

**IN THE INCOME TAX APPELLATE TRIBUNAL  
[ DELHI BENCH "B": NEW DELHI ]**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER  
(Through Video Conferencing)**

ITA. No. 4276/Del/2019  
(Assessment Year: 2009-10)

ACIT,  Circle : 9 (2),  New Delhi.	Vs.	M/s. Frigoglass India Pvt. Ltd., E – 20, 1 <sup>st</sup> & 2 <sup>nd</sup> Floor, Main Market, HauzKhas, New Delhi –110 016. <b>PAN: AAACF6804G</b>
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**AND**

C. O. No. 141/Del/2019  
[ inITA. No. 4276/Del/2019 ]  
(Assessment Year: 2009-10)

M/s. Frigoglass India Pvt. Ltd., E – 20, 1 <sup>st</sup> & 2 <sup>nd</sup> Floor, Main Market, HauzKhas, New Delhi –110 016. <b>PAN: AAACF6804G</b>	Vs.	ACIT,  Circle : 9 (2),  New Delhi.
(Appellants)		(Respondents)

Assessee by :	ShriSparshBhargav, Adv.;
Department by:	Ms. SangeetaYadav, Sr.D.R.;
Date of Hearing :	21/12/2021
Date of pronouncement :	19/01/2022

**ORDER**

**PER N. K. CHOUDHRY, J. M.**

1. This appeal has been preferred by the Revenue-Department and the Cross Objection by the Assessee against the order dated 24.01.2019 impugned herein passed by the Id. Commissioner of

Income Tax (Appeals)-34, New Delhi (in short 'Ld. Commissioner'), for assessment year 2009-10.

**2.** The Revenue-Department in the I.T. Appeal has raised the following grounds of appeal:-

"1. Ld. Commissioner of Income-tax (Appeals) erred in law and on the facts of the case in deleting the addition made on account of disallowance of unabsorbed depreciation claimed of Rs.1,53,10,977/- pertaining to AY 2000-01, which was beyond 8 years for set off and in contravention to Section 32(2) of the Income Tax Act, 1961.

2. The appellant craves leave to add, amend or forego any ground(s) of appeal at any time before or during the hearing of this appeal since many years. "

**3.** In the instant case Assessment Order dated 22<sup>nd</sup> March, 2013 was passed under Section 143(3) of the Income Tax Act, 1961 (the Act) by the Assessing Officer by making addition to the returned income amounting to Rs.3,69,168/- on account of disallowance of demurrage expenses and addition to miscellaneous income. Thereafter the Assessing Officer vide rectification order dated 22<sup>nd</sup> March, 2017 passed under section 154 of the Act, disallowed the set off of un-absorbed depreciation amounting to Rs.1,53,10,977/- pertaining to Assessment Year 2000-01.

**3.1** The Assessee being aggrieved preferred first appeal before the Id. Commissioner by challenging the disallowance as well as rectification order passed by the Assessing Officer under Section 154 of the Act. The Id. Commissioner though affirmed the action of AO order under Section 154 of the Act, however deleted the disallowance qua unabsorbed depreciation of Rs.1,53,10,977/- by holding as under:-

"5.8 It is evident from the provisions of section 32(2) of the Income Tax Act that the relaxed time limit should be applicable to all the live unabsorbed depreciation subsisting as on the date of introduction of amended provision. It is held by **Hon'ble Delhi High Court** in the case of **Motor and General Finance Ltd. 80 taxmann.com 14**, "where in the Hon'ble court has quashed the opening of the reassessment proceedings on the ground that assessee had claimed and allowed set off of unabsorbed depreciation beyond eight years stating as under:

"The benefit of carrying forward the depreciation was, in one sense, limited by the pre-existing ruling that can be done for eight years. All that amendment did with effect from 1-4-2002 was to remove the cap which meant that the previously limited benefit was now not subjected to such restrictions."

5.9 In the case of **General Motors India (P) Ltd. 25 taxmann.com 364** where in the Hon'ble High Court has held that unabsorbed depreciation pertaining to assessment year 1997-98 could 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. Relevant extracts of para 38 of the ruling is reproduced herewith:

"Where there is current depreciation for such succeeding year, the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. It is held that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with,

the unabsorbed depreciation from assessment year 1997-98 up to the assessment year 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever.

**5.10 Hon'ble ITAT, Kolkata in the case of DCIT, Kolkata Vs. India Joot and Industry Ltd.** held that "Section 32(2) pursuant to the amendment in Finance Act, 1996 curtailed the benefit of carry forward of unabsorbed depreciation loss to a period of 8 years and brought the said provision at par with the unabsorbed business losses. This provision was in force till assessment year 2001-02. Again the Finance Act, 2001 with effect from assessment year 2002-03 amended section 32(2) and restored back to the original version of the section as it stood prior to amendment by Finance Act, 1996, allowing the benefit of carry forward of losses to an infinite period and treating the same different from that of unabsorbed business losses. The explanatory memorandum to Finance Act, 2001 clearly spells out the intention of the legislature to provide the benefit of brought forward unabsorbed depreciation to be allowed to be eternally carried forward for an infinite period irrespective of the years to which it pertains. Though it is stated that the proposed amendment will take effect from 1-4-2002, going by the intention behind the amendment to this section vide Finance Act, 2001 restoring back to the same old provisions as it was then existing prior to 1-4-1997, it could only be logical to conclude that the legislature in its wisdom thought it fit not to disturb any of the unabsorbed depreciation losses to be made available for set off for an infinite period. In other words, the same has to be understood as the legislature only intended that any unabsorbed depreciation available to an assessee as on 1-4-2002 will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment.

No specific provision has been incorporated by the Finance Act, 2001 in section 32(2) restricting the allowability of carry forward of unabsorbed depreciation loss upto assessment year 1996-97 as available to be set off only for a period of 8 years. Hence the purposive and harmonious interpretation has to be taken keeping in view the intention of the amendment of section 32(2) by Finance Act 2001. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of the assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. "

5.11 Considering the above facts without prejudice that this issue cannot be subject matter of rectification u/s 154, the amount of unabsorbed depreciation amounting to Rs. 1,53,10,977/- pertaining to AY 2000-01 is available for set off as on 1<sup>st</sup> April, 2002 as per the provision of section 32(2) applicable for AY 2000-01, is eligible for carry forward for an infinite period as per the amended provisions of section 32(2) and accordingly can be set off against the income pertaining to AY 2009-10. Hence, addition made by the AO by disallowing depreciation at **Rs. 1,53,10,977/-** to be carried forward for set off is not sustainable and it is hereby deleted. "

**4.** Against the impugned order, the Revenue–Department and the Assessee has preferred the appeal and Cross Objection respectively under consideration. We will decide the appeal of the Revenue–Department first.

**5.** Heard the parties and perused the material available on record. We observe that while challenging the disallowance of depreciation, the assessee has claimed that the provisions relating to carry forward and set off of un-absorbed

depreciation are contained in Section 32(2) which was amended by Finance Act, 1996 and as per amended Section 32(2) of the Act, with effect from 1<sup>st</sup> April, 1997, un-absorbed depreciation was to be carried forward only for 8 years. In subsequent year the carried forward un-absorbed depreciation could be set off only against business profits, therefore, un-absorbed depreciation up to AY 1996-97 would be available for set off for 8 years commencing from AY 1997-98. However, vide the Finance Act, 2001 Section 32 of the Act has been again amended and in view of over-riding ambit of amended Section 32(2) of the Act, from 2002-03 onwards the un-absorbed depreciation has at the end of 2001-02 becomes part of depreciation of AY 2002-03 and the same can be carried forward for infinite period, till the time the un-absorbed depreciation allowance is actually set off. The Assessee also relied upon the CBDT Circular No. 14 of 2001 whereby purpose of amendment was explained qua indefinite period of carrying forwarding of un-absorbed depreciation.

**5.1** We find that the Id. Commissioner while considering the claim of the Assessee, also considered the judgments passed by the jurisdictional High Court in the cases of **Motor and General Finance Ltd. (supra) and General Motors India (P) Ltd. (supra)** wherein the Hon'ble High Court considered the amendment made by Finance Act, 2001 in Section 32(2) of the Act and the Circular No. 14 of 2001 whereby it was clarified that restriction for carry forward and set off of un-absorbed depreciation had been dispensed with un-absorbed depreciation from assessment year 1997-98 up to the assessment year 2001-02 got carried forward to the assessment year 2002-03 and

*became part thereof, it came to be governed by the provisions of Section 32(2) of the Act as amended by the Finance Act, 2001 and were available for carried forward and set off against the profits and gains of subsequent years without any limit whatsoever.*

Further the Id. Commissioner also taken into consideration the judgment passed by the co-ordinate bench of the **Hon'ble ITAT, Kolkata in the case of DCIT, Kolkata Vs. India Jute and Industry Ltd. (supra)** wherein the Hon'ble Bench also analyzed the provisions of Section 32(2) of the Act along with amendment made by Finance Act, 2001.

**5.2** We observe that the Id. Commissioner not only thoroughly considered the claim of the assessee qua un-absorbed depreciation, but also respectfully followed the dictum laid down by the jurisdictional High Court in the cases referred above and rightly held to the effect that amount of un-absorbed depreciation of Rs.1,53,10,977/- pertaining to assessment year 2000-01 is available for set off as on 1<sup>st</sup> April, 2002 as per the amended provisions of Section 32(2) of the Act applicable for Assessment year 2000-01 and is eligible for carried forward for aninfinite period and accordingly can be set off against the income pertaining to Assessment year 2009-10.

**5.3** The Revenue could not produce any contrary material or judgment to contradict the findings of the Id. Commissioner, hence on the reasons stated above, weare inclined not to interfere with the impugned order. Consequently, the appeal of the Revenue deserves dismissal, ordered accordingly.

## **C. O. No. 141/Del/2019**

**6.** Now coming to the Cross Objection filed by the assessee, the Assessee has raised the following grounds:-

"1. That the CIT (A) has erred in upholding the proceedings initiated against the Assessee / Respondent under Section 154 of the Income Tax Act, 1961 vide notice dated 03.03.2017 and concluded vide order dated 22.03.2017 passed by the Assessing Officer.

2. That the CIT (A) has erred in not appreciating the principle laid down by the Hon'ble Kolkata Tribunal in Deputy Commissioner of Income Tax, Circle-I, Kolkata Vs. India Jute & Industries Ltd. [2016] 65 taxmann.com 238 (Kolkata-Trib.) wherein it has been laid down that issue of unabsorbed depreciation is not a subject matter of rectification. "

**6.1** The Assessee by way of cross objection under consideration challenged the action of Ld. Commissioner in upholding the proceedings initiated under Section 154 of the Act by not appreciating the principle laid down by the Hon'ble Kolkata Tribunal in Deputy Commissioner of Income Tax, Circle-I, Kolkata Vs. India Jute & Industries Ltd. (supra) wherein it has been laid down that issue of unabsorbed depreciation is not a subject matter of rectification.

**6.1** As we have already dismissed the appeal of the Revenue department and upheld the action of the Ld. Commissioner for deletion of the disallowance/addition made vide order u/s 154 of the Act by the Assessing Officer, hence in our considered opinion no purpose would be served by deciding the action of Ld. Commissioner in sustaining the validity of the order u/s 154 of the Act by the AO and the same would become academic exercise only. Resultantly the Assessee's C.O. is dismissed.

**7.** In the result, Revenue's Appeal and Assessee's Cross objection stands dismissed.

Order pronounced in the open court on **19/01 /2022.**

**-Sd/-**  
**( R. K. PANDA )**  
**ACCOUNTANT MEMBER**

**-Sd/-**  
**( N. K. CHOUDHRY )**  
**JUDICIAL MEMBER**

Dated: 19/01/2022.

\*MEHTA\*

Copy forwarded to

1. Appellants;
2. Respondents;
3. CIT
4. CIT (Appeals)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi.