IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD

[THROUGH VIRTUAL COURT]

BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER&
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA Nos.19 to 21/ALLD/2020
Assessment Years: 2012-13& 2013-14

Triveni Glass Ltd 1, Kanpur Road, Allahabad-211001, U.P.	v.	Income Tax Officer, Ward II(3), 38, M. G. Marg, Civil Lines, Allahabad-211001, U.P.
PAN:AAACT8795L		
(Appellant)		(Respondent)

Appellant by:	Ms. Tanu Singhal, CA
Respondent by:	Shri A. K. Singh,Sr. DR
Date of hearing:	19.07.2021& 10.09.2021
Date of pronouncement:	14.10.2021

O R D E R

PER BENCH:

These threeappeals bearing ITA numbers 19 to 21/Alld./2020 for assessment years (ay's): 2012-13& 2013-14 has been filed by assessee before Income Tax Appellate Tribunal, Allahabad, U.P. (hereinafter called "the tribunal") against separateappellate orders passed by ld. Commissioner of Income-tax(A), Allahabad (hereinafter called "the CIT(A)") . The appeal in ITA No. 19/Alld/2020 for assessment year 2012-13 has been filed by assessee before tribunal against appellate order dated 23.09.2019 passed by ld. CIT(A) in Appeal Number: CIT(A), Allahabad/10444/2015-16 , the appellate proceedings had arisen before ld. CIT(A) from the rectification order dated 26.06.2015

passed by ld. Assessing Officer u/s 154 of the Income-tax Act,1961(hereinafter called " the Act"). The appeal in ITA No. 20/Alld/2020 for assessment year 2012-13 has been filed by assessee before tribunal against appellate order dated 07.08.2019 passed by ld. CIT(A) in Appeal Number : CIT(A), Allahabad/10432/2015-16, the appellate proceedings had arisen before ld. CIT(A) from assessment order dated 27.03.2015 passed by ld. Assessing Officer u/s 143(3) of the 1961 Act.The appeal in ITA No. 21/Alld/2020 for assessment year 2013-14 has been filed by assessee before tribunal against appellate order dated 24.09.2019 passed by ld. CIT(A) in Appeal Number : CIT(A), Allahabad/10115/2016-17 , the appellate proceedings had arisen before ld. CIT(A) from assessment order dated 31.03.2016 passed by ld. Assessing Officer u/s 143(3) of the 1961 Act. These three appeals were heard by Division Bench of Income-Tax Appellate Tribunal, Allahabad Bench, Allahabad through Video Conferencing mode through Virtual Court, and are disposed off by this common order.

2. These three appeals were first heard on 19.07.2021, and while dictating order(s) it was observed that all these three appeals were filed by assessee late beyond the time prescribed u/s 253(3) of the 1961 Act for filing of an appeal with tribunal, the delay was ranging from 36 days , 139 days and 36 days respectively for appeals in ITA no. 19 to 21/Alld/2020. These facts of filing all these three appealsby assesseelate with tribunal beyond the time prescribed u/s 253(3) of the 1961 Act, was not brought to the notice of the Division Bench at the time of hearing by both the rival parties when these three appeals were heard on 19.07.2021. Thus, it was deemed fit , in the interest of justice, to put all these three appeals for clarification, to hear arguments of both the rival parties with respect thereto of delay in filing of these three appeal. Thus, these three appeals were finally heard on 10.09.2021, wherein both the rival parties have made their respective arguments with respect to delay in filing of these appeals beyond the statutory time prescribed u/s 253(3) of the 1961 Act. The ld. DR has objected to condonation of delay, while ld. Counsel for the assessee has explained that delay was bonafide and there

was no malice on the part of the assessee in filing these appeals late with tribunal , beyond the time prescribed for filing of an appeal u/s 253(3) of the 1961 Act . We have observed that the assessee has filed an application praying for condonation of delay supported by an Affidavit executed by its Director Finance, Shri A.K.Dhawan. It is averred by assesseein the aforesaid application/affidavit that due to closing of accounts, audit and outstation visit of the Director-Finance for business requirements, these appeals were filed late with tribunal, beyond the time prescribed u/s 253(3) of the 1961 Act. When technicalities are pitted against substantial justice, the Courts will lean in favour of substantial justice , unless malice is at writ large or there are latches on the part of the litigant. In case, the delay in filing of the appeal is not attributable to malice or latches on the part of litigant , and sufficient cause is shown by litigant , the delay is consequently condoned by the Court, what best can happen is that the appeal will be heard and decided on merits, which in our considered view will not prejudice any of the party. Reference is also drawn to decision of Hon'ble Supreme Court in the case of Collector Land Acquisition v. Mst. Katiji&Ors. 1987 AIR 1353.Thus, keeping in view totality of circumstances and facts of the matter in the instant case before us, we condone delay in filing of all these three appeals by assessee with tribunal by exercising our powers u/s 253(5) of the 1961 Act, beyond the time stipulated u/s 253(3) of the 1961 Act , as in our considered view sufficient cause is shown by the assessee, and hence we condone the delay in filing of all these three appeals and proceed to adjudicate these three appeals on merits in accordance with law.We order accordingly.

ITA No. 20/Alld/2020- AY 2012-13

3. First , we shall take up assessee's appeal in ITA No. 20/Alld/2020 for ay: 2012-13 . The grounds of appeals raised by assessee in memo of appeal filed with tribunal reads as under:-

> ***1.*** *"Because the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts to confirm the disallowance made by the Assessing Officer on account of prior period adjustments amounting to Rs. 73,02,000/-*
> ***2.*** *Because the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts to confirm the disallowance made by the Assessing Officer on account of difference in Opening Stock to the tune of Rs. 44,000/-*
> ***3.*** *Because the order of Ld. C.I.T.(Appeals),Allahabad was bad in law and on facts.*
> ***4.*** *The Appellant prays for adducing further or other grounds of Appeal before or at the time of hearing the appeal."*

4. The brief facts of the case are that the assessee is engaged in the business of Manufacturing Glass. The assessee filed its return of income for ay:2012-13 electronically on 29.03.2014 , which admittedly is a belated return of income filed beyond the time prescribed u/s 139(1) of the 1961 Act. The case of the assessee was selected by Revenue for framing scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act. The statutory notices u/s 143(2) and 142(1) were issued by Revenue from time to time and it is claimed by Revenue that they were duly served on the assessee. The Assessing Officer during the course of assessment proceedings observed from the Assessee's Annual Report 2012 vide note no. 21 , that the assessee has claimed prior period adjustment of Rs.73.02 lacs. On being asked by the Assessing Officer to explain the aforesaid prior period adjustment, the assessee could not clarify the head of prior period adjustment and it was also not made clear by assessee before the AO that against which headthis adjustment was made. The Assessing Officer disallowed a sum of Rs.73,02,000/- claimed by assessee as deduction from business income , and made additions to income of the assessee, because as per AO the sameare not allowable as deduction from business income as per provisions of the 1961 Act, vide assessment order dated 27.03.2015 passed by AO u/s 143(3) of the 1961 Act.

5. Aggrieved by an assessment framed by AO vide assessment order dated 27.03.2015 passed u/s 143(3) of the 1961 Act, the assessee filed first appeal before ld. CIT(A) . The

assessee submitted before ld. CIT(A) that prior period adjustment of Rs. 73.02 lacs , includes the following:

Discount Allowed @ 12% against Business Turnover for the year 2009-10, 2010-11 & 2011-12	56,86,194.00	Enclosed copy of statement & JV 31/03/2012 **page 122,123-124**
Appeal fees paid for GST	7,000.00	Enclosed JV dated 31.03.2012 **page 125/123**
Advance given for meeting out pre-operative Expenses of Plant 1	1,94,908.00	Enclosed JV dated 31.03.2012 & Ledger of Pre-operative Exp. **Page 126/123**
Discount allowed to Bawa Float Glass Ltd	8,22,740.00	Copy of Credit Note enclosed **Page 127**
Interest provided on U.P. Safety Glass I.C.D. upto 31.03.2011	5,90,985.59	**Page 126**
	73,01,827.59	

5.2 The ld. CIT(A) rejected the contentions of the assessee and upheld the additions to the income made by the AO vide assessment order dated 27.03.2015 u/s 143(3) of the 1961 Act passed by Assessing Officer , by holding as under, vide appellate order dated 07.08.2019.:-

> *"I have perused the facts of the case and facts relied upon by AO and appellant. Appellant has neither given any reasons for claiming these prior period nor has clarified the nature of these prior period adjustment. Since appellant has not submitted anything in favour of this ground of appeal, the action of the AO is upheld.*
>
> *This ground is dismissed"*

6.Still being aggrieved by the decision of ld. CIT(A) vide appellate order dated 07.08.2019, the assessee filed second appeal with tribunal. The assessee has filed paper book with Tribunal containing 35 pages and also filed copy of printed Annual Reportfor 2012 in the said paper book. Before us, it was submitted by ld. Counsel for the assessee that the assessee is in glass industry for last 40 years , since 1971 and is a leading glass company in Allahabad. The ld. Counsel for the assesseesubmitted before the Bench that M/s. Bawa Float Glass Ltd. was allowed discount @ 12% , amounting to Rs.822,740/- and Rs. 56,86,194 for the year 2009-10, 2010-11 and 2011-12. It was submitted that credit notes were issued on 30.04.2011 and 31.03.2012 respectively during the financial year ended 31.03.2012. It was submitted that copy of ledger account of M/s. Bawa Float

Glass Ltd for the period of 01.01.2010 to 31.07.2012 ,and copy of credit notes issued and statement of discount allowed and respective voucher are stated to be enclosed at page no. 06-09 of the paper book. Further, it was submitted by ld. Counsel for the assessee that an amount of Rs.590,985.59 was interest payable upto 31.03.2011 on Inter-Corporate Deposit taken from M/s. U.P. Safety Glass, which was not provided in the earlier years , and hence is being charged as Prior Period Expenses during the year under consideration. It was claimed by ld. Counsel for the assessee that income-tax was deducted at source on the said amount of Rs.590,985.59. The ld. Counsel for the assesseedrew our attention to copy of ledger account for the year 2011-12 , which is placed at page no. 10 of the paper book. Further, it was submitted by ld. Counsel for the assesse assessee that Travelling & Tour advances were given to Mr. G. Narayan Swamy (Ex-employee) in the earlier years, which were outstanding in the books of accounts for more than 6-7 years since he left his services without intimation to the company. It was submitted that on final settlement of his dues, Rs.194,908.50/- was adjusted against advance outstanding in the name of Mr. G. Narayan Swamy (Ex-employee) during the financial year 2007-08. It was submitted by ld. Counsel for the assesseethat at that time said amount was erroneously debited to head 'Pre-Operative Expenses' instead of 'Prior Period Expenses' . It was submitted that in the year under consideration, in compliance with auditors observation, the same was rectified and then debited to the account head "Prior Period Expenses" . The ld. Counsel for the assessee submitted that relevant copy of staff advance ledger of Mr. G. Narayan Swamy for the year 2001-08, Pre-operative Expenses for the year 2007-08 & 2011-12 & JV No.103 dated 31.03.2012 are enclosed in paper book from page no. 11-14. Further, it was submitted by ld. Counsel for the assesseethat Court fees paid against appeal was erroneously debited to account head "CST, Uttar Pradesh" during the preceding years which is now rectified by debiting the account head "Prior Period Expenses" during the financial year 2011-12. The ld. Counsel for the assessee relied upon the judgment of Hon'ble Delhi High Court in the case of Vishnu Industrial Gases (22 ITR/1998) and also

decision of Delhi-tribunal in the case of ACIT v. NBCC in ITA no. 5870/Del/2010. Our attention was also drawn to the assessment order and appellate order passed by ld. CIT(A).

6.2 On the other hand, Ld. DR submitted that these are prior period expenses and hence the same cannot be allowed as deduction while computing income for the year under consideration , as these expenses did not pertained to year under consideration. Our attention was drawn by ld. DR to Note No. 21 in the Annual Return for the year 2012(Page 45 of Annual Report 2012), which reads as under:

" **Note No. 21 Prior Period Item**

Rs. in Lakhs)

Prior Period Adjustment	For the year ended 31 March 2012	For the year ended 31 March 2011
Prior Period Adjustment	73.02	32.11
	73.02	32.11

It was submitted by ld. DR that no details/ evidences were furnished by the assessee before the Assessing Officer . It was submitted by ld. DR that the assesseefurnished some details before ld. CIT(A), which were additional evidences filed for the first time before ld. CIT(A). It was submitted that ld. CIT(A) admitted these additional evidences without calling for remand report from AO and hence there is a breach of Rule 46A of the Income-tax Rules, 1962. It was submitted that only break-up of expenses were furnished by assessee before ld. CIT(A) and the assessee has neither offered explanations nor any evidences have been furnished . It was also submitted by ld. DR that ld. CIT(A)although has confirmed the additions made by the AO but ld. CIT(A) did not passed speaking order and there should have been finding given by ld. CIT(A) on each of the item of Prior Period expenses, and merely cryptic order was passed by ld. CIT(A).

The ld. DR submitted that the assessee had claimed to have made provision for interest expenses payable to the tune of Rs. 5,90,985.59 till 31.03.2011 on ICD taken from UP Safety Glass , and provision of Section 40(a)(ia) and 43B are attracted to said of interest payable. It was submitted by ld. DR that it is not known whether the assessee complied with provisions of Section 40(a)(ia) and 43B. It was submitted by ld. DR that the assessee has submitted details/evidences / explanations for the first time before ld. CIT(A) , and that the no remand report was called by CIT(A) from AO , which is in breach of Rule 46A of Income-tax Rules, 1962.The prayers were made by ld. DR to set aside and restore the matter for denovo adjudication of the issue.

6.3 Regarding second issue of difference in opening stock to the tune of Rs. 44,000/- ,it was submitted by ld. Counsel for the assesseethat the AO erred in making addition , as there was no difference in the closing stock of last year with the opening stock of current year. Our attention was drawn to page 42 of the Annual Report -2012 to contend that there is no difference in the closing stock of last year with that of the opening stock of current year, which was Rs. 150.12 lacs ,and it was submitted that the authorities below erred in comparing closing stock of this year which was Rs. 124.73 lacs with the increase in stock of last year which was Rs. 125.17 lacs.Thus, it was submitted that the AO erred in adopting incorrect figures.

6.4 The ld. DR fairly submitted that there was an error on the parts of the authorities below and the contentions of the ld. Counsel for the assessee are correct , and that this issue may be decided in favour of the assessee.

7. We have considered rival contentions and perused the material available on record. We have observed that the assessee is in the business of manufacturing glass. We have observed that the assessee has filed paper book with tribunal, containing 35 pages and also copy of Printed Annual Report for 2012, which is also part of the paper book . The said paper book is placed on record in file. It is observed

that this paper book does not contain certification required by to be done by the assessee certifying as to the documents which were filed by assessee before the authorities below , as well additional evidences filed before the tribunal for the first time. We have observed that the assesseehad during the year of assessment under consideration claimed Prior Period expenses to the tune of Rs.73.02 lacs . The relevant note concerning the said Prior Period Expenses is appearing as note number 21 in Annual report 2012(Page 45) , is reproduced as hereunder:

" **Note No. 21 Prior Period Item**

Rs. in Lakhs)

Prior Period Adjustment	For the year ended 31 March 2012	For the year ended 31 March 2011
Prior Period Adjustment	73.02	32.11
	73.02	32.11

We have observed from the orders of authorities below that the assessee did not filed any details before the AO , while the assessee has filed additional evidences before ld. CIT(A) for the first time to support its stand. It is observed that ld. CIT(A) did not call for remand report/comments from AO on these additional evidences which is in breach of Rule 46A of the 1962 Rules. Further, the ld. CIT(A) has passed a non speaking cryptic order without offering reasons/comments for not allowing the claim of the assessee on each and every item of expenses claimed by assessee as 'Prior Period Expenses'. In our considered view based on facts and circumstances of the case, that the matter needs to be set aside and restored to the file of Assessing Officer for de-novo adjudication of the entire issue on merits in accordance with law. The assessee is directed to produce all relevant evidences/details/explanation before the Assessing Officer in set aside de-novoproceedings . Needless to say that

the AO shall give proper and adequate opportunity of being heard to the assessee in set aside de-novo proceedings in accordance with principles of natural justice in accordance with law . The AO shall admit all necessary evidences/explanation filed by assessee in support of its contentions and adjudicate the same on merits in accordance with law. We clarify that we have not commented on merits of the issue and all the contentions are kept open. Since the assessee is claiming these expenses as deduction from its income , the onus is on the assessee to substantiate that these expenses are incurred wholly and exclusively for the purposes of business, and further that these expenses are allowable as per mandate of provisions of the 1961 Act , more-so that these expenses did not pertain to the year under consideration . The AO is directed to pass detailed and reasoned orderon each of the items of the expenses claimed to be 'Prior Period Expenses' by the assessee. This ground of appeal is allowed for statistical purposes.We order accordingly.

8. The second issue concerns itself with addition of Rs. 44,000/- made on account of difference in the Opening Stock in Current Year with that of Closing Stock of the immediately preceding year. The Assessing Officer observed from the record that there is a difference in Opening Stock in Current Year with that of the Closing Stock of the immediately preceding year. The Assessing Officer has observed that the assessee has shown closing stock of Rs.125.17 lacs in previous year ,but in the current year , the opening stock of Rs.124.73 lacs was shown, which led to the difference of 44,000/-, which was added to income of the assessee and brought to tax by the AO vide assessment framed u/s 143(3) of the 1961 Act. The assessee carried the matter further before ld. CIT(A) by filing first appeal and explained that there is no difference in the closing stock of the earlier year with the opening stock in the current year, by making following submissions as under.:-

"Value of Closing Stock of Finished Goods as on 31.03.2011 is Rs. 150.12 Lacs and Value of Opening Stock of finished Goods as on 01.04.2011 is Rs. 150.12 lacs. It has been duly disclosed in Note No. 16 (Changes in Inventories of Finished Goods, Work in progress and Stock in Trade) to the Audited Annual Accounts for the F.Y. 2011-2012. (**Refer page 42 of the Printed Annual Report, 2012)**

The Ld. A.O. has erroneously added Rs. 44,000/- being difference between Value of Increase in Closing Stock of Finished Goods for the F.Y. 2010-11 of Rs. 125.17 lacs and Value of Closing Stock of Finished Goods of Rs. 124.73 lacs as on 31.03.2012. He has wrongly treated this difference of Rs. 44,000/- as "*difference in Opening Stock in current year with closing stock of the previous year".* So, the addition of Rs. 44,000/- made by A.O. is bad in law and facts and may please be deleted."

8.2 The ld. CIT(A) rejected the contentions of the assessee by upholding the additions to income made in the assessment order passed by Assessing Officer. The Ld. Counsel for the assessee brought to our notice the details of stock as is mentioned in the printed copy of the Annual Report-2012 of the assessee at note no. 16 (page 42 of Annual Report 2012), which reads as under.:-

"NOTE No. 16 Changes in inventories of finished goods work-in-progress and Stock-in-Trade

Increase/Decrease in stock of Finished Goods	For the year Ended 31 March 2012	For the year ended 31 March 2011
Closing Stock	124.73	150.12
Less: Opening Stock	*150.12*	*24.95*
Total	*(25.39)*	*125.17*

8.3 It is observed that there is no difference between the closing stock of the preceding year with the opening stock of the current year, which was Rs. 150.12 lacs. The ld. DR has also fairly and correctly submitted that there is no difference in closing stock of preceding year with the opening stock of current year and the issue is to be decided in favour of the assessee. We have observed that as on 31.03.2011 , the closing stock was Rs. 150.12 lacs and the opening stock as on 01.04.2011 was also Rs. 150.12 lacs. There is

no difference at all between the closing stock in the preceding year and the opening stock in the current year, rather the AO adopted wrong figures of closing stock of current year with that of the increase/decrease in the stock of finished goods. The ld. CIT(A) passed cryptic order and did not elaborate on facts correctly. Thus, the authorities below erred in making addition. Thus, based on facts and circumstances of the case, the addition of Rs. 44,000/- as made by authorities below is not sustainable in the eyes of law and is hereby ordered to be deleted.We order accordingly.

9. In the result, the appeal filed by assessee in ITA no. 20/Alld/2020 for ay: 2012-13 is partly allowed for statistical purposes. We order accordingly.

ITA No. 19/ALLD/2020
Assessment Year: 2012-13

10. We shall now take up assessee's appeal in ITA No. 19/Alld/2020 for ay: 2012-13. The grounds of appeals raised by assessee in memo of appeal filed with tribunal reads as under:-

> "1. Because the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts to confirm the disallowance made by the Assessing Officer on account of set off of brought forward business loss amounting to Rs.38,84,38,396/- & unabsorbed depreciation amounting to Rs.15,43,28,383/- determined in pursuance of return filed within time u/s 139(1).
> 2. Because the order of Ld. CIT(Appeals) Allahabad was bad in law and on facts.
> 3. The appellant prays for adducing further or other grounds of appeal before or at the time of hearing the appeal."

11. The solitary issue in this appeal is regarding the allowability of set off of brought forward business losses and unabsorbed depreciation. The assessment for ay: 2012-13 was finalized by AO , vide assessment order dated 27.03.2015 passed u/s 143(3) of the 1961 Act. The income assessed was Rs. 27,20,480/- as against

returned loss of Rs. 2,15,19,363/-. The AO did not allow set off of brought forward business losses and unabsorbed depreciation. Admittedly return of income for ay: 2012-13 was filed belatedly by assesseeon 29.03.2014, much beyond the time prescribed for filing of return of income u/s 139(1) of the 1961 Act . The assessee filed rectification petition u/s 154 of the 1961 Act seeking set off of brought forward business losses and unabsorbed depreciation, which rectification petition was disposed off by AO , vide order dated 26.06.2015 passed u/s 154 of the 1961 Act, by holding as under:

> *" Please refer to the petition U/s 154 for the A.Y.2012-13.*
>
> *In the above case for the A.Y. 2012-13 return was filed on 29.03.2014 which was not within time therefore, carry forward losses will not setoff against the loss/profit for the coming years.*
>
> *Therefore, your petition U/s 154 is here by rejected & interest charged by the system is genuine. You are requested to deposit the demand raised for the A.Y.2012-13 at the earliest."*

12. Aggrieved by rectification order dated 26.06.2015 passed by AO u/s 154 of the 1961 Act, the assessee filed first appeal with ld. CIT(A), and made following submissions before ld. CIT(A).:-

> *"During the Couse of appellate proceeding, the appellant has submitted as under-*
>
> *"the assessee company has filed its original return of income u/s 139 (4) on 29th March, 2014 showing a loss of Rs. 2,15,19,363/- for the Assessment Year 2012-13 and claiming refund of Rs. 3,96,760/-. The assessment u/s 143(3) was completed by I.T.O.-II(3), Allahabad making total additions of Rs. 2,42,39,843/- on adhoc basis and without allowing any set-off of brought forward business, losses and unabsorbed depreciation, thereby raising demand of Rs. 11,18,900/- vide his assessment order dated 27.03.2015.*

The assessee company filed a petition for Rectification u/s 154 of the Act for rectification of mistake apparent from record i.e. set off of current year losses from the brought forward business losses and unabsorbed depreciation not allowed by the AO. while computing the taxable income.

However, the Assessing Officer rejected the petition filed u/s 154 without giving any reasonable ground. Aggrieved by the same, the assessee has filed this appeal. We would like to submit that due to error of omission, amount of brought forward unabsorbed depreciation was taken as Rs. 15,43,28,383/- instead of Rs. 42,64,03,237/- in the Grounds of Appeal, which may please be ignored. Brought forward unabsorbed depreciation of Rs. 42,64,03,237/- can be verified from the assessment order u/s 143(3) dated 29.12.2008 for A.Y. 2006-07.

Please refer to the Chart of Computation of Taxable Income forming part of the Assessment Order u/s 143(3) dated 27.03.2015, wherein the A.O. has erred in disallowing the set-off of brought forward business loss of Rs. 38,84,38,396/- and unabsorbed depreciation of Rs. 52,56,92,612/- against taxable income assessed by him for Rs. 27,20,480/-

Detail of Brought forward Business Loss & Unabsorbed Depreciation has been furnished below:

Assessment Year	Business Loss (Rs.)	Unabsorbed Depreciation (Rs.)	Total Brought Forward Loss (Rs.)
Up to 2006-07	-	42,64,03,237.00	42,64,03,237.00
2007-08	4,95,77,529.00	3,24,71,113.00	8,20,48,642.00
2008-09	15,64,43,000.00	2,59,47,004.00	18,23,90,004.00
2009-10	4,56,00,512.00	2,26,24,009.00	6,82,24,521.00
2010-11	6,87,88,355.00	97,86,320. 00	7,85,74,675.00
2011-12	6,80,29,000.00	84,60,929.00	7,64,89,929.00
Total	**38,84,38,396.00**	**52,56,92,612.00**	**91,41,31,008.00**

Copy of assessment orders u/s 143(1)/143(3)/154 for the assessment years 2006-07 , 2008-09, 2009-10 and 2011-12 has been enclosed from Page No. 03-34 for your perusal."

12.2 The ld. CIT(A) was pleased to dismiss the appeal filed by the assessee vide appellate order dated 23.09.2019 , by holding as under:-

> *"Decision*
>
> *I have gone through the facts and the written submissions filed along with the details filed enclose therein. In this case the appellant has filed its original return of income admittedly late u/s 139(4) on 29th March, 2014 showing a loss of Rs, 2,15,19,363/- for the Assessment Year 2012-13. The assessment was completed without allowing any set off of brought forward business, losses and unabsorbed depreciation, on 27.03.2015. Appellant filed a petition for Rectification u/s 154 of the Act for rectification of this mistake i.e. set off of current year losses from its brought forward business losses and unabsorbed depreciation not allowed by the AO while computing the taxable income. Appellant has submitted that the AO rejected the petition filed u/s 154 without giving any reasonable ground. This submission is not correct as the AO has given a clear finding that for the reason that the return was filed on 29.03.2014 which was not within time therefore, carry forward losses will not be set off against the loss/profit for the coming years. Therefore, the petition 154 was rejected. During the appellate proceedings AR was fair enough to concede on this issue. However, AR made two requests - one, that the current years losses and depreciation should be allowed; and second that due to error of omission, amount of brought forward unabsorbed depreciation was taken as Rs. 15,43,28,383/- instead of Rs. 42,64,03,237/- in the Grounds of Appeal, which may please be ignored. Brought forward unabsorbed depreciation of Rs. 42,64,03,237/- can be verified from the assessment order u/s 143(3) dated 29.12.2008 for A.Y. 2006-07. In this regard appellant will be free to move proper application as per law before AO to get the figures adjusted as this issue cannot be decided in this appeal as it does not arise from this order and there is no material available on record to say that this is a prima facie mistake apparent from records. It is apparent that the appellant itself is not clear about the figures while filing the Appeal and wants to get undue benefit from the appeal order, which cannot be given.*
>
> *With these comments these grounds are dismissed."*

13. Still Aggrieved by appellate order dated 23.09.2019 passed by ld. CIT(A), the assessee company has filed an appeal before tribunal. The ld. counsel for assessee submitted before the Division Bench during the course of hearing that the assessee is only seeking set off of earlier year brought forward business loss and brought forward unabsorbed depreciation , in accordance with law against income of current year and carried forward of the remaining business losses and remaining unabsorbed depreciation to subsequent years , to be set off against business income of subsequent year(s) in accordance withprovisions of Section 72 and 32 of the 1961 Act. It is also submitted by Ld. Counsel for assessee that the assesseeadmittedly filed return of income for the impugned ay belatedly on 29.03.2014 , which was beyond the time prescribed u/s 139(1) of the 1961 Act, and hence the assessee will not be entitled for carried forward of current year business losses to subsequent years. Our attention was drawn to provisions of Section 32(2), 72 , 80 and 139(3) of the 1961 Act. The ld. Counsel for the assessee drew our attention to appellate order passed by ld. CIT(A) . The ld. Counsel for the assessee stated before the Bench that there is an error in the figure of brought forward unabsorbed depreciation in the grounds of appeal filed by assessee with tribunal , wherein the figure mentioned is Rs. 15,43,28,383, while the correct figure is Rs. 52,56,92,612/- and prayers were made that correct figures should be considered , although the assessee did not revise Form No. 36 filed with tribunal.The ld. Counsel for the assessee submitted that ld. CIT(A) should have called for remand report from AO before rejecting the contentions of the assessee.

13.2 The Ld. DR on the other hand submitted that the matteris required to be set aside to the file of Assessing Officer for verification of the contentions of assessee.

14. We have considered contentions of both the parties and perused the material on record. The assessee is engaged in the business of manufacturing of Glass. The solitary issue in this appeal is with respect to carry forward and set off of brought forward business losses and unabsorbed depreciation.Before proceeding further, it will be profitable at this stage to reproduce relevant provisions of the 1961 Act , which were in force at relevant time under consideration viz. ay: 2012-13:

"Depreciation

*32(1) *****

(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year , or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.]

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, [* * *] 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 ;

[* *]*

(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 :]

*[**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 sub-section (1) of this section)] shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

Submission of return for losses.

80. *Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed [in accordance with the provisions of sub-section (3) of section 139], shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) [or sub-section (3)] of section 74[or sub-section (3) of section 74A].*

Return of income.

139. (1) to (2)***

(3) If any person who [***] has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (1) [or sub-section (3)] of section 74, [or sub-section (3) of section 74A], he may furnish, within the time allowed under sub-section (1) [***], a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).

We have observed that admittedly the assessee filed its return of income for the impugned assessment year 2012-13 ,on 29.03.2014 , which return of income was filed belatedly beyond the time prescribed u/s 139(1) of the 1961 Act. The assessee

declared business loss of Rs. 2,15,19,363/- in the return of income filed with Revenue, while the AO in proceedings conducted u/143(3) read with Section 143(2) of the 1961 Act , assessed income of the assessee at Rs. 27,20,480/-. The AO denied the benefit of set off of brought forwardbusiness losses of earlier years and un-absorbed depreciation , against the income assessed for the year under consideration. The ld. CIT(A) granted partial relief to the assessee so far as additions to the income made by the AO under various heads, and we have also adjudicated vide this common order two issues raised by assessee in its appeal in ITA no. 20/All/2020 for ay: 2012-13 which also concerns with additions made by the AO, in preceding para's of this order. These adjudication by appellate authorities have bearing on the assessed income computed under Chapter-IVD and consequently assessed total income of the assessee, for impugned assessment year . So far as carried forward of business losses for the current year under consideration is concerned, it is fairly conceded by ld. Counsel for the assessee and rightly so, that in view of Section 80 and 139(3) of the 1961 Act, the assessee will not be eligible to carry forward current year business losses to subsequent years, as the return of income for the impugned ay:2012-13 was filed belatedly beyond the time stipulated for filing of return of income u/s 139(1) of the 1961 Act . Conjoint reading of Section 80 and 139(3) of the 1961 Act , in our considered view will clearly reveals that it requires for current year business losses to be carried forward to subsequent years for being eligible to be set off against business income of subsequent years, the return of income for the current year has to be mandatorily filed within time stipulated u/s 139(1) of the 1961 Act. In our considered view, the aforesaid provisions u/s 80 and 139(3) cannot be stretched to debar already existing assessed business losses of preceding years to be also hit and not allowed to be set off against the business income of the current year or in case of shortfall of business income of the current year, to be carried forward to subsequent years merely because the

current year return of income was filed belatedly beyond the time prescribed u/s 139(1).However, obviously the conditions u/s 80 and 139(3) has to be met in each of the earlier relevant years to which said business loss belongs to be allowed to be carried forward and set off against business income of subsequent years , and the same is also regulated by Section 72(3) which sets the outer limit of eight years for being business losses to be eligible to be set off against business income of subsequent assessment years. However so far as unabsorbed depreciation is concerned , in view of Section 32(2) of the 1961 Act, if the full effect cannot be given to depreciation u/s 32(1) allowable for the year owing to there being no profits or gains chargeable for the year under consideration under Chapter IV-D, or owing to profits or gains chargeable to tax under Chapter IV-D being less than depreciation allowance u/s 32(1), than, inter-alia, subject to provisions of Section 72(2), the unabsorbed depreciation of the current previous year shall be added to the depreciation allowable u/s 32(1) of the succeeding previous year and deemed to be part of the succeeding previous year to be set off against business income of the succeeding previous year and so on. There is no provision of the 1961 statute which is brought to our notice by rival parties which prohibits carry forward of unabsorbed depreciation even if return of income is filed belatedly for the current year beyond the due date stipulated u/s 139(1) of the 1961 Act. Reference is drawn to decision of ITAT, Delhi Bench decision in ITA No. 504/Del/2017 for ay: 2012-13, vide order dated 23.07.2020 in the case of Addl. CIT v. Nortel Networks India Private Limited. So far as issue of earlier year brought forward business losses and unabsorbed depreciation is concerned, we are of the considered view that the assessee will be entitled to set off against business income of the current year and there is no bar to earlier year brought forward losses and unabsorbed depreciation to be adjusted against current year business income , even if current year return of income is filed belatedly beyond the due date prescribed u/s 139(1) of the 1961 Act.

Similarly, earlier year brought forward business losses and unabsorbed depreciation (to the extent not set off against current year business income) shall be allowed to be carry forward to the succeeding year viz. ay: 2013-14 and so on, and their carry forward to subsequent years will not be affected merely because the return of income for ay: 2012-13 was filed belatedly beyond the time prescribed u/s 139(1) of the 1961 Act. However, the overall carry forward of business losses shall be subject to period of eight assessment years immediately succeeding the assessment year for which the loss was first computed, as is stipulated u/s 72(3) of the 1961 Act, while there is no bar so far as period of carry forward of unabsorbed depreciation as mandated u/s 32(2) of the 1961 Act, after its amendment by Finance Act, 2001. Reference is drawn to the decision(s) of Hon'ble Gujarat High Court in the case of General Motors India Private Limited v. DCIT , reported in (2012) 25 taxmann.com 364(Guj. HC), Hon'ble Madras High Court decision in the case of CIT v. KMC Speciality Hospitals India Private Limited reported in (2021) 130 taxmann.com 215(Mad. HC). Reference is also drawn to dismissal of SLP by Hon'ble Supreme Court in the case of Pr. CIT v. Petrofils Co-operative Limited , reported in (2021) 130 taxmann.com 191(SC), wherein SLP was dismissed by Hon'ble Supreme Court filed by Revenue against the decision of Hon'ble Gujarat High Court holding that unabsorbed depreciation pertaining to assessment year 1997-98could be allowed to be carried forward and set off after a period of eight years without any limit whatsoever in accordance with Section 32(2) as amended by Finance Act , 2001. The Hon'ble Gujarat High Court in the case of Pr. CIT v. Petrofils Co-operative Limited, reported in (2021) 130 taxmann.com 190(Guj HC) followed its earlier decision in the case of General Motors India Private Limited(supra). Further, needless to say that all the earlier year brought forwards business losses which assessee is seeking to set off and carry forward, should be assessed business losses and the return of income for those years ought to have been filed by the assessee

within the time stipulated u/s 139(1) and ought not to be belated return of income filed beyond the due date prescribed u/s 139(1), otherwise it will be hit by provision of Section 80 and 139(3) of the 1961 Act. So far as quantum of brought forward business losses and unabsorbed depreciation which were assessed to be carried forward to subsequent years and its period of allowability is concerned, we are of the considered view that these facts requiresverification by Assessing Officer from the record , and the material on record available before us is not sufficient to give conclusive finding on these facts, and hence we are setting aside this matter to the file of AO for verification of facts and quantum of allowability of brought forward business losses and unabsorbed depreciation, and while allowing the carry forward of business losses , the AO shall also verify that the return of income was filed by assesseein time within due date prescribed u/s 139(1) for those years and the loss assessed by Revenue to be carried forward for each of the years and period of allowabilityof business loss for eight assessment years as is available u/s 72(3) of the 1961 Act. The assessee has also grievance that unabsorbed deprecation amount is wrongly mentioned in grounds of appeal filed with tribunal, this aspect shall also be verified by the AO from records and correct amount be accordingly considered after due verification of records.Needless to say that the AO shall give proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law , to carry on directions as per our order. The AO shall admit all necessary evidences/explanation filed by assessee in support of its contentions and adjudicate the same on merits in accordance with law. The AO is directed to pass detailed and reasoned order . This ground of appeal is partly allowed for statistical purposes. We order accordingly.

15. In the result, the appeal filed by assessee in ITA no. 19/Alld/2020 for ay: 2012-13 is partly allowed for statistical purposes. We order accordingly.

ITA No. 21/ALLD/2020
Assessment Year: 2013-14

15. We shall now take up assessee's appeal in ITA No. 21/Alld/2020 for ay: 2013-14. The grounds of appeals raised by assessee in memo of appeal filed with tribunal reads as under:-

> *"1. Because the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts to confirm the impugned addition made by the Assessing Officer on account of disallowance of depreciation claim Rs.36,44,445/- being 30% of the total depreciation claim of Rs.121,48,152/- u/s 32 of the Income Tax Act, adhoc for closed plant/unit of the assessee company.*
> *2. Because the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts to confirm the impugned addition made by the Assessing Officer on account of Total Rebate Allowed Rs.1,71,24,716/-.*
> *3. Because the order of the Ld. CIT(A) Allahabad was bad in law and on facts.*
> *4. The appellant prays for adducing further or other grounds of appeal before or at the time of hearing the appeal."*

17. The brief facts of the case are that the assessee is engaged in manufacturing of glass. In this appeal filed by assessee with tribunal there are two issues which is agitated by assessee before the tribunal. The first issue concerns itself with disallowance of depreciation with respect to closed manufacturing unit of the assessee at Allahabad(Uttar Pradesh). The assessee has two manufacturing unit , one at Allahabad (Uttar Pradesh) and other at Rajamundri (Andhra Pradesh). The AO during the course of assessment proceedings conducted u/s 143(3) read with Section 143(2) observed that Allahabad Manufacturing unit was lying closed for last several years. The assessee was asked by AO to furnish complete

details/bifurcations of fixed assets and depreciation claimed. The assessee failed to furnish the details/ bifurcation of fixed assets before the AO. The AO observed that the assessee has admittedly closed its Allahabad Manufacturing unit for last many preceding years and fixed assets of Allahabad Manufacturing Unit were not utilized for business purposes for the entire year, and hence consequently the assessee is not entitled and eligible to claim depreciation u/s 32 with respect to Allahabad Manufacturing unit. The Assessing Officer disallowed depreciation of Rs. 3,64,44,445/- i.e. 30% of total depreciation claimed on account of unverifiable fixed assets of closed unit at Allahabad and failure to establish usage of these assets for business purposes as is required u/s 32 of the 1961 Act, vide assessment order dated 31.03.2016 passed by AO u/s 143(3) of the 1961 Act.

17.2 The second issue concerns itself with disallowance of Rebate to the tune of Rs. 17,12,24,716/- . The assessee had claimed Rebate Expenses as deduction while computing income chargeable to tax under the head " Profits and Gains from Business or Profession". The assessee was asked to explain the same by AO in the proceedings conducted by AO u/s 143(3) read with Section 143(2) of the 1961 Act. The assessee submitted credit notes issued to different persons , and submitted before the AO that such rebate is attributable to the promptness of payments and also to performance. The AO observed that these credit notes referred to payments as 'Commission'. The AO further observed that the assessee has not deducted income-tax at source on these payments , even though these payments were covered under the ambit of deduction of income-tax at source u/s 194H of the 1961 Act. The AO by invoking provisions of Section 40(a)(ia) of the 1961 Act, disallowed the Rebate expenses and added the same to income of the assessee, vide assessment order dated 31.03.2016 passed by AO u/s 143(3) of the 1961 Act.

18. The assessee company being aggrieved by assessment framed by AO, carried the matter further before ld. CIT(A) by filing first appeal, and the assessee submitted before ld. CIT(A) on the first issue of disallowance of depreciation , as under.:-

> *"The A.O has wrongly computed the amount disallowed being 30% of total depreciation claimed u/s 32 amounting to Rs.12148152/- as Rs.36444445/- instead of Rs.3644445/-. As mentioned above, manufacturing unit at Allahabad is non-functional for the last 5-6 years and closed down due to Labour unrest. Depreciation claimed for Allahabad Unit comprises of depreciation claimed on building and motor vehicles only and not on plant and machinery. The depreciation of the Allahabad unit was to be allowed as the said assets of the Allahabad unit remain part of the block of assets and was ready for passive use, which was as good as real use. The assets of the Allahabad unit could not be segregated for the purpose of calculating the depreciation. This unit is not finally closed or sold out till date."*

18.2 The assessee submitted before ld. CIT(A) regarding second issue concerning disallowance of Rebate Expenses claimed by assessee , as under:

> "The A.O has erroneously taken the figure of Rebate allowed as Rs. 17,12,247,16/- instead of Rs.1,71,24,716/- taken in the Audited Profit & Loss Account. Rebate of Rs.1,71,24716/- is allowed in the normal course of business to the dealers on the basis of their performance i.e. on achieving sales target & increasing the overall business and to customers on making prompt payment, for which the company issues credit notes to such parties. Discount incentive allowed to such parties is not in the nature of any "Commission" on which provisions of deducting tax at source is applicable."

19. The ld. CIT(A) was pleased to dismiss appeal filed by the assessee on the first issue concerning disallowance of depreciation , vide appellate order dated 24.09.2019 , by holding as under:

"Decision

I have gone through the facts and the written submissions filed along with the details filed enclose therein. AO disallowed the claim of depreciation made on the manufacturing unit at Allahabad which is admittedly non-functional for last 5-6 years due to Labour unrest. I agree with the action of AO even though the depreciation has been claimed only on building and motor vehicles. Applicant itself has not claimed depreciation on plant and machinery. It is not understandable as to how motor vehicles and building can be put to passive use. Depreciation on any unit can be allowed if the said assets are ready for use for want of business, and in absence of business they are ready to be used potentially, which is legally held as real use. Appellant's contention that the assets of the Allahabad unit could not be segregated for the purpose of calculating the depreciation is also not acceptable for the reason that appellant themselves have claimed depreciation only on the part of the assets, meaning thereby that they could segregate the depreciation on assets . As a limited company the appellant is to maintain a fixed asset register as per Company's Act also where complete details are to be maintained in respect of each asset purchased or sold,therefore this submission of the appellant cannot be agreed to. With these comments action of the AO is upheld.
This ground is dismissed."

19.2 The ld. CIT(A) was also pleased to dismiss appeal filed by the assessee on the second issue concerning disallowance of Rebate Expenses claimed by assessee as deduction while computing income chargeable to tax under the head 'Profits and Gains from business or Profession', vide appellate order dated 24.09.2019 , by holding as under:

*"**Decision:***

I have gone through the facts and the written submissions filed along with the details filed enclose therein. AO disallowed the claim of Rebate given by appellant for the reason that payments made were in fact Commission and not rebate and no tax has been deducted at source on those commission payments

> *even though the amount qualified for such deduction of tax at source. Hence AO disallowed u/s 40(a)(ia). Appellant has only submitted that the actual figure is Rs.1,71,24,716/- and not 17,12,247,16/-. I have examined the same and find contention of the appellant correct. Appellant has not submitted anything on the merits of the matter as relied upon by AO. Therefore the addition made by AO is confirmed but is restricted to Rs. 1,71,24,716/- the actual amount claimed.*
> *This ground is partly allowed."*

20. Still aggrieved by the appellate order dated 24.09.2019 passed by ld. CIT(A), the assessee carried the matter in appeal further before the tribunal by filing second appeal, on both issues concerning firstly disallowance of depreciation with respect to closed Allahabad Manufacturing Unit and secondly concerning disallowance of Rebate Expenses claimed by assessee as deduction while computing business income. The ld. Counsel for the assessee submitted before the Division Bench during the course of hearing that ad-hoc disallowance of depreciation was made by the authorities below @30% of the total depreciation claimed. It was submitted by ld. Counsel for the assessee that assessee has two Manufacturing unit, one at Allahabad(U.P.) and second at Rajamundari (Andhra Pradesh). It was submitted by ld. Counsel for the assessee that Manufacturing unit at Allahabad , U.P. is lying closed since 2006. It was submitted that the plants which were operational in Allahabad, U.P. were closed due to labour problem and huge financial losses , and thus it was a forced closure. It was submitted that the assets formed part of Block of Assets, and the assessee is entitled to claim depreciation on entire Block of Assets. The ld. Counsel for the assessee submitted that Allahabad Manufacturing unit is lying closed since 2006 , till date. The ld. Counsel for the assessee submitted that the AO was not justified in making ad-hoc disallowance of depreciation computed @30% of total depreciation claimed by the assessee , and it was submitted that in any case the assessee continued to be in the business of manufacturing glass as its

manufacturing unit at Rajamundari(A.P.) was in operations even during the year under consideration , while only manufacturing unit at Allahabad , U.P. was closed. The ld. Counsel for the assessee relied upon decision of Mumbai-tribunal in the case of Swati Synthetics Limited v. ITO , in ITA No. 1165/M/2006 , order dated 17.12.2009. The ld. Counsel for the assessee also relied upon Hon'ble Bombay High Court decision in the case of CIT v. Visvanath Bhaskar Sathe reported in (1937) 5 ITR 621(Bom.). The ld. Counsel for the assessee submitted that Registered office of the company is situated at Allahabad premises. It was submitted that Motor Vehicles were used by Directors of the assessee company and no new vehicle was purchased during the year . The ld. Counsel for the assessee submitted that the assessee is entitled for claim of depreciation on Allahabad unit as the concept is of Block of Assets. It is also submitted by ld. Counsel for the assessee before the Bench that the assessee never claimed the depreciation on Manufacturing Plant at Allahabad, while depreciation was only claimed on Building and Motor Vehicles situated at Allahabad, as the Building was used for Registered Office purposes , while Motor vehicles are used by Directors for business purposes.

20.2 On the second issue , ld. Counsel for the assessee submitted that Rebate Expenses of Rs. 1.71 crores were claimed as deduction while computing income chargeable to tax under the head 'Profits and Gains of Business or Profession' and it was not Commission expenses except Rs. 58.72 lacs, and hence TDS provisions u/s 194H are not attracted on the remaining payment. It was submitted that Rs. 52.08 lacs was paid to parties towards Rebate for breakage of glass. On being asked by the Bench, the ld. Counsel for the assessee submitted that it was orally explained before ld. CIT(A) that Rs. 52.08 lacs were towards claim for breakage of glass. Our attention was drawn to page 52-59 of the paper book , and it was submitted that Rs. 52,08,544.30 were towards Rebate against claim of Breakage of glass. It was

explained by ld. Counsel for the assessee that this fact that certain rebate was given for claim of breakage from the customer is not emerging from the orders of authorities below. The ld. Counsel for the assessee made statement before the Bench that oral submissions were made before ld. CIT(A) , explaining before ld. CIT(A) that Rs. 52 lacs was towards Rebate allowed to customers against breakage of glass. The assessee has filed paper book containing 229 pages and also filed in the said paper book additionally Printed 'Annual Report-2013' . There is no certification in the paper book as to which documents were filed before the authorities below. On being asked by the Bench, the ld. Counsel for the assessee made statement before the Bench that all the documents as are filed in the paper book filed with tribunal, were filed before both the authorities below. There are large number of credit notes filed by assessee , from page 98-182 which are towards rebate for breakage , but there is no such mention of rebate for breakage in orders of authorities below. Further , on page 183/paper book, is the account ledger of Rebate turnover , wherein total rebate –turnover is Rs. 2,10,000/- allowed during the year. Credit note of Rs. 2,10,000/- in the name of 'Auro Agencies' is placed at page 184/paper book. On page 185-187 is the details of Rebate for Rate difference , aggregating to Rs. 58,33,684/- allowed by assessee during the year under consideration. The assessee has stated by hand written note in page 187, that out of Rs. 1,17,06,172/- paid towards Rebate Rate Difference, an amount of Rs. 58,72,488/- was commission paid to M/s.Chakku & Sons, and hence net Rebate for Rate difference allowed was Rs. 58,33,684/- . The details of commission paid to Chakku & Sons is at page 222/paper book. It was submitted that Rs. 58.72 lacs was paid towards commission on which the assessee was required to deduct income-tax at source u/s 194H, but the income-tax was not deducted at source. The Rebate for rate differences credit notes are placed in page 189-221. The ld. Counsel for the assessee conceded that the disallowance is to be restricted to Rs. 58,72,488/- as it was commission paid by the

assessee to Chakku & Sons and admittedly income-tax was not deducted at source u/s 194H of the 1961 Act.

20.3 The ld. DR on the other hand with respect to first issue of disallowance of depreciation relied upon orders of authorities below. The ld. DR relied upon Special Bench – Chandigarh tribunal decision in the case of Gulati Saree Centre (1999) 71 ITD 73(Chd. SB) and decision of Chandigarh-tribunal in the case of Singla Agencies v. ACIT , reported in (1997) 60 ITD 410(Chd.-trib.)

20.4 On the second issue of disallowance of disallowance of rebate ,the ld. DR submitted that the assessee has paid commission and no income-tax was deducted at source, and hence the entire disallowance is to be upheld.

21. We have considered rival contentions and perused the material on record, including cited case laws. The assessee is engaged in the business of manufacturing of glass. The assessee has two manufacturing unit , one at Allahabad(U.P.) and second at Rajamundari(Andhra Pradesh). The Manufacturing unit at Allahabad is lying closed since last several years and admittedly the said unit was not working during the year under consideration, while Manufacturing Unit at Rajamundari(A.P.) was in operations.. The AO has disallowed 30% of the total deprecation claimed by assessee on the grounds that Manufacturing unit at Allahabad was lying closed for the whole of the year and the assets of the said units were not put to use during the entire year. The assessee did not submitted details/bifurcation of fixed assets before the AO as to identify the assets at Allahabad Manufacturing unit for computing disallowance of depreciation , despite being asked by AO to submit the same. The said details are not furnished even before ld. CIT(A) and also before us . The assessee has claimed that the assets have lost identity once they form part of the

Block of Assets and the entire block of assets will be eligible for the depreciation. The assessee has claimed that its manufacturing unit at Allahabad was lying closed for last several years owing to huge financial losses and labour unrest. It is an admitted position that Manufacturing Unit at Allahabad (U.P.) was lying closed for the entire previous year under consideration. The assessee has claimed that depreciation ought to have been allowed on the assets of Allahabad Manufacturing unit as the assets were ready to be put to use and thus, consequently owing to passive user of the assets, the assessee is entitled for depreciation u/s 32 of the 1961 Act , because as per assessee passive user of the assets is as real as actual user of the Assets. The assessee has relied upon decision of Mumbai-tribunal in the case of Swati Synthetics Limited(supra) and Hon'ble Bombay High Court decision in the case of Visvanath Bhaskar Sathe(supra). The assessee has also claimed that there is a concept of 'Block of Assets' under the new regime of allowability of depreciation, and once the assets formed part of 'Block of Assets', then the individual asset will lose its identity and depreciation is to be allowed on the entire 'Block of Asset' under the new regime of allowability Depreciation u/s 32 of the 1961 Act. The assessee has also claimed that it never claimed depreciation on 'Plant and Machinery' which are situated at Allahabad Manufacturing unit , and only depreciation is claimed on Building as well Motor Vehicles at Allahabad. It is claimed that the Building at Allahabad Manufacturing unit is used for Registered Office of the assessee company , and secondly Motor Vehicles at Allahabad are used by Directors of the assessee company for business purposes. It is an admitted position that the assessee did not give bifurcation/details of fixed assets before the AO and even before us no details are furnished. The AO has made ad-hoc disallowance of 30% of total depreciation claimed , which is later confirmed by ld. CIT(A). Hence, it could not be verified as to the details of depreciation claimed. In the absence of details/bifurcation of assets and other relevant material , even we are also not in a position to give conclusive

finding as to whether the assessee did claimed depreciation on Plant and Machinery situated at Allahabad Manufacturing unit or not. Further, there is no finding by authorities below , nor any evidence on record to substantiate that the entire Building at Allahabad Manufacturing unit was used for registered office purposes, nor there is any finding of authorities below as to usage of motor vehicle at Allahabad for business purposes by Directors, nor are there any evidence on record in context thereto, to arrive at conclusive finding. Secondly, the assessee has claimed that once asset forms part of Block of Assets , then it losses its identity and till Block of Assets remains in existence, then deprecation on the entire block of asset is to be allowed. We are afraid that the contentions of the assessee are not correct as it is the foremost condition of claiming depreciation u/s 32 of the 1961 Act is that the asset is being put to use for business purposes. The relevant clause of Section 32 is reproduced hereunder:

> ***"Depreciation.***
>
> ***32.*** *(1) [In respect of depreciation of—*
>
> *(i) buildings, machinery, plant or furniture, being tangible assets;*
>
> *(ii) know-how, patents, copyrights, trade marks, 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,* ***[****not being goodwill of a business or profession,****]***
>
> *owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—]*
>
> *****
>
> ****"*

Thus, perusal of Section 32(1) clearly stipulates that user of the assets for the purposes of business or profession is a mandatory requirement , before claiming depreciation u/s 32 of the 1961 Act. There is Section 38(2) in statute, wherein even where the assets forms part of Block of assets , and the same is not wholly and exclusively used for business , and is partly used for personal purposes, the

depreciation shall be proportionately disallowed. Section 38(2) is reproduced hereunder:

> ***"Building, etc., partly used for business, etc., or not exclusively so used.***
>
> ***38.*** *(1) ****
>
> *(2) Where any building, machinery, plant or furniture is not exclusively used for the purposes of the business or profession, the deductions under sub-clause (ii) of clause (a) and clause (c) of section 30, clauses (i) and (ii) of section 31 and [clause (ii) of sub-section (1)] of section 32 shall be restricted to a fair proportionate part thereof which the [Assessing] Officer may determine, having regard to the user of such building, machinery, plant or furniture for the purposes of the business or profession."*

Reference is also drawn to Special Bench decision of Chandigarh-tribunal in the case of Gulati Saree Centre(Supra) and decision of Chandigarh-tribunal decision in the case of Singla Agencies(supra), as relied upon by ld. DR, wherein it is held that the individual assets will not lose their identity merely because they form part of 'Block of Asset'. This contention of ld. Counsel for the assessee that once asset forms part of 'Block of Assets' , then it losses its identity and till 'Block of Assets' remains in existence, then deprecation on the entire block of asset is to be allowed , whether or not the asset is used for business purposes is rejected. Further, it is claimed that the assets were ready and available for use for business purposes and hence , the depreciation is to be allowed on passive user of the asset, which is as good as real user of the asset for business purposes . It is admitted position that the Allahabad Manufacturing unit was lying closed for last several years, and even during the year under consideration, the said unit was lying closed.It is explained that due to huge financial losses and labor unrest, the Allahabad manufacturing unit was closed. On being asked by the Bench, the ld. Counsel for the assessee made statement before the Bench, that Allahabad Manufacturing unit is still lying closed , as of date i.e. in the year 2021 . Under this scenario, whether the depreciation can be allowed to assessee towards Allahabad Manufacturing unit on the grounds of passive user, it

will be profitable to refer to the Annual Report 2013 filed by the assessee in its paper book. Under the Report of Directors(page 4 of Annual Report 2013), it is mentioned as under:

> *" As informed to the members in the last Annual report, the company had sold its Merrut unit and settled part of the dues of Institutions and Banks. In order to repay back the balance dues of the Institutions and Banks, it was decided to sell off the Allahabad unit of the Company. BIFR initially agreed to the proposal and appointed an Operating Agency M/s IDBI Bank Ltd, New Delhi. The Operating Agency was given the task of constituting an Assets Sales Committee which would handle the sale of Allahabad Plant. The Assets Sales Committee floated tenders twice for sale of the plant, but for some reasons or other , the sale could not materialize. As in subsequent BIFR meetings, no headway could be made in putting-up the unit for sale for a third time, the company decided to file a fresh MA before the BIFR requesting them once again to give permission for sale of plant in lots or as a whole. The Misc. Application before BIFR came up for hearing on 10.05.2012 wherein the BIFR passed orders detrimental to the interest of the Company and therefore the company had no option but to file an appeal before the Hon'ble AIFFR seeking stay of the BIFR order and permission for sale of the Allahabad unit.*
>
> *In the meantime, a number of buyers have come forward to buy the Plant and Machinery and the Plant as a whole which will help the company to finalize the sale once we get the necessary permission for sale.*
>
> *After a lot of follow up even at High Court Level as AAIFR Board had been dismantled , we were eventually able to get a favorable order from Hon'ble AIFFR on 19.03.2013 wherein they remanded back our case to BIFR for reconsideration. BIFR on 21.03.2013 accepted the recommendation of AIFFR and passed orders to Operating Agency to take steps for sale of the Allahabad Plant as per BIFR guidelines. The Operating agency has started the process of reconstituting the sale committee, etc."*

Conjoint reading of the factual status as stated by ld. Counsel for the assessee before the Bench that the Allahabad manufacturing unit was lying closed for several years with the above note in Directors Report, clearly reveals that the assets of Manufacturing unit at Allahabad were not being used during the year , both active user as well passive user were not there, rather the assessee was making efforts to

sell the Plant and Machinery at Allahabad Manufacturing unit to clear its financial liabilities , as the assessee was registered as a sick company with BIFR. Thus, the Revenue has rightly denied the depreciation on the assets at Allahabad Manufacturing unit , as the same were neither actually used for business nor the same were passively used for business as these assets were not even ready for use, and rather the assets were held to be sold to clear its financial liabilities . So far as quantum of disallowance of depreciation is concerned, the AO disallowed 30% of total depreciation claimed by the assessee, as the assessee failed to produce details/break up of fixed assets. Even before ld. CIT(A) and also before us, the break-up/details of fixed assets are not furnished. The contentions of the assessee that Building and Motor vehicles at Allahabad Manufacturing unit were used for business purposes , building for the purposes of Registered office and Motor Vehicle for the purposes of official usage by Directors, the facts on record are not sufficient to come to conclusive finding that these assets were actually used by assessee and further that these assets were wholly and exclusively for the business of the assessee company to satisfy the mandate of Section 32 and 38(2) of the 1961 Act. Further, contention of the assessee that it only claimed depreciation on Building and Motor Vehicle of Allahabad unit and no depreciation was claimed with respect to 'Plant and Machinery' installed at Allahabad Manufacturing unit, again the facts on record are not sufficient to give conclusive finding on this issue, in the absence of details/break-up furnished by the assessee. The assessee is also aggrieved that figure adopted by AO for disallowance of depreciation is not correct. Keeping in view totality of facts and circumstances of the case, we are of the considered view that the assessee will not be entitled for claiming depreciation on the closed Manufacturing unit at Allahabad, but , however, for verification and adjudication of other claims of the assessee as detailed by us in this order, such as user of building and Motor Vehicles of Allahabad Manufacturing unit for business purposes, that no

depreciation was claimed in return of income filed with Revenue with respect to 'Plant and Machinery' installed at Allahabad Manufacturing unit, adoption of the correct amount of disallowance of depreciation , the matter need to be remitted back to the file of AO for fresh adjudication on merits in accordance with law. Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in set aside proceedings. The evidences/explanations submitted by assessee in its defense shall be admitted by AO , and adjudicated by AO on merits in accordance with law. In case the assessee do not co-operate before the AO in set aside proceedings by bringing on record complete details/break-up of assets of Allahabad Manufacturing unit , Rajamundari Manufacturing unit and other assets , or in providing other required details , then the AO shall be free to proceed on merits in accordance with law , based on material available on record. This ground of appeal is partly allowed for statistical purposes. We order accordingly.

21.2 So far as second issue is concerned which concerns itself with disallowance of Rebate Expenses claimed by the assessee as deduction while computing income chargeable to tax under the head 'Profits and Gains from Business or Profession' . The ld. Counsel for the assessee has conceded before the Bench that Rs. 58,72,488/- (page 222-229 of paper book) was paid as Commission to M/s Chakku & Sons, on which no income-tax was deducted at source u/s 194H of the 1961 Act and hence keeping in view provisions of the Section 40(a)(ia), the same is to be disallowed. We hold so and order accordingly, that Rs. 58,72,488/- claimed as Rebate Expenses is to be disallowed and added to the income of the assessee for the reasons that no income tax was deducted at source u/s 194H on these expenses as is mandated under Chapter XVII-B of the 1961 Act. So far as remaining expenses claimed as Rebate Expenses while computing income chargeable to tax under the head 'Profits and Gains of Business or Profession' , it is the contention of the assessee that the

said amounts were towards Rebate for breakage and rate difference. It was submitted that Rs. 52.08 lacs was paid to parties towards Rebate for breakage of glass. On being asked by the Bench, the ld. Counsel for the assessee had submitted before the Bench that it was orally explained before ld. CIT(A) that Rs. 52.08 lacs were towards claim for breakage of glass. Our attention was drawn to page 52-59 of the paper book , and it was submitted that Rs. 52,08,544.30 were towards Rebate against claim of Breakage of glass. It was explained by ld. Counsel for the assessee that this fact that certain rebate was given for claim of breakage from the customer is not emerging from the orders of authorities below. The ld. Counsel for the assessee made statement before the Bench that oral submissions were made before ld. CIT(A) , explaining before ld. CIT(A) that Rs. 52.08 lacs was towards Rebate allowed to customers against breakage of glass. The assessee has filed paper book containing 229 pages and also filed in the said paper book additionally Printed 'Annual Report-2013' . There is no certification in the paper book as to which documents were filed before the authorities below. On being asked by the Bench, the ld. Counsel for the assessee made statement before the Bench that all the documents as are filed in the paper book filed with tribunal, were filed before both the authorities below. There are large number of credit notes filed by assessee , from page 98-182 which are towards rebate for breakage , but there is no such mention of rebate for breakage in orders of authorities below. Further , on page 183/paper book, is the account ledger of Rebate turnover , wherein total rebate – turnover is Rs. 2,10,000/- allowed during the year. Credit note of Rs. 2,10,000/- in the name of 'Auro Agencies' is placed at page 184/paper book. On page 185-187 is the details of Rebate for Rate difference , aggregating to Rs. 58,33,684/- allowed by assessee during the year under consideration. The assessee has stated by hand written note in page 187, that out of Rs. 1,17,06,172/- paid towards Rebate for Rate Difference, an amount of Rs. 58,72,488/- was commission paid to M/s.Chakku &

Sons, and hence net Rebate for Rate difference allowed was Rs. 58,33,684/- .The assessee has claimed that these are not commission expenses, while the authorities below held the same to be Commission. It is further held by authorities below that no income-tax was deducted at source by assessee u/s 194H and the same is not allowable as deduction while computing income chargeable to tax. The assessee is claiming these expenses as deduction while computing income chargeable to tax under the provisions of the 1961 Act and the primary onus is on the assessee to establish that these expenses are incurred wholly and exclusively for the purposes of business of the assessee and mandate of Section 37(1) is fulfilled. The assessee has merely submitted credit notes, and no further details as to contract/agreement with parties, claim(s) raised by parties and evidences to substantiate the claims are bonafide and genuine etc. , are furnished by assessee. Further, material on record , is not sufficient to give conclusive finding that these rebate allowed were actually towards breakage or rate difference , and not commission. This requires verifications and evaluation of evidences to come to conclusive finding, firstly that these are business expenses which are incurred wholly and exclusively for business of the assessee and are genuine claims. Further , if the said expenses are within ambit of deduction of income-tax at source, then due income tax was deducted at source and paid to the credit of Central Government within the stipulated time, as is required for claiming deduction under the provisions of Section 40(a)(ia) of the 1961 Act. Thus, keeping in view , totality of facts and circumstances of the case , the matter need to be remitted back to the file of AO for fresh adjudication on merits in accordance with law. Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in set aside proceedings. The evidences/explanations submitted by assessee in its defense shall be admitted by AO , and adjudicated by AO on merits in accordance with law. In case the assessee do not co-operate before the AO by bringing on complete details/break-up of Rebate

Expenses so claimed or in providing other required details , then the AO shall be free to proceed on merits in accordance with law , based on material available on record. We order accordingly.

22. In the result, the appeal filed by assessee in ITA no. 21/Alld/2020 for ay: 2013-14 is partly allowed for statistical purposes. We order accordingly.

23. In the result, all the three appeals filed by assessee in ITA no.19- 21/Alld/2020 for ay's: 2012-13 and 2013-14 are partly allowed for statistical purposes. We order accordingly.

Order pronounced in the open Court on 14 /10/2021 through video conferencing.

Sd/-	Sd/-
[VIJAY PAL RAO]	[RAMIT KOCHAR]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 14 /10/2021
Allahabad
Vijay Pal Singh (Sr. PS)

Copy forwarded to:

1.Appellant –Triveni Glass Limited,1, Kanpur Road, Allahabad-211001,U.P.
2.Respondent –The Income Tax Officer, Ward II(3), Allahabad, U.P.
3. CIT(A) –Allahabad, U.P.
4. CIT, Allahabad, U.P.
5. DR –Sr. DR, ITAT, Allahabad, U.P.

By order
Assistant Registrar