

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'B' BENCH, KOLKATA**

**Dr. Manish Borad, Accountant Member
&
Shri Sonjoy Sarma, Judicial Member**

**I.T.A. No. 2299/KOL/2017
Assessment Year: 2011-2012**

***M/s. Millennium Stock Broking (P) Limited,..Appellant
1, R.N. Mukherjee Road, 3rd Floor,
Room No. 317, Kolkata-700001
[PAN: AACCM2853Q]***

-Vs.-

***Deputy Commissioner of Income Tax,.....Respondent
Circle-4(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069***

Appearances by:

*Shri J.P. Khaitan, Sr. Counsel & Shri Pratush
Jhunjhunwala, Advocate, appeared on behalf of the
assessee*

*Shri Biswnath Das, CIT, D.R., appeared on behalf of
the Revenue*

**Date of concluding the hearing : December 08, 2022
Date of pronouncing the order : February 22, 2023**

O R D E R

Per Dr. Manish Borad, Accountant Member:-

This appeal at the instance of assessee for assessment year 2011-12 is directed against the order of Id. Commissioner of Income Tax (Appeals)-2, Kolkata dated 25.08.2017, which is arising out of the order under

section 143(3) of the Act on 19.02.2014 framed by JCIT,
Range-4, Kolkata.

2. The grounds of appeal raised by the assessee are as under:-

(1) That on the facts and circumstances of the case the Ld. CIT(A) has passed the perverse order without application of mind, ignoring submissions, clear mandate of Act and settled law. The appeal be allowed in full.

(2) (a) That on the facts and circumstances of the case the Ld. CIT(A) erred in agreeing with AO in disallowing set off of unabsorbed depreciation of Rs.952839/- from income from other sources ignoring the mandate of section 32(2) read with section 72(2) of I.T.ACT, 1961 and settled law. The same be allowed in full.

(2)b) That on the facts and circumstances of the case the Ld. CIT(A) erred in agreeing with AO in ignoring that in case of both B/F business loss and unabsorbed depreciation scenario, the set off with business income should be with B/F business loss in view of section 72(2) first and not assessment year wise taking both B/F business loss and unabsorbed depreciation together. The deduction of Rs.952839/- be allowed in full.

(3) (a) That on the facts and circumstance of the case the Ld. CIT(A) erred in agreeing with AO in not allowing deduction u/s 115JB of Rs.2420618/- without considering the written submissions made but relying on submission which were never made by appellant. The same be allowed in full.

(3) (b) That on the facts and circumstances of the case the Ld. CIT(A) erred in agreeing with AO in not allowing deduction of unabsorbed depreciation of Rs.2420618/- as per books of account of asst year 2009-10 and 2010-11 of Rs 1428430/- and 992188/- from MAT book profit computation stating that deficit of Rs.8100194/- was already adjusted in F.Y. 31.03.2010 with the general reserve. The same be allowed in full.

(3) (c) That on the facts and circumstances of the case the Ld. CIT(A) erred in agreeing with AO in ignoring the clear mandate of Section 115JB (2) Explanation and settled law regarding adjustments/deductions to be made. The appellant be allowed deduction Rs.2420618/- in full.

3. From perusal of the above grounds, we notice that the issue raised in Ground No. 1 is general in nature, which does not need for adjudication. In Ground No. 2, the issue relates to set off of brought forward business loss and unabsorbed depreciation; and Ground No. 3 relates to computation of book profit under section 115JB of the Act.

4. At the outset, ld. Sr. Counsel for the assessee stated that both the lower authorities erred in not giving set off of business loss as per section 72(2) read with section 32(2) of the Income Tax Act.

5. On the other hand, ld. D.R. supported the order of lower authorities.

6. We have heard the rival contentions and gone through the relevant records placed before us. In Ground No.2, the grievance of the assessee is that ld. CIT(Appeals) erred in confirming the action of the ld. Assessing Officer of giving incorrect set off of brought forward business loss and unabsorbed depreciation. The contention of the ld. Sr. Counsel for the assessee is that the said

set off should have been provided as per provisions of section 72(2) of the Act.

7. The facts in brief are that the assessee is a Private Limited Company engaged in broking and dealing in shares and securities. Income of Rs. NIL declared in the e-return filed on 30.09.2011 under normal computation and MAT computation under section 115JB of the Act at Rs.1,68,61,740/-. We notice that for the year under appeal, the assessee had positive income and set off was given for the brought forward business loss and unabsorbed depreciation for A.Ys. 2009-10 and 2010-11. The relevant portion of computation of income filed by the assessee is annexed below:-

COMPUTATION OF INCOME OF M/S/ MILLINNIUM STOCK BROKING PVT.LTD. FOR ASST. YEAR 2011-2012 (ACCOUNT YEAR ENDED 31.03.2011)			
A. BUSINESS			
Net Profit as per P/L Accounts			19308081
Add: Speculations Loss	10806459		
Add: Depreciation as per Cos. Act	1011410		
Add: Expenses added u/s 14A	<u>328705</u>		<u>12146574</u>
			31454655
Less: Bank Interest	1385865		
Less: STCG	311219		
Less: Dividend (exempt)	354428		
Less: Depreciation as per IT Act	<u>1094935</u>		<u>3146447</u>
			28308208
Less B/F Business Losses from Asst. Year 2009-10 & 2010-11 (Rs. 19482486+8825722)			<u>28308208</u>
			Nil
B. CAPITAL GAINS			
Short term capital gains		311219	
Less: Unabsorbed Depreciation		<u>311219</u>	Nil
C. OTHER SOURCES			
Bank interest		1385865	
Less: Unabsorbed Depreciation		<u>1385865</u>	Nil
		Total Income	<u>Nil</u>
Loss C/F of current year		Tax	<u>Nil</u>
Speculation loss	10806459		

Further we notice that the case of the assessee for A.Ys. 2009-10 and 2010-11 was scrutinized under section 143(3) of the Act and the business loss was assessed at Rs.1,93,31,345/- as against the business loss shown by the assessee at Rs.1,94,82,486/-. When assessment for A.Y. 2011-12 was completed, the set off of business loss and brought forward unabsorbed depreciation computed by the ld. Assessing Officer in the following manner:-

Total income is computed as under :			
A	Business Income		
	As per assessee's computation		28308208
	Less: Adjustment with b/f losses		
	A.Y. 2009-10 [as per order u/s.143(3) dtd.02.12.2011]	20948239	
	A.Y. 2010-11 [as per order u/s.143(3) dtd.28.01.2013]	11592839	
		32541078	
	Adjustment this year		28308208
			NIL
B	Capital Gains		
	As per computation	311219	
	Less: Unabsorbed depreciation (as discussed)	311219	NIL
C	Income from Other Sources		
	As per computation	1385865	
	Less: Unabsorbed depreciation (as discussed)	433026	952839
	Total Income		952839
	Tax thereon 30% is	(A)	285852

8. Before dealing with the issue that what is the correct amount of set off available to assessee, we would like to go through the provisions of section 72 of the Act:-

“Carry forward and set off of business losses.

72. (1) Where for any assessment year, the net result of the computation under the head " Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, ³] where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and-

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year: Provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:]⁴ Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re- established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re- established, reconstructed or revived, and--

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re- established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding.]

(2) Where any allowance or part thereof is, under sub- section (2) of section 32 or sub- section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section.

(3) No loss (other than the loss referred to in the proviso to subsection (1) of this section)] shall be carried for- ward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

Now on perusal of the above provision sub-section 2 of section 72 of the Act states that where there is any allowance or any part

thereof under section 32(2) of the Act, i.e. depreciation or under section 35(4) of the Act, i.e. expenditure on scientific research which are carried forward, while giving effect for setting off of business loss and unabsorbed depreciation, first priority is to be given to brought forward business loss. Now going through the computation of income as abstracted above, we find that against the positive income of Rs.2,83,08,208/-, the assessee claimed set off of total brought forward business loss for A.Y. 2009-10 at Rs.1,94,82,486/- and available amount of the brought forward business loss was for A.Y. 2010-11. So far as the unabsorbed depreciation brought forward from the preceding year is concerned, the assessee claimed set off of this amount against the income from short-term capital gain and income from other sources at Rs.3,11,219/- and Rs,13,85,865/- respectively. We also notice that after the filing of return of income by the assessee for A.Y. 2011-12 claiming brought forward business loss and brought forward unabsorbed depreciation, the assessments for A.Y. 2009-10 and 2011-12 were completed and for A.Y. 2009-10 business loss was assessed at Rs.1,93,31,345/- as against the business loss claimed by the assessee for A.Y. 2009-10 at Rs.1,94,82,486/- and for A.Y. 2010-11, there was no change in business loss declared by assessee at Rs.1,15,92,839/-. The ld. Assessing Officer while giving effect to the brought forward business loss and unabsorbed depreciation has adopted the figure of assessed loss for A.Y. 2009-10 and 2010-11 respectively.

9. Now going through the calculation of assessed income by the ld. Assessing Officer for the assessment year 2011-12 dated 19.02.2014, we notice that against the positive income for A.Y. 2011-12 under the head "business income" at Rs.2,83,08,208/-, ld. Assessing Officer adjusted the brought forward assessed losses for A.Y. 2009-10, at Rs.1,93,31,345/- and unabsorbed depreciation of Rs.16,16,894/- and the remaining amount of positive income was adjusted against the assessed brought forward business loss for A.Y. 2010-11 and thereafter while dealing with the unabsorbed depreciation to be set off against the income from capital gain and income from other sources, the ld. Assessing Officer gave the set off of unabsorbed depreciation of Rs.7,44,245/-. This working of the ld. Assessing Officer contains the mistakes as they are not in consonance with the provision of section 72(2) of the Act. The correct method for adjustment of brought forward losses, which the ld. Assessing Officer ought to have adopted, was to first set off the brought forward assessed business loss for A.Ys. 2009-10 and 2010-11 against the positive business income for the year under consideration and whatever remained should have been allowed to be carried forward for set off in subsequent years. As far as the unabsorbed depreciation is concerned, since the total brought forward business loss could not be said against the business income for the year under consideration, the unabsorbed depreciation is eligible for set off against the income under other heads, which in this case, are capital gain and income from other sources. Since the ld. Assessing Officer has not adopted the correct method and not complied with the provisions of section 72(2) of the Act and ld.

CIT(Appeals) has also not considered the contention made by the assessee regarding the correct method of setting off of business loss and unabsorbed depreciation, we are of the view that the finding of the Id. CIT(Appeals) on this issue needs to be reversed and the same is set aside and the grounds no. 2(a) to 2(b) of the appeal raised by the assessee are allowed. The Id. Assessing Officer is directed to give effect of the brought forward business loss and unabsorbed depreciation as per the computation of income filed by the assessee with the only difference with regard to brought forward loss for A.Y. 2009-10, which has been assessed at Rs.1,93,31,345/-. In other words, as against the business income for A.Y. 2011-12 at Rs.2,83,08,208/-, the assessee is eligible for set off of assessed business loss of Rs.1,93,31,345/- and set off of balance amount of unabsorbed business loss for A.Y. 2010-11 at Rs.89,76,863/-, which will thus leave balance of unabsorbed business loss to be carried forward for A.Y. 2011-11 at Rs.26,15,976/-. As regards the unabsorbed depreciation is concerned, the claim made by the assessee is correct and the Id. Assessing Officer is directed to accept the same.

10. The next issue for our consideration is regarding not allowing deduction under section 115JB of the Act towards unabsorbed depreciation at Rs.24,20,618/-. We notice that Id. Assessing Officer denied this deduction on the basis of his observation that deficit as to profit & loss account of the assessee at Rs.81,00,194/- has already been adjusted in the previous year ending on 31.03.2010 with the general reserve of that year and as a result of such adjustment, entire deficit is wiped off and

there remains no trace of either unabsorbed loss or unabsorbed depreciation, hence, there cannot be any adjustment of either unabsorbed loss or unabsorbed depreciation from the book profit. This view of the ld. Assessing Officer has been confirmed by the ld. CIT(Appeals) also.

11. Before us, ld. Counsel for the assessee referring to the written submission filed before the ld. CIT(Appeals) stated that ld. Assessing Officer erred in observing that deficit of Rs.81,00,144/- was adjusted fully on 31.03.2010. The ld. Assessing Officer further erred in stating the adjustment with general reserve etc, wherein section 115JB(2) Explanation (1)(i)(iii), nowhere put any condition as such invoked by the ld. Assessing Officer. It is further submitted that in so far as the computation of book profit is concerned, the entire mechanism for its calculation is clearly set out in Explanation (1). Not only starting point being the net profit as shown in the profit and loss account but also all the amounts which are to be ' increased as stipulated in clauses (a) to (j) and those which are to be reduced as specified in clauses (i) to (viii), find separate mention in the scheme of the section itself.. So, the computation of "book profit" is to be done strictly, as per this Explanation and the same is settled law. What AO is stating the condition to deny the deductions is neither legally tenable nor finds mention in the clear provisions of the section. For this proposition, further reliance was placed on the judgment in ITA No. 144/KOL/2013 in the case of DCIT -vs.- M/s/ Binani Industries Limited, wherein this Tribunal held as under:-

"3.3. We have heard the rival submissions and perused the materials available on record. We are in agreement

with the arguments of the Learned AR that the losses (both cash loss and depreciation loss) would continue to remain in the books of accounts till it is wiped off by earning profits by the assessee company and accordingly the same would be available for reduction from book profits u/s 115JB of the Act. We hold that the least of the cash loss or depreciation loss once adjusted / reduced from book profits in earlier assessment years, do not vanish out of the books until it is wiped out by profits in subsequent years. Till such time, the losses would only continue to remain in the books. We hold that for the purpose of computation of book profits u/s 115JB of the Act, every year the situation of least of cash loss and depreciation loss needs to be worked out and reviewed and accordingly the understanding of the Learned AO that such loss once adjusted in earlier year is no longer available for set off is misconceived. Hence we do not find any infirmity in the order of the Learned CIT(A) in this regard.

The Ground No.2 raised by the revenue is dismissed”.

12. From perusal of the above decision, we find force in the contention of the Id. Counsel for the assessee and find that the assessee has rightly claimed deduction of unabsorbed depreciation at Rs.24,20,618/- (A.Y. 2009-10 at Rs.14,28,430/- and A.Y. 2010-11 at Rs.9,92,188/-) for the purpose of calculating MAT. Thus Ground No. 3 raised by the assessee is allowed.

13. In the result, the appeal of the assessee is allowed as per terms indicated above.

Order pronounced in the open Court on 22nd February, 2023.

Sd/-

**(Sonjoy Sarma)
Judicial Member**

Kolkata, the 22nd day of February, 2023

Sd/-

**(Manish Borad)
Accountant Member**

Copies to :(1) **M/s. Millennium Stock Broking (P) Ltd.,
1, R.N. Mukherjee Road, 3rd Floor,
Room No. 317, Kolkata-700001**

(2) **Deputy Commissioner of Income Tax,
Circle-4(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata- 700069**

(3) Commissioner of Income Tax (Appeals)-2,
Kolkata;

4) *Commissioner of Income Tax-* ;

(5) *The Departmental Representative*

(6) *Guard File*

TRUE COPY

By order

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

Laha/Sr. P.S.