

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 5094/Mum/2019
(A.Y.2015-16)**

DCIT, CC-8(1) Room No. 656, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400020	Vs.	M/s Dharamshi Securities Pvt. Ltd. Ground Floor, New Hind House, Narottam Morarjee Marg, Ballard Estate, Mumbai – 400 001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACD3927G		
Appellant	..	Respondent

Appellant by :	Smt. Riddhi Mishra
Respondent by :	Shri Paresh Shaparia

Date of Hearing	01.12.2022
Date of Pronouncement	12.12.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-50, Mumbai, dated 21.05.2019 for A.Y. 2015-16. The revenue has raised the following grounds before us:

- “1. The ld. CIT(A) erred in facts and circumstances of case and law in allowing the unabsorbed depreciation of Rs.2,27,91,340 claimed by the assessee in calculation u/s 115JB of the I.T. Act without appreciating fact that as per sub clause (iii) of the said Explanation, the book profit is to be calculated

after reducing the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of accounts and there is no B/F losses in books of the assessee as on 31.03.2015.”

2. Fact in brief is that return of income declaring total loss of Rs.nil was filed on 10.09.2015. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 28.04.2016. During the course of assessment the A.O noticed that while computing book profit u/s 115JB of the Act the assessee has deducted brought forward unabsorbed depreciation of Rs.2,27,91,340/-. However, as per the assessee’s books of account there was not having brought forward losses in the books. On query the assessee explained that losses of subsequent year cannot be utilized to offset profit of prior years and the loss depreciation of any particular years can only be utilized for set off against future profit. However, A.O has not agreed with the submission of the assessee and after referring sub-clause (iii) of the Explanation 1 of Sec. 115JB disallowed the claim of the assessee of set off of unabsorbed depreciation of Rs.2,27,91,340/-.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the claim of the assessee, after following the decision of ITAT, Chennai in the case of Prithvi Software Ltd. Vs. CIT, vide ITA No. 797/Mds/2010 reproduced as under:

“7. *We have heard the rival submissions and perused the orders of the lower authorities and the material available on record. We find that in the instant case, the original assessment was completed u/s 143(3) on 28.12.2007 wherein book profit u/s 115JB was computed at NIL after allowing set off of brought forward loss or depreciation of Rs. 1,13,01,457/-. The said order of assessment was revised by the ld. CIT vide impugned order passed u/s 263 of the Act. The ld. CIT was of the opinion that there was no amount which could be allowed as deduction under clause (iii) of Explanation to section 115JB(2) of the Act as there was no loss balance in the profit and loss account. It is not in dispute in the instant case that the*

assessee company suffered loss continuously since F.Y. 2000-01 till the immediately preceding previous year. However, the assessee adjusted the figure of accumulated loss of Rs. 3,58,75,731/- with the paid up capital and balance in profit and loss account was not reflecting any loss. The assessee submitted year-wise position as under before the ld. CIT which was not controverted by the ld. CIT or by the ld. D.R:

F.Y.	Business loss	Unabsorbed depreciation	Total
2000-01	6,516,294	5,038,745	11,555,039
2001-02	8,616,502	4,568,920	13,185,422
2002-03	8,300,582	4,658,373	12,958,955
2003-04		2,971,925	2,971,925

8. *It is not in dispute that the above figures are as per audited books of account of the assessee for the immediately preceding four years. From the above, it is observed that the assessee has continuously suffered loss as per its books for the last four years and out of which in the first year the entire loss was on account of depreciation, and in the remaining three years, there was also loss more than depreciation, i.e., cash loss. In spite of the above, to say that there was no brought forward loss or unabsorbed depreciation as per books in the current year is, in our considered opinion, an absurdity. It seems that the ld. CIT is of the opinion that unless there is a debit balance in the profit and loss account, the assessee cannot be allowed the benefit of clause (iii) Explanation to Section 115JB(2). In our considered view, the phrase 'loss brought forward' and phrase 'debit balance in profit and loss account' are two different and does not convey the same meaning. The above position becomes evident when one looks into the example given by the CBDT in its Circular No. 495 dated 22.9.1987. A reading of para 36.3 and 36.5 thereof shows that by virtue of the said clause, "brought forward losses" or "unabsorbed depreciation", whichever is less, could be reduced in arriving at books profits. It requires working out separate amount of losses and unabsorbed depreciation in each year from the books of account and their set off, if any, against subsequent year's book profit for determining the amount to be carried forward or the amount remaining unabsorbed. The loss or unabsorbed depreciation is to be determined with reference to books of account in contra-distinction to the loss of unabsorbed depreciation arrived at from normal computation of total income under sections 72 to 74A of the Act or u/s 32 of the Act. Herein, it may be noted that phrase used is 'books of account' and not 'profit and loss account' or 'balance sheet'. 'Profit and loss account, balance sheet and books of account' are different and distinct terms and in a given circumstance, may not carry the same meaning. Though 'profit and loss account' and 'balance sheet' are normally drawn up from the books of account and the amount reflected therein agree with the balance sheet as per books of account, but books of account also contain many details and break up of balances which are disclosed in a summarized manner in the profit and loss account and balance sheet and hence, a figure which may be available as per books of account may not always be necessarily apparently visible from either the*

profit and loss account or balance sheet. The said clause (iii) cannot be read to mean that if the loss suffered in a year and unabsorbed depreciation of that year are not kept separately and shown distinctly in the balance sheet, then no deduction for the said loss or depreciation can be allowed in the succeeding years in computing the book profit. There is no such further legal requirement that the loss should appear in the balance sheet of the succeeding year also and hence such requirement cannot be imposed by any authority. In our considered opinion, the loss or unabsorbed depreciation of one year can be set off against the profit of the subsequent year only and till such set off, the amounts are carried forward to the subsequent year, or in other words, are brought forward in the subsequent year from earlier year and are available for set off as per provisions of clause (iii) of section 115JB(2) of the Act. In the instant case, it is observed that the assessee has suffered loss continuously in the last four years. No material has been brought on record that such loss was set off against any profit of the subsequent year in determining the book profit of the assessee company after the year in which such loss was suffered. Thus in our considered opinion, such loss was available for set off during the year under consideration for determining the book profit as per provisions of clause (iii) of section 115JB(2) of the Act. In view of the above, in our considered opinion, there was no error in the order of the assessment as passed by the Assessing Officer in so far as it allowed deduction of Rs. 1,13,01,457/- as per the provisions of section 115JB(2) of the Act in determining the book profit of the year under consideration. Our above view also finds support from the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Sumi Motherson Innovative Engineering Ltd. [2010] 195 Taxman 353 [Del].”

8.9 On the basis of the above facts and circumstances of the case, I do not find any merit in the arguments of the A>o that merely because the balance sheet reflects a surplus, the benefit of unabsorbed depreciation/los should be denied to the Appellant. I am of the considered opinion that unabsorbed loss/depreciation of Rs.2,27,91,340/- should be allowed to the appellant after due verification of the amount claimed, while computing the books profits u/s 115JB. Accordingly, this Ground of Appeal No. 1 of the present appeal is allowed.”

4. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above Sec.115JB(iii) provides that amount of loss forward or unabsorbed depreciation whichever is less as per books of account is to be reduced while computing book profit. The assessee has computed book profit of Rs.9,67,17,109/- under the MAT as per provisions of Sec.115JB of the Act as per computation of income for assessment year 2015-16 after reducing brought forward loss or

unabsorbed depreciation to the amount of Rs.2,27,91,340/-. The assessee has incurred continuous loss as per books of account from assessment year 2011-12 to A.Y. 2014-15 as given below:

<i>Asst. Year</i>	<i>Brought Forward</i>	<i>Business loss</i>	<i>Depreciation</i>	<i>Total loss</i>	<i>Carry forward</i>	<i>Cumulative Carry Forward</i>
2011-12	0	3,09,38,016	27,36,491	3,36,74,507	27,36,491	
2012-13	27,36,491	16,13,147	24,38,848	40,51,995	16,13,147	43,49,638
2013-14	43,49,638	17,10,13,825	87,45,124	17,97,58,949	87,45,124	1,30,94,762
2014-15	1,30,94,762	23,20,52,701	96,96,578	24,17,49,279	96,96,578	2,27,91,340
2015-16	2,27,91,340					

However, before assessment year 2010-11 the assessee was having cumulated profit/surplus which resulted in reflecting cumulative reserve and surplus because of profit earned prior to the year of incurring losses by the assessee company. The ld. CIT(A) after referring the CBDT Circular No.495 and decision of ITAT in the case of Prithvi Software Ltd. Vs. CIT, vide ITA No. 797/Mds/2010 has allowed the claim of the assessee. With the assistance of ld. representative we have also perused the decision of ITAT, Ahmedabad in the case of Surat Textiles Mills Ltd. Vs. DCIT (2016) 70 taxman.com 158 wherein held that assessee will be entitled to claim of loss/unabsorbed depreciation, whichever is lower from the book profit under clause (iii) of Explanation 2 to Sec. 115JB of the Act. The aforesaid decision of the ITAT, Ahmedabad was also confirmed by the Hon'ble Gujarat High Court in the case of Pr.CIT vs. Surat Textiles Mills Ltd. Vs. (2012) 79 taxman.com 209 (Guj HC). The Hon'ble Supreme Court has also dismissed the SLP filed against the decision of Hon'ble Gujarat High Court vide Pr.CIT Vs. Surat Textiles Mills Ltd (2022) 134 taxman.com 213 (SC). The said Sub-clause (iii) cannot be read to mean that if the loss suffered in a year and unabsorbed depreciation of that year are not kept separately and shown distinctively in the balance sheet, then no deduction for the said loss or

depreciation can be allowed in the succeeding years in computing book profit. After considering the judicial finding as supra it is our considered view that carry forward losses cannot be set off against profit of prior year and the same can be set off against profit earned in subsequent year, therefore, we don't find any infirmity in the decision of Id. CIT. Accordingly, the ground of appeal of the revenue is allowed.

5. In the result, the appeal of the revenue is allowed.

Order pronounced in the open court on 12.12.2022

Sd/-

(Rahul Chaudhary)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 12.12.2022

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

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आदेशानुसार/ BY ORDER,

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आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.