

**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA**

**BEFORE SHRI S. S. GODARA, JM & Dr. A. L. SAINI, AM**

**I.T.A Nos.472 & 474 & C.O Nos.64 & 66/Kol/2018**

**(निर्धारण वर्ष / Assessment Years: 2007-08 & 2008-09)**

<b>DCIT, Circle-11(1), Kolkata</b>	<b>Vs.</b>	<b>M/s. Graphite India Ltd.</b> 31, Chowringhee Road, Kolkata-700016.
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAACC0457C</b>		
<b>(Appellant)</b>	<b>..</b>	<b>(Respondent/Cross-Objector)</b>

Appellant by : Dr. P. K. Srihari, CIT(DR)  
Respondent by : Ms. Ruchira Lakhotia, ACA

सुनवाईकीतारीख/ Date of Hearing : 05/11/2019

घोषणाकीतारीख/Date of Pronouncement : 22/11/2019

**आदेश / ORDER**

**Per Shri S. S. Godara:**

These two Revenue's appeals and assessee's cross-objections for assessment years 2007-08 & 2008-09 arise against the Commissioner of Income Tax (A) - 22, Kolkata's orders; both dated 22.12.2017, passed in Case No.42/CIT(A)-22/Kol/2007-08/15-16 & No.182/CIT(A)-22/Kol/2008-09/14-15; respectively involving proceedings u/s 143(3)/144C/147 of the Income Tax Act, 1961 (in short 'the Act').

Heard both the parties. Case files perused.

2. It transpires during the course of hearing that all these four cases involve identical/interconnected issues. We therefore proceed to deal with these four cases together for the sake of convenience and brevity.

3. We advert to the Revenue's two appeals ITA Nos.472&474/Kol/2018. Its sole substantive grievance in former assessment year 2007-08 and former grievance in later assessment year 2009-10 seeks to revise Assessing Officer's

action declining assessee's additional depreciation claim(s) of Rs.10,37,81,969/- and 58,89,93,448/- respectively. The CIT(A)'s identical detailed discussion to this effect reads as under:

*"10. Decision:*

*1. The findings of the Ld. AO, the written submission and case laws / judicial precedents cited by the Ld. ARs have been duly considered. The Ld. AO disallowed the claim of the appellant holding that the assets on which additional depreciation is claimed by the assessee was neither new nor brought into existence in the year under consideration.*

*2. However, the Ld. ARs for the appellant submitted that the Act nowhere specifies the period in which such claim of additional depreciation shall be allowed. The Hon'ble Legislature do not intend to restrict the time limit of providing benefit of the claim and hence no restriction in this regard has been imposed, In absence of such specific provision, the benefit shall be available in subsequent years also. Further, the Ld, ARs stated that additional depreciation is allowed only on 'new assets' and the eligibility criteria of 'new assets' is applicable only for the initial assessment year when the asset is acquired and put to use for the first time and not for the subsequent years. Once the assets have been tested to be new in the first year, the said assets are eligible for depreciation in subsequent years.*

*3. In support of the above view, the Ld. ARs relied upon the various judgment of Hon'ble High Courts & Tribunals including jurisdictional Tribunal. The issue under consideration has been dealt with by Hon'ble jurisdictional Tribunal in the case of DCIT -vs.-Gloster Jute Mills Limited (ITA No. 5/Kol/2011 dated 01.03.2017). In that case, the Hon'ble Tribunal has held that provision of Sec 32(1)(iia) does not provide for any restriction that the additional depreciation will be allowed only in one year or that it would be allowed only on the written down value. The condition imposed by the provision is that the plant and machinery must be new at the time of installation to be eligible for additional depreciation u/s 32(1)(iia) and not new in subsequent years. Further the issue has also been dealt with by Hon'ble Mumbai Tribunal in a rather recent decision in Everest Industries Ltd. -vs- ACIT (ITA No. 815/Mum/2007 dated 15-09-2017).*

*4. In the case of DCIT -vs.-Gloster Jute Mills Limited (ITA No. 95/Kol/2011 dated 01-03-2017) the Hon'ble jurisdictional ITAT have on this issue observed as under:*

*24, Ground No.3 raised by the revenue reads as follows :*

*"3. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in law by allowing assessee's claim of additional depreciation of plant and machinery on original cost in the year subsequent to the year of acquisition and installation and thereby has erred in deleting the addition of Rs.54,21,617/- without appreciating the fact that such additional depreciation is allowable on plant and machinery only in the year of acquisition and installation."*

*25. This ground of appeal relates to the claim of the assessee for additional depreciation u/s 32(1)(iia) of the Act. The undisputed facts are that the original cost of the new machinery purchased and installed by the assessee after 31.03.2005 but before 01.04.2006 in the 100% EOU and DTA unit Rs. 29,77,470/- and Rs. 2,41,30,615/-. The WDV of these machineries as on 01.04.2006 was Rs. 24,51,920/- and Rs. 1,81,50,266/- respectively. The assessee availed of additional depreciation @ 20% on the original cost of the machinery at Rs. 5,95,494/- and Rs. 48,26,123/- respectively in AY 2006-07. In AY 2007-08 also the assessee claimed additional depreciation at 20% of the original cost viz., Rs. 5,95,494/- and Rs. 48,26,123/- respectively in all depreciation totalling Rs. 54,21,617/-.*

*26. According to the AO, the deduction u/s.32(1)(iia) of the Act is granted only to "new" plant and machinery and once depreciation is granted in the 1st year in which the machinery is installed or put to use, the machinery ceases to be a new machinery and therefore additional depreciation*

cannot be allowed. The plea of the Assessee however was that Section 32(1)(iia) of the Act merely provides that further to the normal depreciation at the prescribed rates, an additional depreciation shall be allowed to the assessee at the rate of 200/o on new plant and machinery acquired and installed after 31.03.2005. However, the period during which such additional depreciation shall be allowed is not specified in the Act. Thus, one may conclude that the allowance of additional depreciation shall not only be restricted to the initial year but continue to second and subsequent years.

27. The claim for additional depreciation was however rejected by the CIT(A) for the reason that additional depreciation is available only in respect of new plant and machinery acquired and installed after 31.03.2005. The word 'new' is not defined in the Act. According to the Shorter Oxford Dictionary the word 'new' means "not existing before; now made, or brought into existence, for the first time". The AO held that the assets on which additional depreciation was claimed by the assessee is neither "new" nor brought into existence in the hands of the assessee in the relevant previous year. It is already used in earlier years and is already depreciated and, therefore, old in the hands of the assessee in the previous year. He held that the qualification that the asset should be new was basic qualification for entitlement of additional depreciation as laid down in the provisions of Sec.32(1)(iia) of the Act and that conditions was not satisfied in the case of the Assessee. The AO accordingly disallowed the claim of the Assessee for additional depreciation.

28. Before we set out the conclusions of the CIT(A) on this issue, it would be worthwhile to examine the history of scheme of allowance by way of additional depreciation in the Act.

"Sec.32 Depreciation.

(1) In respect of depreciation of--

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other: business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed--

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:

Section 32(1)(iia) of the Act was originally introduced by the finance (no. 2) Act, 1980 w.e.f. 1.4.1981 reads thus (the sub-section existed upto 31.3.1988 and was deleted thereafter):

"(iia) in the case of any new machinery or plant (other than ships and aircraft) which has been installed after the 31st day of March, 1980 but before the 1<sup>st</sup> day of April, 1985, a further sum equal to one-half of the amount admissible under clause (ii) {exclusive of extra allowance for double or multiple shift working of the machinery or plant and the extra allowance in respect of machinery and plant installed in any premises used as a hotel) in respect of previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year, then in respect of that previous year."

Sec. 32(1)(iia) of the Act as reinserted by finance (No.2) Act, 2002, w.e.f. 1.4.2003 reads thus:

"(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31<sup>st</sup> day of March, 2002 by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):

*Provided that such further deduction of fifteen per cent shall be allowed to--*

*(A) a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or (B) any industrial undertaking existing before the 1<sup>st</sup> day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than \*[ten per cent]:*

*\*Subs. for "twenty-five per cent" by Finance (No. 2) Act, 2004, (w.e.f. 1.4.2005)."*

*Sec.32(1)(iia) as substituted by Finance Act, 2005 w.e.f. 1.4.2006) reads as follows:*

*"(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31<sup>st</sup> day of March, 2005 by an thing, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):"*

*29, It can be seen from the provisions of Sec. 32(1)(iia) as it existed from 1.4.1981 to 31.3.1988 and reinserted subsequently from 1.4.2003 that the benefit for claiming additional depreciation was restricted only to the initial assessment year. However the provisions of Sec.32(1)(iia) as substituted by the finance Act, 2005 w.e.f, 7-4-2006, the benefit for claiming additional depreciation was not so restricted to only to the intital assessment year. From AY 19&1-82 to 87-88, the claim for additional depreciation was restricted to previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year.*

*From AY 2003-04 till 2005-05, the claim for additional depreciation was restricted to previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or if any industrial undertaking existed before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than ten per cent. From AY 2006-07, there is no restriction with regard to the year in which such additional depreciation should be allowed and also there is no restriction with regard to the additional depreciation being allowed only on the written down value and therefore the additional depreciation even in the second and subsequent years have to be allowed on the original cost of the Asset. These are evident from a plain reading and literal construction of the relevant statutory provisions.*

*30. The CIT(A) after considering the aforesaid scheme and history of the provisions of Sec.32(1)(iia) of the Act, deleted the addition made by AO observing as follows :-*

*"I have considered the submissions of the Ld, A/R and find substance in the contention of the Appellant, On a conjoint reading of the provisions of section 32(1)(iia) inserted by Finance (No. 2) Act, 1980 and reinserted by Finance Act. 2002 it is evident that the said sections specifically restricted the allowability of additional depreciation in the year of installation of P&M. However, in the section 32( 1 )(iia) amended vide Finance Act. 2005 Legislature had omitted the proviso wherein it was provided that such depreciation could be claimed only in the initial assessment year. This being a specific omission it could be construed that the intent of the Legislature was not to restrict the allowance of additional depreciation to the year in which the assets are installed but also in the second and subsequent years provided that the aggregate depreciation does not exceed the cost of the asset. It is settled law that a fiscal statute has to be interpreted the basis of the language used therein and not interpreted out of context the same as held by Apex Court in the case of Orissa State Warehousing Corporation, Mohammad Ali Khan and Madurai Mills Co. Ltd. (Referred to by the Appellant). Further, it is also imperative to state that Section 32(1)(iia) is a beneficial provision enacted with the view to provide benefit to the assessee. The same is also evident from the Explanatory Notes to the Finance Act. 2005 wherein it has been clarified that in order to encourage investment the provisions of sec. 32(1)(iia) have been amended. In so far as the*

language used in the provision in concerned one has to construe the language beneficially and in favour of the assessee as held by the Jurisdictional High Court in the case of Indian Jute Mill Association in 134 ITR 68. There is little merit in the contention of the AO that the asset is not new in the second year. In my view for claiming additional depreciation the assessee has to acquire and install the plant & machinery after 31-03-2005 and the same should be new in the year of installation. There is no requirement that the assets should be new in the year of claim of additional depreciation.

For the reasons aforesaid I am of the view that in terms of provisions of Section 32(l)(iia), additional depreciation is available in AY 2006-07 and subsequent years in respect of all new plant & machinery acquired and installed after 31-03-2005 subject to overall criteria that total depreciation does not exceed the actual cost. Hence Ground No. 4 is declared in favour of the appellant”

31. Aggrieved by the order of CIT(A) the revenue has raised ground no.3 before the Tribunal. The ld. DR placed reliance on the order of the AO. The ld. Counsel for the assessee submitted that fiscal statute shall be interpreted on the basis of the language used therein and not de hors the same. It was argued that Clause (iia) to Sec. 32(1) was first introduced vide Finance (No. 2) Act, 1980 w.e.f. 01-04-81 and was applicable till AY 1987-88. The clause was subsequently re-introduced vide Finance Act,2002 w.e.f. 01-04-03. On perusal of clause (iia) to Sec. 32(1) as existed during the aforesaid period, it could be seen that the legislature conferred the benefit of additional depreciation only in the first AY when the asset was installed and first put to use. However vide Finance Act,2005, clause (iia) to Sec. 32(1) was amended w.e.f. 01-04-06 wherein the condition of claiming additional depreciation only in the initial AY was deleted. It was submitted that since the specific condition for claim of additional depreciation in one year has been done away with, it should be construed as the intention of the legislature to allow additional depreciation in subsequent years as well. Reliance was placed on the following decisions wherein it has been held that a fiscal statute shall have to be interpreted on the basis of the language used therein and not de hors the same. Even if there is a casus omissus, the defect can be remedied only by legislation and not by judicial interpretation :

- Orissa State Warehousing Corporation -vs.- CIT (1999) 237 ITR 589 (SC)

- Prakash Nath Khanna and Another -vs.- CIT (2004) 266 ITR 1 (SC)

- Smt. Tarulata Shyam & Others -vs.- CIT (1977) 108 ITR 345 (SC)

- Padmasundara Rao vs. State of Tamil Nadu: 255 ITR 147 (SC)

Apart from the above, it was also pointed out that DTC Bill 2013 has proposed expressly that additional depreciation would be allowed in the FY in which the P&M is used for the first time and those provisions are not made with retrospective effect. It was argued that the legislature has consciously not restricted the allowance of additional depreciation on the original cost for AY 2006-07 till AY 2013-14 to one year only and therefore the additional depreciation should be allowed on the original cost of the asset for the second and subsequent years as well. It was submitted that the condition imposed by the relevant provisions was that Plant and Machinery must be new at the time of installation to be eligible for additional depreciation u/ s 32(1)(iia) and not new in subsequent years.

32. We have given very careful consideration to the rival submissions and are of the view that the provision of section 32(1)(iia) as amended w.e.f. 01.04.2006 by the Finance Act 2005, there is no restriction that the additional depreciation will be allowed only in one year or that it would be allowed only on the written down value. The law as it prevailed prior to the said amendment imposed such a condition that additional depreciation will be allowed only in the year of installation of machinery or plant or the year in which it is first put to use or the year in which the concerned undertaking begins to manufacture or produce any article or thing or achieves substantial expansion by way of increase in installed capacity by 25%. The only objection of the AO is that the provisions refer to "new machinery or plant" and therefore the machinery will cease to be a new machinery after the end of the first year in which it is installed or put to use. In our

*view this stand taken by the revenue is not supported by the language of statutory provision. The condition imposed by the relevant provisions is that Plant and Machinery must be new at the time of installation to be eligible for additional depreciation u/ s 32(1)(ia) and not new iD\_lgLsequent years. The expression "new machinery" is therefore to be construed as referring to the condition that at the time of acquisition or installation the machinery or plant should be new. Going by the legislative history of the relevant provision, we are of the view that the condition for allowing additional depreciation only in the initial assessment year ceased to exist as and from 01.04.2006. The plain language of the section warrants such an interpretation. We therefore uphold the order of CIT(A) and dismiss ground no. 3 raised by the revenue.*

*5. Relying on and respectfully following the decision of Hon'ble Kolkata Tribunal and Hon'ble Mumbai Tribunal, the appellant's claim is allowed and Ld. AO is directed to delete disallowance amounting to Rs. 10,37,81,969/-."*

4. Learned CIT-DR vehemently contends during the course of hearing that the CIT(A) has erred in law and on facts in accepting the assessee's additional depreciation claim. His case as per the Assessing Officer's discussion in page 3 of the assessment order dated 28.03.2013 is that the impugned additional depreciation relief is available only in respect of the new plant and machinery acquired and installed after 31.03.2005 whereas the assessee's assets in question are neither new nor they came into existence in the year under consideration. It terms the CIT(A) detailed discussion to be a totally non-speaking order since going by the tribunal's decision (supra) than dealing with relevant facts of the issue. Mr. Srihari further quotes the tribunal's yet another decision in [2017] 82 taxmann.com 238 (Chennai-Trib) Brakes India Ltd. vs. ACIT as under:

*"15. We have considered the rival submissions. A perusal of the provisions of section 32 as applicable for the relevant assessment year clearly shows that additional depreciation is allowable on the plant and machinery only for the year in which the capacity expansion has taken place which has resulted in the substantial increase in the installed capacity. In the assessee's case this took place I the assessment year 2005-06 and the assessee has also claimed the additional depreciation during that year and the same has also been allowed. Each assessment year is separate and independent assessment year. The provisions of section 32 of the Act do not provide for carry forward of the residual additional depreciation, if any. In the circumstances, the finding of the learned CIT(A) on this issue is on a right footing and does not call for any interference. Consequently, ground no.1 of the assessee's appeal stands dismissed."*

*We are therefore of the opinion that CIT(A) was justified in following the view taken by co-ordinate Bench of this Tribunal"*

5. We have given our thoughtful consideration to the Revenue's instant grievance. We notice that the jurisdictional tribunal's order in Gloster Jute Mills Ltd. (supra) has decided the issue in assessee's favour that the impugned additional depreciation claim is not allowable in case of new plant and machinery

only. Coupled with this, it further emerges that hon'ble Madras high court's decision in the very assessee's case M/s Brakes India Ltd. vs. DCIT in T.C.A. NO.551 of 2013 dated 14.03.2017 has reversed the tribunal's non-jurisdictional bench's decision hereinabove. We hold in this factual and legal backdrop that the CIT(A)'s findings under challenge deleting the corresponding additional depreciation disallowance by quoting section 32(1)(ia) in the twin assessment years (supra) deserves to be confirmed. We order accordingly. The Revenue's sole substantive grievance as well with main appeal ITA No.471/Kol/2018 in assessment year 2007-08 and former substantive ground in latter assessment year 2008-09 fail accordingly.

6. The Revenue's latter substantive ground in Assessment Year 2008-09 pleads that the CIT(A) has erred in law and on facts in deleting assessee's corporate guarantee's arm's length price's adjudication of Rs.2,35,40,061/- made by the Assessing Officer as per the Transfer Pricing Officer's order. Its case is that a corporate guarantee amounts to an international transaction as per section 92B Explanation inserted by the Finance Act 2012 w.e.f 01.04.02. We find no merit in Revenue's instant grievance since various judicial precedents (2016) 157 ITD 132(Ahd), Tega Industries Ltd. vs. DCIT (ITA 1912/Kol/2012 dated 21.09.16) & Bharti Airtel Ltd. vs. Addl. CIT (2014 64 SOT 50 (URO) take note of the foregoing legislative amendment to hold that a corporate guarantee is not an international transaction u/s 92B of the Act. We decline the Revenue's instant grievance and main appeal ITA No.474/KOI/2018 therefore.

7. Next comes assessee's former Cross-Objection CO.64/Kol/2018 pertaining to the twin assessment years. Its former C.O No.64/Kol/2018 is not pressed during the course of hearing since we upheld the CIT(A)'s findings under challenge we therefore decline the same as rendered infructuous. The assessee's latter C.O No.66/Kol/2018 raises former issue of provision for leave encashment disallowance of Rs.1,40,24,677/- u/s 43B(f) of the Act. Both the learned lower authorities have treated the same as a contingent liability being a mere provision

only. It transpires during the course of hearing the hon'ble jurisdictional high court's decision in the case of Exide Industries Ltd. vs. UOI [2007] 292 ITR 470 (Cal) had quashed the very statutory provision itself as ultra vires. Hon'ble apex court stated thereof in SLP Civil No.22889/2008 stated to be pending till date. We therefore direct the Assessing Officer to keep this issue in abeyance for a fresh decision in view of their lordships' final call in the above stated lis. This former substantive ground is accepted for statistical purposes.

8. Next comes the assessee's latter substantive ground seeking to delete education cess disallowance of Rs.193,40,697/- made in both the lower proceedings u/s 40(a)(ii) of the Act. It emerges that the same is no more res integra as hon'ble Rajasthan high court's decision in Chambal Fertilizers Ltd. vs. DCIT, Income Tax Appeal No.52 of 2018 dated 31.07.2018 has considered the CBDT circular issued long back dated 18.05.1967 that the expression "tax" does not include cess. We therefore go by their lordships' view to delete the impugned educational cess disallowance of Rs.1,93,40,697/-. This latter Cross-Objection No.66/Kol/2018 is partly allowed in above terms.

9. To sum up, Revenue's two appeals ITA No.472& 474/Kol/2018 are dismissed. The assessee's former C.O No.64/Kol/2018 is dismissed as rendered infructuous, the latter C.O No.66/Kol/2018 is partly allowed in foregoing terms. Ordered accordingly. A copy of this order be placed in the respective case files.

Order is pronounced in the open court on 22.11.2019.

Sd/-  
**(A. L. Saini)**  
ACCOUNTANT MEMBER

Sd/-  
**(S. S. Godara)**  
JUDICIAL MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 22/11/2019

RS, Sr. PS

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. The Appellant - DCIT, Circle-11(1), Kolkata
2. The Respondent- M/s. Graphite India Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata  
[sent through email]
6. गार्डफाईल / Guard file.  
सत्यापितप्रति

True Copy

By Order

Assistant Registrar,  
I.T.A.T, Kolkata Benches,  
Kolkata.