

“1. The Ld. CIT(A) has grossly erred on facts as well as in law in confirming the order passed by the Ld. AO which is ex facie illegal, arbitrary and without jurisdiction being against the provisions of Income Tax Act, 1961 and principles of natural justice.

2. The Ld. CIT(A) has grossly erred on facts as well as in law in confirming disallowance of set off of depreciation and business loss amounting to Rs. 21,58,600/- being Rs. 20,52,510/- of the current year unabsorbed depreciation, Rs. 99,831/- unabsorbed depreciation of earlier year and Rs. 6,260/- unabsorbed business loss of earlier year against the surrendered

income of Rs. 2.47 Cr.”

3. The assessee company is engaged in the business of real estate development as builder. A search and seizure operation u/s 132 of the Income Tax Act, 1961 was conducted on 4/7/2014 on the premises of the assessee comprising ACE group of cases. The original return of income was filed on 27/09/2015 at a loss of Rs. 20,52,510/- as unobserved depreciation to be carried forward. During search proceedings an amount of Rs. 2,47,00,000/- was surrendered and thus return was revised and filed on 8/7/2016 showing total income of Rs. 2,25,41,400/- after setting off unobserved depreciation of the current year and that of preceding assessment years. The assessee company commenced business operation since 1/3/2014 and it is an admitted fact as stated in Para 6 of the Assessment order that an amount of Rs. 26,30,36,962/- has been incurred on construction of group housing construction was merely 18.25% of the estimated cost of project. Thus, Revenue was not recognized during the year. The Assessing Officer made addition of Rs. 21,58,600/- on account of admission of undisclosed income and assessed the total income at Rs. 2,47,00,000/-

4. Being aggrieved by the assessment order, the assessee filed appeal before CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. The Ld. AR submitted that the Ld. CIT(A) confirmed the addition on the ground that the nature of the surrender of income is an unexplained investment u/s 69 of the Act. There exist specific provisions u/s 115BBE w.e.f. 01.04.2013 in the provision of Income Tax statute and by virtue of sub-section (2) of section 115BBE, no set off of loss u/s 69 can be allowed. However, sub-section 2 of 115BBE as applicable in AY 2015-16. The Ld. AR also relied upon the CBDT Circular NO. 11/2019 dated 19.06.2019. The Ld. AR relied upon the following case laws:-

i) Vijaya Hospitality and Resorts Ltd., v. CIT [419 ITR 322 (Kar. HC)]

- ii) M/s Sangeet Resorts Vs DCIT; 2020-TIOL-468-1TAT-CHD
- iii) M/s Star Ply Board Ltd Vs PCIT; 2020-TIOL-611-ITAT-CHD
- iv) M/s. Innovative Construction Pvt. Ltd. Vs ACIT ITA No.1084/Mum/2019 (A.Y 2013-14) dated 11/1/2020.

Therefore, it is clearly established that set off of brought forward losses/depreciation against the income assessed u/s 69 is allowable in AY 2015- 16. Had it not been so, there was no need for any amendment in sec 115BBE. The very fact that now, w.e.f. AY 2017-18 the provision has been amended proves conclusively that earlier there was no bar for adjusting brought forward losses/ depreciation against the income assessed u/s 69. Accordingly, even if for the sake argument it is said that the surrender of Rs. 2,47,00,000/- is under sec 69, the assessee is still entitled to get setoff of loss/depreciation against the additions of Rs. 2,47,00,000/-. The Ld. AR submitted that the Assessing Officer has made the disallowance on the ground that depreciation/losses cannot be claimed against the surrendered income of business amounting to Rs. 2.47 Cr. Since the surrendered income pertains to business of the appellant being in relation to purchase bills, depreciation/loss was rightly claimed by the appellant. Even the Assessing Officer has taxed the surrendered income as income from business. The Ld. AR further submitted that the CIT(A) confirmed the addition on the ground that the nature of the surrender of income is on unexplained investment u/s 69 of the Act. There exist specific provisions u/s 115BBE w.e.f. 01.04.2013 in the provision of Income Tax statute and by virtue of sub-section (2) of section 115BBE no set off of loss can be allowed u/s 69. The Ld. AR submitted that during assessment proceedings, the Assessing Officer has not considered any issue pertaining to Section 69 as is evident from the assessment order itself. By Now it is judicially settled that the CIT(A) did not have any jurisdiction to make such addition/disallowance on the issues which were never considered by the Assessing Officer. Though the powers of CIT (A) are co-terminus with the powers of the Assessing Officer yet he has jurisdiction only on those items

which have been considered by the AO irrespective of the fact whether the issue is subject matter of appeal or not He does not have any jurisdiction over those issues which have not been considered by the AO because they will be subject matter of revision u/s 263 or reassessment u/s 147. If CIT(A) tries to examine those issues which have not been considered by the AO, sec. 147 as well as sec. 263 will become redundant and the conditions for their operation will be nullified. This view is fully supported by various judgments of Hon'ble Apex Court, High Court and Hon'ble jurisdictional ITAT as under:

- (a) Sh. Vikrant Puri vs ACIT; 142 & 5789/Del/2013; dt. 04/03/2016
- (b) Holcim (India) Pvt. Ltd. v/s DCIT, 2013-TIOI-903-ITAT-DEL
- (c) CIT vs. Rai Bahadur Hardutroy Motilal Chamaria, (1967) 66 ITR 443 (SC)
- (d) CIT vs. Sardari Lal & Co. 251 ITR 864 (Del)(FB)
- (e) CIT(A) vs. Union Tyres; 240 ITR 556 (Del)

6. The Ld. DR submitted that the Assessing Officer as well as the CIT(A) has given a detailed finding as to why the set off of depreciation requires to be confirmed and relied upon the assessment order and the order of the CIT(A).

7. We have heard both the parties and perused the material available on record. The submission made by the Ld. AR related to CBDT Circular No. 11/2019 dated 19/06/2019 are very much relevant in the present appeal before us. Before that Section 115BBE has to be taken into account. The extract of Section 115BBE is as follows:

"115BBE. (1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income- tax payable shall be the aggregate of—

(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income

referred to in clause (a).

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1)."

From perusal of Section 115BBE, it is very clear that any expense or allowance shall not be allowed from the income assessed u/s 69 but, this Section does not indicate that set off of brought forward business losses shall not be allowed from income assessed u/s 69 for the purpose of calculating tax u/s 115BBE. This is further confirmed by the amendment made under the Finance Act, 2016, which is applicable from AY 2017-18. Relevant extract of the amended provision is reproduced as under:

"115BBE. (2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance or setoff of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1)."

As per the Finance Act, 2016, amendment for disallowance of set off of brought forward losses against the income assessed u/s 68 has been inserted w.e.f. 01/04/2017, i.e., from AY 2017-18. This issue has already been clarified by the CBDT itself vide circular no. 11/2019 dt. 19/06/2019. Relevant extracts of the circular are as under:

"2 The matter has been referred to the Board so that a consistent approach is adopted by the Assessing Officers while applying provision of section 115BBE in assessments for period prior to the assessment year 2017-18.

3. The Board has examined the matter. The Circular No. 3/2017 of the Board dated 20th January, 2017 which contains Explanatory notes to the provisions of the Finance Act, 2016, at para 46.2, regarding amendment made in section 115BBEJ2] of the Act mentions that currently there is uncertainty on the issue of set-off of losses against income referred to in

section 115BBE.”

It also further mentions that the pre-amended provision of Section 115BBE of the Act did not convey the intention that losses shall not be allowed to be set-off against income referred to in Section 115BBE of the Act and hence, the amendment was made vide the Finance Act, 2016. Thus keeping the legislative intent behind amendment in Section 115BBE(2) vide the Finance Act, 2016 to remove any ambiguity of interpretation, the Board is of the view that since the term 'or set off of any loss' was specifically inserted only vide the Finance Act 2016, w.e.f. 01.04.2017, an assessee is entitled to claim set-off of loss against income determined under Section 115BBE of the Act till the assessment year 2016-17. Since, CBDT Circular No. 11/2019 dated 19.06.2019 was issued after the order of the CIT(A), the CIT(A) did not have the benefit of the circular. Therefore, we are of the view that the Circular applies in the present assessee's case as the Assessment Year before us is that of A.Y. 2015-16 and till A.Y. 2016-17, the assessee is entitled to claim se-off of loss against income determined under Section 115BBE of the Act. The appeal of the assessee is allowed.

7. In result, the appeal of the assessee is allowed

Order pronounced in the Open Court on this 05TH Day of March, 2021.

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

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 05/03/2021
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent

3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI