



2. *The Learned CIT(A) has erred in rejecting the application of rectification u/s 154 filed to set off the brought forward loss from Business & Profession against the income added u/s 68, stating that the mistake is not apparent from the records, giving reasons that "I find that the issue is debatable. I find that there are large number of case laws both for and against on this issue. Therefore, mistake if any in the order, is not apparent from record. Hence, I do not see any reason to interfere in the order of the AO."*

3. Brief facts of the case are that in this case, assessee's claim under Section 154 of the Income Tax Act, 1961 (in short 'the Act') adjusting the disallowance under Section 68 of the Act amounting to Rs.2,80,61,325/- against current year unabsorbed depreciation and unabsorbed business loss of past year, was denied by the Assessing Officer by holding as under :-

*"By Virtue of rulings of the Hon'ble Courts the income brought to tax u/s. 68, 69, 69A, 69B, 69C does not fall under any source of income prescribed in section 14 of the Income Tax Act, 1961. The Hon'ble Courts have held that due to this factual and statutory fact such income does not qualify for corresponding deductions which are applicable to various heads of income.*

- (i) Fakir Mohd. Haji Hasan v/s CIT (247 ITR 290 (GUJ)*
- (ii) Kerala Sponge Iron Ltd. V/s ACIT [32 ITR 712] (Cochin Trib.)*
- (iii) Dulari Digital Photo Services (P) Ltd. V/s CIT [38 Taxman 390] (Punj. & Haryana)*

*Following these rulings needless to mention it is provided beyond iota of doubt that this issue is not only debatable issue but in some of the court ruling it is provided that no set off can be given to loss determined against the income brought to tax u/s 68 of the I.T. Act"*

Upon assessee's appeal, Ld. CIT(A) upheld the same, holding as under :-

*"I find the issue is debatable. I find that there are large number of case laws both for and against on this issue. Therefore, mistake if any in the order, is*

*not apparent from record. Hence, I do not see any reason to interfere in the order of AO.”*

Against this order, assessee is in appeal before us.

4. We have heard both the parties and perused the record. The assessee has made following submission before us.

*“(a) Central Board of Direct Tax (CBDT) circular No. 11/2019 dated 19<sup>th</sup> of June, 2019 wherein the CBDT considering the legislative intent behind the amendment in Section 115BBE(2) vide Finance Act, 2016 to remove any ambiguity of interpretation stated that*

*“The Board is of the view that since the term ‘or set off of any loss’ was specifically inserted only vide 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.” Please refer point 4 (Page no 45 of the Paper Book) of the said circular – Annexed vide Annexure VIII.*

*(b) Shree Karthik Papers Ltd vs Deputy Commissioner of Income Tax, Centre Circle – 1, Coimbatore [2020] 118 taxmann.com 467 (Madras) (HC)*

*In the above mentioned case, the Hon'ble High Court pronounced that where the additions were made u/s 68, the same can be set off against brought forward losses till Assessment Year 2016-2017 referring to the above mentioned circular.*

*The relevant portion is reproduced below for your quick perusal:*

*“The Central Board of Direct Taxes, New Delhi in the above cited circular bearing no. 11/2019 dated 19-6-2019 had taken note of the legislative intent behind amendment in section 115BBE(2), for the purpose of removing any ambiguity of interpretation, observed that vide Finance Act 2016 with effect from 1-4-2017, an assessee is entitled to claim set-off of loss against income determined under section 115BBE of the Act till the assessment year 2016-2017. In the case on hand, the assessment year pertains to 2006-2007 and*

therefore, this Court is of the considered view that in the light of the above cited judgment in 2007 (291) ITR 258 as well as the circular, the matter in issue requires further adjudication at the hands of the Income-tax Appellate Tribunal.” - (Point No 10 on page No 49 of the Paper Book) Annexed vide Annexure IX.

Your Honor, we humbly pray that in view of the above facts, the above total additions of Rs.2,80,61,325/- may please be set off against the current year's unabsorbed depreciation of Rs.1,02,04,224/- and brought forward Business loss of Rs.1,78,57,101/-. After adjusting additions/income of Rs.2,91,90,026, against unabsorbed business loss and depreciation of past years, The position of unabsorbed Business loss and Depreciation would be as follows :

A.Y.	Date of filing of ROI	Business Loss (Incl. Unabsorbed Depreciation)	Unabsorbed Depreciation	Business Loss	Short-term Capital Loss
2008-09	03/11/2008	-	-	-	17,14,781
2009-10	29/09/2009	12,24,25,011	5,80,44,034	6,43,80,977	-
2010-11	29/09/2010	96,27,812	96,27,812	-	-
2011-12	29/11/2011	3,14,48,518	3,14,48,518	-	-
<b>Total b/f Losses</b>		<b>16,35,01,341</b>	<b>9,91,20,364</b>	<b>6,43,80,977</b>	<b>17,14,781</b>
CY Loss as per ROI	30/11/2013	1,13,32,925	1,13,32,925	-	-
Addition as per order u/s 143(3) which were already set off by the Assessing Officer		(-) 11,28,701	(-) 11,28,701		
Addition as per order u/s 143(3) which was not set off by the AO		(-) 2,80,61,325	(-) 1,02,04,224	(-) 1,78,57,101	
<b>Total Additions as per order 143(3) to be set off</b>		<b>(-) 2,35,55,776</b>	<b>(-) 1,13,32,925</b>	<b>(-) 1,78,57,101</b>	
<b>Total c/f losses</b>		<b>14,56,44,240</b>	<b>9,91,20,364</b>	<b>4,65,23,876</b>	<b>17,14,781”</b>

5. The Ld. DR, however, pointed out that the reference to CBDT circular is not relevant as the same came out after the CIT(A) order. Upon careful consideration, we note that the above argument and reference to CBDT circular were not before the Ld. CIT(A). In light of the Hon'ble Madras High Court decision referred above and in the interest of justice, we are of the opinion that the issue needs to be remitted to the Ld. CIT(A) for fresh

adjudication. In any case, the order of Ld. CIT(A) is a non-speaking order. Hence, the issue stands remitted to the file of Ld. CIT(A).

6. In the result, appeal of assessee is allowed for statistical purposes.

Order pronounced under Rule 34(4) of ITAT Rules on 17<sup>th</sup> May, 2021.

Sd/-  
(AMARJIT SINGH)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai, Date : 17<sup>th</sup> May, 2021

\*SSL\*

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "C" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai