IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.815/M/2020
Assessment Year: 2013-14

Income Tax Officer-3(3)(4), Room No.672, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Regency Property Investments Pvt. Ltd., 77, Nariman Bhavan, 227, Nariman Point, Mumbai – 400 021 **PAN: AACCR 7727A**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Satish Mody, A.R.
Revenue by : Shri Bharat Andhale, D.R.

Date of Hearing : 31.08.2021
Date of Pronouncement : 27.10.2021

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 26.11.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2013-14.

2. The only issue raised by the Revenue in ground No.1 is against the order of Ld. CIT(A) directing the AO to allow the set up of unabsorbed depreciation against the income from house property as well as income from the sources and also to allow setting off of business loss pertaining to earlier years against the current years business income.

3. At the outset, the Ld. Counsel of the assessee submitted that the issue involved in the present case is a recurring one and has been decided by the co-ordinate Bench of the Tribunal in assessee's own case in ITA No.2434/M/2018 A.Y. 2011-12 in favour of the assessee. The Ld. A.R. therefore prayed that the present appeal of the Revenue may kindly be dismissed by following the said decision of the co-ordinate Bench of the Tribunal.

4. The Ld. D.R., on the other hand, fairly agreed that the issue is recurring one and has been decided in favour of the assessee in A.Y. 2011-12, however, relied on the grounds of appeal filed before the Tribunal.

5. After hearing both the parties and perusing the material on record including the decision of the co-ordinate Bench of the Tribunal in assessee's case in ITA No.2434/M/2018 A.Y. 2011-12, we find that the issue raised in this ground is squarely covered in favour of the assessee. The operative part of the decision of the co-ordinate Bench is reproduced as under :

> "6. We shall first advert to the claim of the ld. D.R that the CIT(A) is in error in allowing „set off" of the brought forward „business losses" of the earlier years against the current years „business income" of Rs.17,96,914/- shown by the assessee in its return of income. It is submitted by the ld. Departmental Representative (for short „D.R"), that admittedly as the business of the assessee company was discontinued in the immediately preceding year viz. A.Y. 2010-11 and there was no business activity carried out by it during the year under consideration, therefore, the „set off" of the brought forward „business losses" of the earlier years against the „business income" for the year under consideration was not justified. We have given a thoughtful consideration to the aforesaid contention of the ld. D.R and are unable to persuade ourselves to subscribe to the same. As is discernible from a perusal of Sec.72(1) of the Act, where a loss suffered by an assessee under the head "Profit or gains of business or profession", not being a loss sustained in a speculation business, cannot be or is not wholly „set off" against income under any head of income in accordance with the provisions of Sec.71, then so much of the loss as had not been so „set off" shall be carried forward to the following

assessment year and be „set off" against the profit or gains, if any, of any business or profession carried on by him and assessable for that assessment year. Further, in case the „business loss" cannot be wholly so „set off", then the amount of loss not so „set off" shall be carried forward to the following assessment year, and so on, for a period of eight assessment years immediately succeeding the assessment year for which the loss was first computed. Accordingly, as per the mandate of the aforesaid statutory provision, it can safely be gathered that a „business loss" (other than a speculation loss) which cannot be „set off" against the income under any head of income in accordance with the provisions of Sec. 71 during the year itself is to be carried forward and to be „set off" against the profit or gains, if any, of any business or profession carried on by him and assessable for that assessment year.

7. Admittedly, at the first blush the contention of the ld. D.R appeared to be very convincing and we were persuaded to subscribe to his view that in the absence of any "business or profession carried on by the assessee" during the year, the requisite condition envisaged in clause (i) of sub-section (1) of Sec. 72 was not satisfied, and resultantly the claim of "set off" of the brought forward „business losses" raised by the assessee could not be accepted. However, a careful perusal of clause (i) of sub-section (1) of Sec. 72 reveals that what is required for "set off" of the brought forward „business losses" is "...the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year". In fact, there is nothing therein provided that such business or profession must be carried on by the assessee during the year in which „set off" of the brought forward „business losses" is claimed by the assessee. We are of the considered view that unlike Sec. 28(i) which emphasises the carrying on of the business or profession by the assessee any time during the previous year, the requirement envisaged in Sec. 72(1)(i) as a precondition for „set off" of brought forward „business losses" is that there is profits and gains of any business or profession carried on by the assessee and assessable for that assessment year. Accordingly, there is nothing provided in Sec. 72(1)(i) which mandates that the business or profession should be carried on by the assessee during the previous year. In our considered view, if during the year there are profits and gains of any business or profession carried on by the assessee and assessable for that assessment year, then, the assessee would be entitled for „set off"" of its brought forward „business losses" against the same. Accordingly, Sec. 72(1)(i) does not mandate that the business or profession should have been carried on by the assessee during the previous year as a precondition for „set off" of the „brought forward" business losses. In fact, if there are profits and gains of any business or profession carried on by the assessee, which are assessable in its hands during the year, it would be entitled to „set off" its brought forward „business losses" against the same. Say, for instance, sum received by the assessee after discontinuance of its business and chargeable to tax as its „business income" u/s 176(3A) in the year of receipt, would irrespective of the fact that the assessee was not carrying on any business in the said year of receipt will be available for „set off" of the brought forward „business losses" of the assessee during the said year.

8. It is in the backdrop of the aforesaid position of law that we shall now adjudicate as to whether the claim of „set off" of the brought forward „business loss" by the assessee during the year under consideration is in order, or not. As is discernible from the assessment order, it is an admitted fact that the assessee had during the

year shown its „business income" at Rs.17,96,914/-. In fact, the said „business income" had been accepted by the A.O while computing the total income of the assessee for the year under consideration. Accordingly, the assessing of the „business income" by the A.O while framing the assessment, as such, in itself satisfies the precondition envisaged in clause (i) of sub-section (1) of Sec. 72, as had been deliberated at length by us hereinabove. In the backdrop of the aforesaid facts, we are of the considered view that the „set off" of the brought forward „business losses" against the „business income" of Rs.17,96,914/- as claimed by assessee is well in order. We thus not finding any infirmity in the order of the CIT(A) to the extent he had upheld the claim of the assessee as regards „set off" of the brought forward business losses of Rs.17,96,914/-, uphold the same.

9. We shall now advert to the claim of the revenue that the CIT(A) had erred in allowing the „set off" of the brought forward „unabsorbed depreciation" of earlier years against the current years „Income from house property" of Rs. 2,15,72,559/- and „Income from other sources" of Rs. 5,66,579/-. The controversy involved in context of the present issues lies in a narrow compass i.e as to whether the brought forward „unabsorbed depreciation" could be „set off" against income other than that shown under the head „business income", or not. It is the claim of the assessee that „unabsorbed depreciation" under Sec. 32(2) can be carried forward indefinitely and „set off" against any head of income. On the contrary, the revenue is of the view that in the absence of any business activity carried on by the assessee during the year, the unabsorbed loss and also the unabsorbed depreciation of the earlier years cannot be „set off" against the income shown by the assessee under the other heads. We have given a thoughtful consideration to the aforesaid issue and are unable to persuade ourselves to subscribe to the view taken by the A.O. As per Sec.32(2) of the Act (as was applicable to the year under consideration), where in the assessment of the assessee, full effect cannot be given to any allowance under sub- section (i) in any previous year, owing to their being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of Sec. 72 and sub-section (3) of Sec.73, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on in for the succeeding previous years. A perusal of the aforesaid statutory provision reveals that in a case where the claim of depreciation as worked out under sub-section (1) of Sec.32 cannot be fully adjusted against the profits or gains chargeable for that year, then such „unabsorbed depreciation" shall be carried forward to the succeeding years and shall be added to the amount of the claim for depreciation of the assessee for the said succeeding year and deemed to be part of such claim of depreciation for the said year. Further, in case if there is no claim of depreciation in the said succeeding year, then the brought forward claim of „unabsorbed depreciation" shall be deemed to be claim of depreciation of the assessee for the said year, and so on. In sum and substance, as per the mandate of law the brought forward „unabsorbed depreciation" would take the colour and character as that of the claim of depreciation of the assessee for the succeeding year, and so on. Accordingly, the brought forward claim of „unabsorbed depreciation" of the assessee which is

deemed to be the claim of the assessee for the current year shall be eligible for being „set off" against his income, if any, assessable for that assessment year under any other head (other than income assessable under the head "Salaries").

10. We have perused the observations of the A.O and are unable to persuade ourselves to subscribe to the same. Admittedly, as per the provisions of Sec. 32(2) of the Act prior to their amendment by the Finance Act, 2000 w.e.f 01.04.2001 the „set off" of the „unabsorbed depreciation" was restricted to the profits and gains from business or profession. However, post-amendment of Sec. 32(2) the „set off" of unabsorbed depreciation is no more restricted to the profits and gains of business or profession. In fact, pursuant to the amendment made available on the statute vide the Finance Act, 2001, w.e.f 01.04.2002 the liberal regime prior to A.Y 1997-98 had been restored from A.Y 2002-03 onwards. In our considered view, the observations of the A.O as regards the limited scope of „set off" of „unabsorbed depreciation" appears to be guided by the pre-amended provisions of Sec. 32(2) of the Act i.e as had remained available on the statute during the period A.Y 1997-98 to A.Y 2000-01. Our aforesaid view that existence of any business in the year in which the „unabsorbed depreciation" is sought to be „set off" by the assessee is not required is fortified by the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Virmani Industries Pvt. Ltd. (1995) 216 ITR 607 (SC). The Hon"ble Apex Court in its aforesaid judgment had observed as under:

> "Yet another question which has to be answered before we can answer the question concerned in this appeal is whether it is necessary that in the following year the assessee must carry on business, i.e., some or other business, to avail of the benefit of the said sub-section ? Two views are possible in this behalf, viz., (1) since the sub-section speaks of unabsorbed depreciation being carried forward to the next year and "added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance" the sub-section necessarily contemplates existence of a business in the following year, and (2) inasmuch as the sub-section not only speaks of adding the unabsorbed depreciation to the depreciation allowance allowed in the following year but also says that in the absence of such allowance, the carried forward depreciation allowance shall be the allowance for that year, it means that in the following year the assessee need not carry on any business or profession for availing the benefit of sub-s. (2) of s. 32. We are inclined to adopt the second of the above two views having regard to the decisions of this Court in Jaipuria China Clay Mines (P) Ltd. (supra) and Rajapalayam Mills Ltd. (supra)."

At this stage, we may herein observe that as the aforesaid judgment was rendered by the Hon"ble Apex Court in context of a case pertaining to A.Y 1965-66, therefore, we feel it necessary to cull out Sec. 32(2) as was then available on the statute, which we find as was then available on the statute, read as under:

> "32(2) where, in the assessment of the assessee or, if the assessee is a registered firm (or an unregistered firm assessed as a registered firm, in the assessment of its partners) full effect cannot be given to any allowance under cl. (i) or cl. (ii) or cl. (iv) or cl. (v) of sub-s. (1) in any previous year

owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance then, subject to the provisions of sub-s. (2) of s. 72 and sub-s. (3) of s. 73, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years."

As is discernible from a perusal of the aforesaid statutory provision i.e Sec. 32(2), it can safely be concluded that as the same in substance had remained the same as in context to that applicable to the case of the assessee before us, therefore, the aforesaid view arrived at by the Hon"ble Apex Court seizes the issue under consideration. Accordingly, we are of the considered view that as the „set off" of the „unabsorbed depreciation" cannot be bridled with a condition that the business should be continued by the assessee in the said year, therefore, the claim of „set off"" of the brought forward „unabsorbed depreciation" by the assessee against its current year „Income from house property" of Rs.2,15,72,559/- and „Income from other sources" of Rs.5,60,579/- is found to be in conformity with the mandate of law. We thus not finding any infirmity in the order of the CIT(A), who had rightly vacated the incorrect view taken by the A.O, therefore, uphold his order.

11. The appeal filed by the revenue is dismissed."

6. Since the issue before us is materially same as decided by the co-ordinate Bench of the Tribunal in ITA No.2434/M/2018 A.Y. 2011-12, therefore, we are inclined to dismiss the appeal of the Revenue by upholding the order of Ld. CIT(A).

7. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 27.10.2021.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 27.10.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai

The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.