IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Saktijit Dey (Judicial Member)]

ITA No. 1889 and 1891/Mum/2020
Assessment year: 2016-17 and 2017-18

Shelf Drilling Ron Tappmeyer Limited **……..……Appellant**
4th floor, Schindler House, Main Street,
Hiranandani Gardens, Powai, Mumbai 400076
[PAN: AASCS2715P]

Vs.

Deputy Commissioner of Income Tax
International Taxation 4(2)(1), Mumbai **……Respondent**

ITA No. 1890 and 1892/Mum/2020
Assessment year: 2016-17 and 2017-18

Shelf Drill J T Angel Limited **……..……Appellant**
4th floor, Schindler House, Main Street,
Hiranandani Gardens, Powai, Mumbai 400076
[PAN: AASCS2719P]

Vs.

Deputy Commissioner of Income Tax
International Taxation 4(2)(1), Mumbai **……Respondent**

Appearances by
Nitesh Joshi *for the appellant*
Vijaykumar G Subramanian *for the respondent*

Date of concluding the hearing : January 4, 2021
Date of pronouncement : January 5, 2021

O R D E R

Per Pramod Kumar, VP:

1. These four appeals pertain to the same group of assessee, involve a common issue arising out of materially similar facts, and were heard together. As a matter of convenience, therefore, all the four appeals are being disposed of by this common order.

2. Learned representatives fairly agree that whatever we decide in the case of Shelf Drilling Ron Tappmeyer Limited will apply *mutatis mutandis* for the Shelf Drilling J T Angel

Limited as well. All the material facts are stated to be similar and the difference is only in the figures. We, therefore, take up the case of Shelf Drilling Ron Tappmeyer Limited as the lead case, and will apply the conclusions arrived therein on the Shelf Drilling J T Angel Limited as well.

3. This assessee before us, like the other assessee, is a company incorporated in Cayman Islands and is engaged, inter alia, in the business of providing drilling services in connection with exploration and production of mineral oil. In the income tax return filed by the assessee for the assessment year 2014-15, the assessee had claimed a loss of Rs 80,99,58,751 but, as a result of the additions made by the Assessing Officer, by rejecting the books of accounts in the course of scrutiny assessment proceedings under section 143(3) of the Income Tax Act, 1961, the income finally assessed in the hands of the assessee was a positive income of Rs 6,55,22,160. Aggrieved, assessee carried the matter in appeal before a coordinate bench of this Tribunal. While the coordinate bench did not uphold the rejection of books of accounts, as was done by the Assessing Officer, the coordinate bench nevertheless remitted the matter to the file of the Assessing Officer for framing the assessment *de novo*. As on now, this remanded assessment proceedings are pending before the learned Assessing Officer. In the meantime, however, the question arises whether, during the pendency of these remanded proceedings, the set off of loss, as claimed in the income tax return filed by the assessee, can be claimed. The assessee had claimed a set off of unabsorbed business losses pertaining to the assessment year. In the assessment year 2016-17, this set off was claimed to the extent of Rs 20,30,15,122, and, in the assessment year 2017-18, this set off was claimed to the extent of Rs 18,43,59,295. The Assessing Officer, in the draft assessment orders for these assessment years, declined this set off on the basis of the following reasoning:

> **6. Claim of set off of unabsorbed business loss pertaining to AY 2014-15 to the extent of Rs 20,30,15,122/- : In this regard, vide notice u/s. 142(1) dated 9.10.2019, the attention of the assessee was drawn to the fact that the assessment for AY 2014-15 was completed u/s 143(3) rws 144C(13) of the Act determining Total income at Rs 6,15,22,160 as against the returned loss of Rs 80,99,58,751, Thereby, unabsorbed loss for AY 2014-15 does not exist and is not available to be set off against business income of AY 2016-17. Therefore, the assessee was requested to justify its claim of set off of unabsorbed losses. The assessee, vide submissions dated 6.11.2019 narrated the provisions of Sec 72 and sec44BB and claimed that set off of business losses is permissible in this case. It also referred to various case laws on the subject. Accordingly, it requested for allowing the set off of the unabsorbed business losses pertaining to AY 2014-15.**
>
> *(Assessment year 2016-17)*

> **6. Claim of set off of unabsorbed business loss pertaining to AY 2014-15 to the extent of Rs 18,43,24,754/- : In this regard, vide notice u/s 142(1) dated 9.10.2019, the attention of the assessee was drawn to the fact that the assessment for AY 2014-15 was completed u/s 143(3) rws 144C(13) of the Act determining Total income at Rs 6,15,22,160 as against the returned loss of Rs 80,99,58,751, Thereby, unabsorbed loss for AY 2014-15 does not exist and is not available to be set off against business income of AY 2017-18. Therefore, the assessee was requested to justify its claim of set off of unabsorbed losses. The assessee, vide submissions dated 6.11.2019 narrated the provisions of Sec 72 and sec44BB and**

> **claimed that set off of business losses is permissible in this case. It also referred to various case laws on the subject. Accordingly, it requested for allowing the set off of the unabsorbed business losses pertaining to AY 2014-15.**
>
> *(Assessment year 2017-18)*

4. Aggrieved, assessee raised the grievance before the Dispute Resolution Panel but without any success. Learned Dispute Resolution Panel confirmed the action of the Assessing Officer and made identical observations for both the assessment years as follows:

> **11. We have considered the submission of the assessee. As regards to the assessee's contention of non granting of carry forwarding and setting off of the brought forward losses pertaining to A.Y. 2014-15, it is pertinent to note that the relevant assessment was quashed by the ITAT in its order in ITA No. 7415/Mum/2017 dated 04.10.2019 and restored the case for fresh adjudication to the file of the AO. Since, the relevant assessment is pending before the AO by virtue of the ITAT order (supra), therefore, the claimed carry forward and set off of the brought forward losses pertaining to AY 2014-15 was rightly denied by the AO. The objection no (iv) is disposed off accordingly.**

5. It was in this backdrop that the set off of the losses carried forward has been declined to the assessee. The assessee is aggrieved and is in appeal before us.

6. The short issue that we are required to take a call whether the loss incurred by an assessee in an assessment year, as per the income tax return filed by the assessee, and in a situation in which the assessment proceedings of the assessee are in progress- particularly as a result of the matter being set aside to the file of the Assessing Officer, can be allowed to be set off in the subsequent assessment years. It is, at the outset, important to bear in mind the fact that even if the assessee is allowed the set off on the basis of the income tax return filed by the assessee, the set off allowed to the assessee, on the basis of such income tax return, is only temporary inasmuch as the moment the assessment proceedings for the assessment year, in which loss is incurred, are finalized, the loss/income figures as per assessment so finalized are to be replaced for the loss figure as claimed by the assessee. The assessee was thus asked as to what does he gain by such a short-term relief, even if any.

7. Learned counsel submits that as on now the issue is with respect to the collection of demand raised by declining the set off and imposition of penalties for non-payment of such demands. Learned counsel submits that by denying the assessee set off of loss against the income of subsequent years, even during the period when the loss returned by him remains intact, he is being visited with the consequences of denial of a claim even when the claim is yet to denied- fully or partially. Learned counsel also takes us through the scheme of Section 240, and points out that where legislature wanted the refund process to be kept in abeyance till the assessment is finalized, legislature specifically provided so. He also takes us through the circular explaining insertion of proviso to Section 240, by virtue of which refund is deferred in such a situation, and law prevailing prior to this amendment. Learned counsel submits that in the absence of any such provisions being legislated in the provision for set off of the losses carried forward, it cannot be open to us to infer such restrictions in the process of set off also. Learned counsel points out that the scheme of the Act does not visualize any

such action, of declining the setoff till the assessment is finalized, on the part of the Assessing Officer. No matter how desirable such a provision could theoretically be justified, it does not exist in the law. The action of the Assessing Officer, in declining the set off of the carried forward losses, is thus without the authority of law, and must be vacated. Learned counsel for the assessee also refers to certain judicial precedents which, for the reasons we will set out in a short while, are not really required to be referred to in the present context. Learned Departmental Representative, on the other hands, submits that in case the assessee is to be allowed the set off of this loss in the subsequent years, i.e. the assessment years before us, the assessee will become eligible for refund of taxes and, therefore, legitimate interests of the revenue will be prejudiced by allowing such refunds. He urges us to defer a decision on this matter till the time the remanded assessment is finalized. Even on merits, learned Departmental Representative defends the action of the authorities below. In a short note emailed to us after the hearing, learned Departmental Representative submits as follows:

> **3 The ground of appeal of the assessee claiming set off of unabsorbed losses pertaining to AY 2014-15 against the income for AY 2016-17 implies that, pending fresh assessment proceedings for AY 2014-15, the claim of unabsorbed losses as per ROI is valid and live.**
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> **4 In the present case, the entire issue, in fresh assessment proceedings for AY 2014-15, is whether assessee has earned income or incurred losses during AY 2014-15.**
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> **5 The order of Hon. ITAT for AY 2014-15 has not directed the AO to delete the additions made. The ITAT has also not restored the Returned Income/loss. It has only directed the AO to conduct afresh adjudication of the issues involved.**
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> **6 In this case, an order u/s 143(3) rws 254 of the Act has to be passed and such order will record a finding whether any unabsorbed losses are available to be carried forward and be set off in subsequent years as per section 72 of the Act. Till such time, the claim of unabsorbed losses (as per return of income) and claim of revenue of NIL unabsorbed losses and taxable total income remain in suspended animation. Both are not actionable.**
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> **7 In the given circumstances, there is no direction of Hon. ITAT, for converting the positive total income determined u/s 143(3) into a loss, before the conclusion of fresh assessment proceedings.**
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> **8 If, such a direction is read into the order for AY 2014-15, it would imply that the Hon. ITAT has deleted the additions made. Unfortunately, that is not the case.**
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> **9. Submissions on the issue of provisions of section 240 :**
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> **Refund [if any] cannot be quantified, unless the total income is determined under fresh assessment proceedings. Thereby the refund becomes due only on conclusion of fresh assessment proceedings.**

9.1 Likewise, the losses for AY 2014-15 will be eligible for set off under section 70 of the Act and carry forward to be set off in subsequent years under section 72 of the Act, only on completion of fresh assessment proceedings.

10. Submissions on the decision of Hon. Supreme Court and Hon. Madras High court.:

The decisions relied upon are on a different set of facts wherein the issue of allowing carry forward of unabsorbed losses as per ROI for Year 1 [which is subject matter of fresh assessment proceedings] against profits for Year 2,3,4.....is not involved.

10.1. In the decision rendered by Hon Supreme Court in the case of Manmohan Das, the issue was whether the services rendered by the Treasurer of a Bank are to be considered under the Head Salaries or Business. Thereafter, the question of carry forward and set off of unabsorbed losses in subsequent years arises. The Hon. Supreme court held that the services are in the nature of 'vocation' and therefore the losses can be carried forward and set-off in subsequent years. Thus facts are neither identical nor similar.

10.2 In the decision rendered by Hon. Madras High court in the case of Kanaka films (P) Ltd, the issue was whether the losses of AY 1965-66 can be carried forward and set off in AY 1970-71 & 1971-72 after the limitation u/s 154 expires.[para 8 of the Hon. HC order]. Thus facts are neither identical nor similar.

To sum up

It is humbly submitted, that the claim of the assessee is strongly objected on the ground that Hon'ble ITAT in its order for AY 2014-15 has not directed the AO to delete the additions made and therefore unabsorbed losses do not exist pending conclusion of fresh assessment proceedings. The claim of unabsorbed losses as per ROI as well as total income determined u/s 143(3) rws 144C(13) are in suspended animation. Further the decisions relied upon by the assessee are on a different set of facts and are therefore neither identical or similar in any manner.

8. Having given our careful consideration to the rival contentions and having perused the material on record, we see merits, in principle, in the stand of the assessee. As the things as on now, the assessment proceedings for the assessment year 2014-15 are not yet finalized, and, therefore, any determination of tax liability, on the assumption that the claim of loss in the said income tax return is untenable in law, is certainly uncalled for, and, at the minimum, premature. This is, however, precisely what the Assessing Officer ends up doing when he declines the set off of the loss, as claimed by the assessee, in the income tax return for the assessment year 2014-15. In our considered view, therefore, the set off of the loss claimed by the assessee, at this stage, cannot indeed be declined. However, as we hold so, let us also deal with the apprehension of the learned Departmental Representative so far as refund becoming due to the assessee even as a related assessment, having crucial bearing on the refund, is in progress. That position, if correct, does seem incongruous at the first sight, but that does not

seem to be the correct legal position. The reason is this. When one carefully looks at the scheme of Section 240, the apprehensions seem to be perhaps ill conceived. Section 240, *inter alia*, provides that "**(w)here, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf: Provided that where, by the order aforesaid, an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment**". In the present case, the coordinate bench decision, by virtue of which the assessment under section 143(3) was remanded to the Assessing Officer, was passed on 4th October 2019, whereas the related income tax returns for the present assessment years were filed by the assessee much before that date. The refunds, if any due to the assessee, have thus become due as a result of the appellate order dated 4th October 2019 and, to borrow the words of section 240, "by the order aforesaid, an assessment is set aside or cancelled and an order of fresh assessment is directed to be made". It would appear to us that the law does not provide that the assessment in which the refund has arisen must be the assessment set aside or cancelled. Therefore, a view is indeed possible that even though the assessment set aside and directed to made afresh may be of an year other than the assessment year in which the refund has arisen, refund will become due only on such fresh assessment being made. There does, therefore, seem to be a *prima facie* valid school of thought that in such a situation, as in the present case, refund of taxes for the present assessment years must wait the finalization of the assessment for the assessment year 2014-15 because of which the refund may arise. Viewed thus, the apprehension of the learned Departmental Representative, therefore, does not seem valid. In any case, the remanded assessment is to be finalized, as learned Departmental Representative himself accepts, within less than three months from today, and, therefore, this situation of uncertainty is too transitory and too short by any standard. As soon as the remanded assessment is finalized, any variations in the assessed loss/income will have to be taken into account by suitably amending these set off claims in these years as well.

9. In view of the above discussions, as also bearing in mind entirety of the case, we uphold the plea of the assessee that so far as set off of loss returned by the assessee in the assessment year 2014-15 is concerned, the same cannot be declined by the Assessing Officer in the assessment years 2016-17 and 2017-18, if otherwise admissible, only for the reason that the assessment for the assessment year 2014-15 is in progress. We direct the Assessing Officer to allow, for the time being, the claim for set off of loss brought forward, in the light of the above observations. The above direction, however, should not be construed as our direction for the grant of refund, if any is found admissible as a result of income computed as above, for the simple reason that a call will have to be taken by the Assessing Officer as to whether, in the light of the discussions above, refund of taxes is permissible in such a situation in the light of first proviso to Section 240. While doing so, needless to say, the Assessing Officer shall give a due and reasonable opportunity of hearing to the assessee on this point as well. Ordered, accordingly.

10. The situation about the other assessee, i.e. Shelf Drilling J T Angel Limited, is the same, except for some insignificant changes in the figures – i.e. for the quantum of loss claimed by the assessee in the assessment year 2014-15 was Rs 120,18,46,672 which, upon scrutiny assessment, was converted into income if Rs 4,34,74,890, and the subsequent sets off claimed in the assessment years 2016-17 and 2017-18 being Rs 21,71,09,430 and Rs

31,02,93,000 respectively. All the material facts, barring these variations in figures of returned loss and set off claimed- which have no bearing on the core issue decided in these appeals, being admittedly the same, the above directions will, therefore, equally apply for Shelf Drilling J T Angel Limited as well. Ordered, accordingly.

11. In the result, all the four appeals are allowed in the terms indicated above. Pronounced in the open court today on the 5th day of January 2021

Sd/-	Sd/-
Saktijit Dey	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 5th day of January, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai