

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

**BEFORE SHRI C. N. PRASAD, JM&  
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 2081/Mum/2016  
(निर्धारणवर्ष / Assessment Year: 2011-12)

M/s Schott Glass India Pvt. Ltd. 303/304, 3 <sup>rd</sup> floor, Dynasty A wing, Andheri Kurla Road, Andheri (east), Mumbai-400 059.	<b>बनाम/ Vs.</b>	ITO 11(2)(1), Room No. 425, 4 <sup>th</sup> floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AADCS8583L		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Dhanesh Bafna, AR
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri V. Vinod Kumr, DR
<b>Virtual Date of Hearing</b>	:	04.08.2020
<b>Date of Pronouncement</b>	:	15.09.2020

आदेश / ORDER

**Per S. Rifaur Rahman, Accountant Member:**

The present appeal filed by the assessee is against the final order of assessment passed u/s 143(3) r.w.s. 144C(1) of I.T. Act, 1961 in pursuance of the directions issued by the Dispute

Resolution Panel (in short 'DRP') u/s 144C(5) of the Act vide order dated 22.12.2015 for AY 2011-12.

2. At the time of hearing, Ld AR submitted that assessee prefers to press only ground No. 2 and 3 and not pressed ground No. 4. Accordingly ground No.1 (being general) and 4 are **dismissed**.

3. Brief facts relating to Ground No. 2 and 3 are, assessee filed the return of income for assessment year 2011 – 12 on 29.11.2011 declaring total income at Rs. Nil and book profit of ₹ 11,19,51,325/-. Subsequently, the case was selected for scrutiny and notice under section 143 (2) and 142 (1) were issued and served on the assessee. In response, assessee filed the relevant information as called for. During assessment proceedings, AO noted that assessee has claimed ₹ 1,92,30,918/- in its profit and loss account on loss of precious metal. When the assessee was asked to give the details for such claim and assessing officer observed that assessee has never claimed the expenditure to such extent in the earlier assessment year and the assessee has claimed the maximum amount of ₹ 14,44,477/- in the assessment year

2007 – 08. In the detail, assessee submitted that assessee has paid to its parent company M/s Schott AG for the loss in the precious metal leased from them amounting to ₹ 46,57,540/- and an amount of ₹ 1,45,73,378/- paid for replenishing the loss in precious metal on account of wear and tear.

4. Further assessee vide letter dated 25.02.2015, explained the reasons of climbing the loss that the assessee is engaged in the business of manufacturing of specialized glass tubes used for ampoules, vials manufacturing. In the manufacturing process, the assessee uses following specialized machinery/equipment made of platinum and rhodium alloy for producing defect free glass products like Stirrer, Feeder, Nozzle etc. These machineries are made of precious metals like platinum and rhodium alloy. These metals enable the aforesaid specialized machineries to withstand high temperature of molten glass passing through it during the course of production. Assessee further submitted that most of the previous metals machineries are obtained on lease from Schott AG. This is because the precious metals are extremely costly and therefore it is more economical to obtain the same on lease. These metals are spread across the surface of the specialized

machineries by the parent company at its workshop in Germany. During the course of usage of these machineries, there is a physical loss of the precious metals as a result of corrosion and erosion. It submitted that the precious metals need to be changed between 10 to 15 months.

5. Under the terms of lease with parent company, assessee required to replenish the precious metals lost during the production or compensate the parent company for precious metals loss. This exercise is undertaken on a quarterly basis. It submitted that during the year, assessee has compensated to its parent company for loss in the precious metals to the extent of ₹ 46,57,540/- and it has paid to M/s Ravindra-Heraeus Private Limited for replenishing the precious metals for ₹ 1,45,73,378/-. This payment was made to above company for remaking and refining the precious metals and making sheets/cones et cetera of precious metals to be used again in specialized machineries. The assessee submitted that the above expenses constitute repairs to plant and machinery under Section 30 of the Act and hence allowable under Section 31 of the Act. The assessee further submitted that it had incurred expenditure towards loss of

precious metal every year and the quantum of the expenditure increased during the year on account of specific operation losses in terms of leakage in the feeder.

6. After considering the submissions of the assessee, AO rejected the contention of the assessee by observing as under:-

*6.3.1. On perusal of the agreement for lease entered into between the M/s. Schott AG and the assessee company it was observed that as per the agreement M/s A.G. Schott was to provide the precious metals to the assessee company on lease and it was stated that the actual loss of precious metal on account of corrosion shall be reimbursed by the assessee to M/s Schott A.G.*

*The assessee has submitted copies of documents received from M/s. Schott AG dated 2007.2010, 03.02,2011 and 23.09.2010 wherein M/s.Schott AG has given the details of the loss of precious metals incurred due to erosion and corrosion being the amount of Rs.27,77,873/-, Rs.8,72,6561- and Rs.1007,011/- respectively. The total amount of loss in precious metals worked out by M/s Schott A.G. amounted to Rs. 46,57540/-. The assessee has claimed that the amount of Rs. 1,45,75,945/- represents the charges paid for refining and melting of precious metals and the same were replenished on account of loss of*

*precious metals. The assessee had submitted Invoices raised by M/s. Ravindra Heareus Pvt. Ltd. invoice no.1513/10-11 dated 16.03.2011 amounting to Rs.1,00,21,801/-, invoice No.0998/10-11 dated 10.12.2010 amounting to Rs.24,67,935/-and invoice No.0874/10-11 dated 10.11.2010 amounting to Rs.20,86,209 pertaining to actual purchase of precious metals sheets viz. Rhodium and Platinum. The total amount of purchase of sheets of precious metal from M/s. Ravindra Geraeus Pvt. Ltd. amounted to Rs. 1,45,75,945/-.. The total amount of losses of precious metal determined by MIs.Schott AG is to the extent of Rs.46,57,540/-. The assessee has debited a sum of Rs,1,92,30,918/- on account of loss of precious metals as against the actual loss of precious metal determined by M/s. Schott AG of Rs.46,57,540/-. As regards the difference being amounting to Rs.1,45,75,945/-, the same is not allowable since as the agreement for lease entered into between the assessee and Ms. Shott AG specifically stated that only the actual loss of precious metal shall be reimbursed by the assessee. The claim of the assessee that the payment made to M/s. Ravindra Heraeus Pvt. Ltd. was for re-melting and refining the precious metals and making sheets/cones is not acceptable as on perusal of the bill of M/s. Ravindra Heraeus Pvt. Ltd., it is observed that these are the Sale bills issued to the assessee for sale of Rhodium/Platinum sheets at a rate ranging from Rs.2,700/- to Rs.2,800 per gram of precious metal and*

*these are in fact actual market rates of such precious metals. This fact shows that the amount paid to M/s.Ravindra Heraeus Pvt. Ltd. is for the purchase of precious metal and not for refining/re-melting of the precious metal. The bills of M/s. Ravindra Heraeus Pvt. Ltd. do not indicate anything about refining/re-melting of precious metals. The market rate of precious metal specified in the obtained on lease is also in the similar range. This shows that the assessee has actually purchased the precious metals from M/s. Ravindra Heraeus Pvt. Ltd. and payment is refining/re-melting of precious metal. Had the bills been raised for the refining or re-melting purpose, the bills would have been raised for the labour charges/ refining or melting charges and not as the sale of precious metals.*

*Since the actual loss of precious metal occurred to the extent of Rs. 46,57,540/- and the same was also determined by M/s Schott AG, therefore the claim of loss of precious metal in excess of Rs. 46,57,540/- is incorrect. Thus the claim of the assessee that the amount of Rs. 1,45,75,945/- represented replenishment of precious metals for loss of precious metals is not allowable as the same is not an actual loss as the loss has been determined by M/.s Schott AG for the previous year to the extent of Rs.46,47,540/-. Thus, the same is not allowable u/s.37 of the Act. A sum of Rs. 145,75,945/- is added to the total*

*income of the assessee. Penalty proceedings u/s 271(1)(c) of the I.T. Act is initiated for furnishing of inaccurate particulars of income.*

*6.3.2 Without prejudice to the above, the claim of the assessee that the expenses are incurred i.e. loss on precious metals is of the nature of repairs to plant and machinery due to the following reasons:*

*a. In the past four years the amount of loss of precious metal was never claimed in excess of Rs. 15,00,000/-. During the year the assessee has claimed the loss of precious metal on account of replenishment of metals corroded to the extent of Rs.1 .92 crores.*

*b. As discussed above, the assessee has purchased precious metals to the extent of Rs.1,45,75,945/-. The assessee company and M/s. Schott AG have entered into an agreement of lease of precious metals whereby M/s. Schott AG will provide precious metals to the assessee company on lease and in case of any loss on precious metal the assessee company will repay the loss. In this case, the assessee has purchased precious metal sheets amounting to Rs. 1,45,75,945/- and the same were claimed to have been given to M/s Schott AG for replenishing of loss of precious metal. However, as discussed above the actual loss raised by M/s. Schott AG was only of Rs.46,47,540/-. Thus, the amount paid by the assessee of*

*Rs.1,45,75,945/- in excess of actual loss represents the purchase of precious metal sheets. The assessee in the past 4-5 years has not incurred expenses for purchase of precious metals or loss in precious metals exceeding about 15 lacs. Thus expenses incurred in respect of purchases of rhodium and platinum are not incurred for the purpose of day to day maintenance. The assessee has not incurred such expenditure every year in routine course of business. It is a one-time expenditure which will result in enduring benefit for the several years and therefore the same is treated as capital expenditure and hereby disallowed.*

7. Further, AO observed that assessee has claimed repairs and maintenance expenses relating to repair works to RCC road at its factory at Ankhi, Taluka Jambusar, assessee paid ₹ 15,94,003/- to M/s Shivanjali projects and ₹ 15,78,762/- paid to Mr. Ramanlal Ranchodlal Shah. The details of work undertaken are:-

Item No.	Description	Qty/unit
1.	<i>Excavation including fillin with good yellow soil available from excavation(Manually excavating and stacking the earth in near by area) in clay, sand murrum etc.</i>	<i>5.78 cu.m</i>
2.	<i>PCC in 1:3:6 proportion</i>	<i>54.10 cu.m</i>
3	<i>Brickwork upto plinth level</i>	<i>30 sq mt.</i>
4	<i>12-15 mm Thick cement plaster cement</i>	<i>100 sq mt.</i>

	<i>finish upto 3 mt. Height</i>	
5	<i>Coping</i>	<i>74.10 sq.mt.</i>
6	<i>Supplying &amp; Fixing Paver Block</i>	<i>1715 Sq.ft.</i>
7	<i>Supplying and Fixing curbing stone</i>	<i>265 No.</i>
8	<i>Skilled Labour</i>	<i>51 No.</i>
9	<i>Unskilled labour</i>	<i>282 No.</i>
10	<i>Cleaning applying 12 to 20 mm cement mortar &amp; finishing with cement slurry on floor</i>	<i>1669.50 sq.mt</i>
11	<i>Making 25 mm x :25 mm groove in RCC Tremix Floor</i>	<i>150 R.mt.</i>
12	<i>Hire charges of electric breaker</i>	<i>195.30 hrs</i>

8. The assessee was asked as to why the expenses in respect of repairs to existing road be treated as capital expenses as the nature of the expenses incurred had an enduring benefit to the assessee. In response assessee filed the detailed submission dated 19.02.2015, which is reproduce below:-

*"That the company has made payment to MIs. Shivanjali Projects amounting to Ps. 15,94,003 during the year under consideration for undertaking repairs of damaged sections/portions of road within factory premises and that the same included repairs of damaged sections of existing roads as well as preventive maintenance of roads and also*

*involved supply of gravel/undertaking of gravelling activities on the road.*

*Sample copies of the invoices for the payments made to Ws Shivanjali Projects have been submitted vide letter dated 29.1.2015. In respect of payment made to M/s. Ramanlal Ranchodlal Shah the assessee has submitted that*

*"the company has made payment to MIs. Ramanla! Ranchodlal Shah for the undertaking following repairs:*

*a. Payment for repairs of damaged sections/portions of roads within the factory premises amounting to Rs. 15,68,762.*

*This involved the following activities like RCC work, Reinforcement for RCC, PCC work, Framework, Contraction joint*

*Expenditure incurred in respect of repairs of damaged roads within the factory premises amounting to Rs. 15,68,762 has been claimed as revenue expenditure.*

*b. Payment for PCC surface of warehouse —Rs. 6,17,888/-*

*This expenditure in respect of PCC surface warehouse amounting to Rs.5,27,888 has been capitalized and added to the cost of the warehouse in the balance sheet"*

*The assessee also submitted as under in the said letter:*

*1. The roads within the factory premises are constructed for the purpose of facilitating the movement of motor vehicles for transportation of raw materials and finished goods in the factory premises. Due to the continuous movement of heavy motor vehicles, there is a constant wear and tear of the road requiring repairs at certain intervals so as to ensure smooth transportation of materials.*

*2. Therefore it is under such circumstances, that the repairs are necessarily required to be undertaken over a period of time. During the year under consideration particular sections of road were damaged thereby hampering the transportation. In order to ensure smooth movement of vehicles/trucks within the factory premises, the company undertook repairs of the road.*

*3. The repair activity involved pre-monsoon preventive maintenance, RCC work, PCC work, supplying gravel, gravelling, reinforcing RCC work etc. The aforesaid repairs resulted in the roads being restored to their original operating condition. It may be noted that there were no new roads constructed as a result of the aforesaid activity.*

*4. The expenditure on repairs has been undertaken for smooth conduct of the business i.e. for the purpose of commercial expediency. Neither any new asset is created*

*nor is any advantage of enduring nature accrued as a result of the repairs undertaken during the year under consideration. Therefore the company has claimed the same as revenue expenditure.*

*5, Further we would like to draw your attention to the decisions of jurisdictional Hon'ble Bombay High Court wherein it was held that the expenditure incurred on repairs of road P' within factory premises constitutes revenue expenditure."*

*The assessee relied on the judgement of Hon'ble High Court in the cases of CIT v/s Chamauz Ltd (74 Taxman 201) and the case of Bharat Forge Co. Ltd v/s CIT (240 ITR 654).*

9. After Considering the submissions of the assessee, AO rejected the contention of the assessee by making following observation:

*The assessee had not carried out repairs to the road at its factory but it is a case of complete construction of new road right from dismanteling the existing road, excavation of the entire road up to a depth of 1.5 mts (i.e 5.0 feet), and filling the excavated area by soil, placing a layer of Plain Cement Concrete, constructing with brick work upto plinth level, giving contract for supplying and fixing the paver blocks and laying the top layer with RCC. Thus the entire*

*work of laying of the road was carried out right from dismantling of existing road, excavation of the foundation up to depth of 1.5 mts and till fixing the top RCC surface alongwith brickwork upto the plinth level and fixing the paver blocks in sides etc was carried out. This nature of work does not constitute petty repairs ie. Repairing of patches of road as claimed by the assessee. In respect of work of PCC surface at Warehouse amounting to Rs. 6,17,888/-, out of which the assessee had capitalized expenditure for PCC surface amounting to Rs. 5,27,888/- and the same was added to the cost of warehouse in the balance sheet and this was explained vide assessee's letter dated 19.2.2015, however in respect of similar nature of expenses right from the dismantling of existing road to the laying of top surface with Reinforced Cement Concrete (RCC) the assessee had claimed it as repairs expenses. Thus the laying of new road and together with construction/finishing surrounding work results in benefit of enduring nature to the assessee. Therefore the expenditure of Rs.15,94,003/- paid to M/s. Shivanjali Projects and expenditure of Rs.15,68,762/- paid to M/s Ramanlal Ranohodlal Shah in all amounting to Rs. 31,62,765/- is treated as capital expenses. Penalty proceedings u/s 271 (1)(c) are separately initiated for submission of inaccurate particulars of income.*

10. assessee filed objections before the DRP since the case of the assessee involves International Taxation and the case was referred to TPO. Before DRP, assessee made a detailed submission and for the sake of clarity it is reproduced below:-

**With regard to replacement of loss of precious metal, assessee submitted as below:**

*5.3. The assessee submits that the payment made to Ravindra Heraeus Pvt. Ltd. for replenishment of precious metals is allowable:*

- (i) as a deduction under section 31 of the Act.*
- (ii) without prejudice to the above, as a deduction under section 37 of the Act.*

*(i) Deduction under Section 31 of the Act*

*> The assessee made payment of Rs. 1 45,75,945 to Ravindra Heraeus Pvt. Ltd. for purchase of precious metal sheets which were utilised in the refabrication of feeders/nozzles which were being used in the furnaces. Thus these expenses were incurred for preserving and maintaining the equipment / tools of the assessee and therefore is in the nature of current repairs. The life of the feeders/nozzles ranges from 10 to 15 months only, hence, the refabrication of these equipment are required to be*

*done each year and thus the expenditure incurred for the same cannot be considered as capital in nature.*

*> The assessee places reliance in case of CIT v. Saravana Spinning Mills Ltd. (293 ITR 201) (SC); Ballimal Naval Kishore v. CIT (225 ITR 414) (SC); New Shorrock Spg & Mfg Co. Ltd. v. CIT (30 ITR 338) (Born HC) and others (please refer the point no. 5.5 of appendix II of the objections filed before Your Honour)*

*> Rebuttal of Assessing Officer's observations while disallowing assessee's claim for deduction under section 31 of the Act*

*Observation - The expenses incurred are one-time expenses resulting in enduring benefit to the assessee*

*Rebuttal - The assessee contends that expenditure incurred for replenishment of loss of precious metal is incurred every year for the normal wear and tear day to day maintenance of the specialised tools used to manufacture the glass products of the Assessee. The assessee has incurred these expenses only to maintain and to bring back the original state of the specialised equipment and by incurring these costs the assessee does not bring a new asset I equipment into existence.*

Observation - The expense incurred in the year under consideration is abnormally high as compared to previous years

*Rebuttal - The increase in the loss of precious metals was on account of the following:*

*a) The assessee has four furnaces (Tank 61 and 62 which manufactures NCG & Tank 63 and 64 which manufactures fiolax glass tubes). During the financial year 2008-09, there is an increase in capacity of Tank 61 and 62 by 25% and an additional furnace (Tank 64) was set up for manufacture of fiolax glass tubes, which involves more corrosion and wear and tear of the equipment such as feeder, nozzle, electrode, etc as against equipment used in the manufacture of neutral glass tubes. In view of the increase in capacity and setting up of new furnace the consumption of the precious metals by the assessee has increased substantially in the year under consideration and subsequent years. The details of furnace-wise annual production for FY 2007-08 to FY 2013-14, are attached herewith.*

Year	Furnace1 (MT)	Furnace 2 (MT)	Total production of furnace 1	Furnace 3 (MT)	Furnace 4 (MT)	Total production of furnace 3 and 4(MT)	Total production all furnaces (MT)
2007-08	2,837	3,030	5,867	6,545		6,545	12,412
2008-09	2,657	3,824	6,481	6567	3,182	9,749	16,229
2009-	3,828	291	41119	6129	6,452	12,581	16,700

10							
2010-11	4189	-	4,189	6,342	6,544	12,886	17,075
2011-12	3,546	1,468	5,013	5167	6,351	11,518	16,532
2012-13	2645	.2,982	5,627	7,366	6,563	13,929	19,556
2013-14	4,649	-	4,649	7,324	5,768	13,092	17,740

b) *Further the details of loss on precious metal is tabulated below:*

<i>AssessmentYear</i>	<i>Amount(in Rs.)</i>
<i>2012-13</i>	<i>97,08,018</i>
<i>2013-14</i>	<i>79,71,202</i>
<i>2014-15</i>	<i>1,18,05,588</i>

c) *There were abnormal circumstances such as leakages in the feeder (3 instances) which resulted in frequent replacement of feeder/ nozzle.*

*Without prejudice, the assessee contends that mere increase in the quantum of loss on precious metals in a current year cannot be the basis for concluding that the aforesaid expenses results in enduring benefit to the assessee as laid down by the Hon'ble Supreme Court in case of M.K.Bros (P) Ltd. V. CIT (86 hR 38), Travancore Sugars and Chemicals v. CIT (62 ITR 566), Gannon Norton Medical Diamond Dies Ltd. V. CIT (163 ITR 807).*

(ii) Deduction under Section 37 of the Act:

- *The Assessee had made the payment to Ravindra Heraeus for acquiring precious metals for replenishing the*

*loss in the precious metals used in the production process. The aforesaid purchases were mostly applied towards replenishing the wear and tear in the precious metals leased from Schott AG. As mentioned earlier, the loss in precious metals occurred mainly on account of the leakage of feeders/nozzles during the year (details of which were submitted during the course of the assessment proceedings). Since the expenses incurred for replenishment neither gives rise to any benefit of enduring nature nor any added advantage to the assessee and is a genuine business transaction, the assessee contends that the deduction in respect of the aforesaid expenses should be allowed under Section 37 of the Act.*

*Rebuttal of Assessing Officer's observations while disallowing assessee's claim for deduction under section 31 of the Act*

*Observation - The aforesaid loss did not arise at all since the payments made to Ravindra Heraeus was merely towards purchase of precious metals. The payment made to Ravindra-Heraeus Pvt Ltd for replenishment of precious metal is not allowable under the agreement entered into by the assessee with Schott AG.*

*Rebuttal - As mentioned above, the assessee had made payments to Ravindra Heraeus for acquiring precious metals for replenishing the loss in the precious metals used*

*in the production process. The precious metals acquired by the assessee from Ravindra Heraeus were used in the refabrication into the refined feeders/nozzles in the Assessee's own workshop. This is evidenced by the engineer's certificate enclosed as additional evidence, certifying the use of the precious metals. Thus the aforesaid payment made towards acquisition of the precious metal, is a genuine business transaction and is to be allowed under section 37 of the Act. Further the replenishment of precious metals is mandated even under the terms of the lease contract with Schott AG.*

*In this regards, the assessee places reliance on the decision of the Supreme Court in the case of CIT v. Kalyanji Mavji & Co. Ltd (Supra) wherein, it has been held that repairs which are not 'current repairs' should be considered for deduction on general principles or under section 37(1) of the Act. The assessee also places reliance in case of Commissioner of Income-Tax v, Kusum Products Ltd (41 Taxman 188) (Cal HC), Allied Metal Products v. Commissioner of Income-Tax (7 Taxman 181) (Punj & Haryana HC) and Girdhari Dass & Sons (105 ITR 339) (All HC) wherein the claim of expenditure incurred on leased/ rented asset has been allowed as deduction under section 37 of the Act.*

*Without prejudice to the above claim under section 31/37, if the aforesaid expense is held to be capital in nature then*

*assessee prays that Assessing Officer be directed to grant depreciation thereon under section 32 of the Act.*

**With regard to expenses incurred on repair of roads, assessee submitted as below:**

*6.2 Assessee's contention:*

*In this connection, the assessee submits that the repair activity involved pre- monsoon preventive maintenance, RCC work, FCC work, supplying gravel, gravelling, reinforcing RCC work etc. These activities were essential for restoring the roads to their original operating condition and did not result into construction of new roads. The assessee reiterates that the expenditure on repairs has been undertaken for smooth conduct of the business i.e, for the purpose of commercial expediency. Neither any new asset is created nor is any advantage of enduring nature accrued as a result of the repairs undertaken during the year under consideration. Therefore the expenditure incurred on repairs of roads constitutes revenue expenditure.*

*In this connection, the assessee places reliance on the decision of the jurisdictional Hon'ble Bombay High Court in the case of Commissioner of Income-Tax vs Chemaux Ltd (74 Taxman 201) and Bharat Forge Co. Ltd. vs Commissioner of Income Tax (240 ITR 654) and the*

*decision of Punjab and Haryana High Court in case of Voith Paper Fabrics India Ltd (346 ITR 70).*

*Without prejudice to the above, it is submitted that in case the expense of Rs. 31,62,765 incurred on repair of road is held to be capital in nature, then it is prayed that the Assessing Officer be directed to add the expense on repair of road of Rs. 31,62,765 to the block of assets "factory building" and grant depreciation thereon at 10%.*

11. After considering the submissions of the assessee, learned DRP rejected the contention of the assessee and sustained the addition made by AO by observing that AO has given valid reasoning for disallowance. Aggrieved with the above order the assessee is in appeal before us raising following grounds of appeal:-

*Ground 1:*

*1.1 On the facts and in the circumstances of the case and in law, the Order dated 25 January 2016 (impugned Order) passed by Income-tax Officer -11(2)(1) (Assessing Officer) under section 143(3) read with section 144C(13) of the Income-tax Act,1961 (the Act) pursuant to the directions of the Dispute Resolution Panel ('DRP') dated 22 December, 2015 is bad in law since the Hon'ble DRP merely confirmed the adjustments proposed by the*

*Assesssing Officer without providing justification/  
reasoning for rejecting the objections of the appellant.*

*The Appellant prays that the impugned Order be quashed  
since it is bad in law.*

*Ground 2:*

*2.1 On the facts and circumstances of the case and in law,  
the Hon'ble DRP/ Assessing Officer erred in disallowing  
an amount of Rs. 1,45,75,945 in respect of loss incurred on  
precious metal on the ground that the same is capital in  
nature.*

*The Appellant prays that the Assessing Officer be directed  
to delete the aforesaid disallowance.*

*2.2 Without prejudice to the ground no. 3.1 above, on the  
facts and in the circumstances of the case and in law, the  
Hon'ble DRP/Assessing Officer erred in not granting  
depreciation on the loss incurred on precious metal of  
Rs.1,45,75,945.*

*The Appellant prays that the Assessing Officer be directed  
to allow depreciation on the loss incurred on precious  
metal of Rs.1,45,75,945.*

*Ground 3:*

*3.1 On the facts and in the circumstances of the case and  
in law, the Hon'ble DRP/Assessing Officer has erred in*

*disallowing the expenses incurred on repair of road of Rs. 31,62,765 on the ground that it resulted in construction of new road and is therefore capital in nature.*

*The Appellant prays that the Assessing Officer be directed to delete the aforesaid disallowance.*

*3.2 Without prejudice to the ground no. 4.1 above, on the facts and in the circumstances of the case and in law, the Hon'ble DRP/Assessing Officer erred in not granting depreciation on the road repair expenses of Rs. 31,62,765, held to be capital in nature.*

*The Appellant prays that the Assessing Officer be directed to allow depreciation on the road repair expenses of Rs. 31,62,765.*

*Ground 4 :*

*4.1 On the facts and in the circumstances of the case and in law, the Assessing Officer has erred in not allowing consequential depreciation in respect of furnace repair expenses disallowed in earlier assessment years starting from AY 2003-04 to AY 2006-07 and AY 2008-09 to AY 2011-12,*

*The Appellant prays that the Assessing Officer be directed to allow consequential depreciation.*

*The Appellant craves leave to add, alter, amend, delete, modify or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing as they may be advised to do so.*

12. At the time of hearing, learned AR brought to our notice observations and findings of AO at page 4 of assessment order and submitted that it is a question of notional loss or actual loss, he submitted that there is no dispute as for as purchase of precious metals and these metals are used in specialised machines in the production of glass tubes. It is proved beyond doubt that assessee has actually purchased these precious metals and assessee has used in the machineries for production purpose. He brought to our notice page 168 of the paper book which is certificate issued by Assistant Manager from production and platinum workshop who has confirmed that these materials were consumed in the re-fabrication of damaged feeders/nozzles during this year. Further he brought to our notice page 161 to 164 of the paper book, which is invoice copies of the vendors who supplied these precious metals. He brought to our notice findings of AO in which he observed that it is one-time expenditure and

he himself compared the expenditure of earlier assessment years. He objected to the observation of DRP for sustaining the additions made by assessing officer without appreciating the technical submissions of the assessee considering the peculiar process in the manufacturing of glass tubes. Further he submitted that the ground No. 2.2 is an alternate plea of the assessee in case bench considers the above said repair expenditure as capital in nature, the assessee should be granted depreciation on the loss incurred on precious metals.

13. With regard to ground No. 3, he submitted that assessee has carried out repairs to the existing road used in the factory premises and it is not a new asset came into existence but it is only a regular repair carried out during this year. In case the bench considers this expenditure as capital in nature, the assessee should be granted depreciation on the above repair expenditure.

14. On the other hand, learned DR brought to our notice lease agreement entered by the assessee vide with its parent company and he submitted that assessee agreed to reimburse the loss incurred in utilisation of precious metals and he brought to our

notice page 9 of DRP order. He supported the findings of the assessing officer that assessee has quantified the loss of precious metals and reimbursed the same to its parent company. The loss is already quantified and whatever purchases of precious metals made by the assessee are only purchases and not refurbishment of any feeders or nozzles. Accordingly, he supported the findings of assessing officer. With regard to ground No. 3, he relied on the orders of DRP and submitted that it clearly indicates that assessee has constructed/laid the completely New Road and not regular repairs carried on by the assessee.

15. In rejoinder, Ld AR submitted that DRP has observed that it is “dismantling” i.e., repair of the existing road and it is not in capital nature.

16. Considered the rival submissions and material on record. With regard to Ground no 2, we notice that assessee is in the business of manufacturing glass tubes and in the manufacturing, the melted glass has to pass thru feeder/nozzles in the furnaces. The temperature in which the melted glass is passed through feeder or nozzles at 1600 degree or more. It is not disputed that

the assessee has to use the special metals like rhodium and platinum in the production process. In order to reduce the cost of utilization of precious metals, assessee entered into lease agreement to utilize the leased feeder/nozzles from the M/s Schott AG, its parent company. Assessee has accordingly utilized the machineries leased from the parent company and as per agreement, assessee has to reimburse the loss of precious metals in production process. During this AY, it was quantified and reimbursed to its parent company. There is no dispute on this account. However, assessee also purchased precious metals from M/s Ravindra Heraeus Pvt Ltd and replaced the eroded metals in the production process. We notice that AO has rejected the purchase of metals with the observation that the vendors has raised the bill as sale of precious metals rather than raising bill for refurbishment of the nozzles or feeder. Further he observed that the loss of precious metals were quantified by the assessee and as per agreement, it was reimbursed to its parent company. There is no other loss incurred by the assessee during this year. Therefore, assessee cannot claim any loss during this year.

17. We notice that the assessee has submitted that it has four furnaces and there is increase in the capacity of furnaces during this year. Accordingly, the consumption of precious metal has increased substantially. Assessee has filed yearwise annual production for financial year 2007 – 08 to financial year 2013-14. Further it submitted that the assessee has incurred loss on precious metal during this year is at ₹ 1.92 crores and in the subsequent assessment years assessee has incurred ₹ 97,08,018/- in assessment year 2012 – 13, ₹ 79,71,272/- in assessment year 2013 – 14 and ₹ 1,18,05,588/- in assessment year 2014–15. Further it is submitted that there were abnormal circumstances such as leakages in the feeder (3 instances) which resulted in frequent replacement of feeder/nozzle. All these submissions of assessee indicates that assessee has increased its production capacity and assessee has to utilize the precious metals in the specialised machineries in the production process. No doubt assessee has not claimed loss on precious metals in the previous assessment years however we notice that assessee has incurred huge losses during this year considering the fact that the capacity is increased and due to abnormal circumstances, it has to replace

feeder/nozzles in order to carry out the production. There is no doubt that assessee has entered into lease agreement with its parent company for utilisation of their specialised machineries and reimburse the actual loss due to wear and tear. During this assessment year assessee has already quantified and reimburse the same. During this year as submitted by the assessee due to abnormal circumstances assessee has to replace feeder/nozzles due to frequent leakages in the feeder. These are all abnormal and special circumstances in which utilisation of metal has increased abnormally during this assessment year when compared to previous assessment year, however when we compare the loss in the subsequent assessment year, it does not look abnormal. We do not have any record of subsequent assessment year to appreciate the loss incurred by the assessee. Considering the abnormal situation existed during this year, in our considered view, the loss of precious metal during this year is abnormal. The abnormal utilisation of precious metal, however big, it is utilised as machinery consumables only, it does not or will not increase the life of the machinery.

18. The abnormal loss incurred by the assessee can be treated as revenue expenditure to be allowable during this year or the abnormal loss can be amortised in 2 to 3 years. In our considered view no doubt the losses considerably high, we direct assessing officer to amortise the abnormal loss in 2 years that is 50% during this assessment year and balance in the next assessment year.

19. With regard to observation of the assessing officer that assessee has purchased from the vendor and the documentation does not show that it is refurbished the machineries. We observe from the certificate issued by technical engineers from the company that assessee has purchased these precious metals and the internal technical department has carried out the respective work of re-fabrication of damaged feeders/nozzles. Therefore, in our considered view we do not notice anything wrong in purchasing of the precious metals and carrying on repair work of the machineries internally by the assessee. Accordingly ground No. 2 raised by the assessee is partly allowed.

20. With regard to ground No. 3, we notice that assessee has carried out substantial repair of the internal road inside the factory and claimed the same as repair expenditure during this assessment year. AO disallowed the above expenditure with the observation that assessee has not carried out repairs to the road at its factory but it is a case of complete construction of new road right from dismantling the existing road, excavation of entire road up to depth of 1.5 m and filling the excavated area by soil, placing a layer of plain cement concrete et cetera with top layer with RCC. This nature of work does not constitute petty repairs. Therefore, laying of new road and construction/finishing surrounding work results in benefit of enduring nature to the assessee. Accordingly, he treated the above expenses as capital expenses. Considering the substantial amount of expenses incurred to re-lay the road and it will certainly give enduring benefit to the assessee and we are in agreement with the findings of assessing officer that it is capital expenses. Since he treated the expenses as capital in nature incurred for the purpose of smooth functioning of the business, therefore these expenses were incurred for the purpose of business only. In our considered

view, assessee is eligible to claim depreciation on the cost of construction of Road. Therefore, we are directing the assessing officer to allow the depreciation on the expenditure incurred to construct the road. Accordingly, ground raised by the assessee is **partly allowed.**

21. In the result, the ground No. 2 and 3 raised by the assessee is partly allowed and ground No 1 and 4 are **dismissed.**

22. Accordingly, appeal filed by the assessee is **partly allowed.**

*Order pronounced in the open court on 15.09.2020.*

<i>Sd/-</i> (C. N. Prasad) न्यायिकसदस्य / Judicial Member मुंबई Mumbai;दिनांकDated : <i>Sr.PS. Dhananjay</i>	<i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 15/09/2020
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**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai

6. गार्डफाईल / Guard File  
आदेशानुसार/ BY ORDER,

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आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai