आयकर अपीलीय अधिकरण, मुंबई "के " खंडपीठ

Income-tax Appellate Tribunal "K"Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह, न्यायिक सदस्य

Before S/Sh. Rajendra,Accountant Member & Pawan Singh, Judicial Member

आयकर अपील सं./I.T.A./1867/Mum/2015, निर्धारण वर्ष /AY.: 2010-11

Income tax Officer-11(2)(1) 425, Aayakar Bhavan, M.K. Marg Churchgate, Mumbai-400 020.	Vs.	M/s. Schott Glass India Pvt.Ltd. Dynasty, A-Wing, 303/304, 3rd Floor Opp.Sangam Theatre,Andheri-Kurla Road Andheri(E), Mumbai-400 059. **PAN:AADCS 8583 L**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent**)

प्रत्याक्षेप **सं./C.O. No.12/Mum/2016**

Arising out of आयकर अपील सं./I.T.A./12/Mum/2016, निर्धारण वर्ष /AY.: 2010-11

M/s. Schott Glass India Pvt. Ltd. Mumbai-400 059.	Vs.	Income tax Officer-11(2)(1) Mumbai-400 020.

(प्रत्याक्षेपक **/Cross Objector**) (प्रत्यर्थी / **Respondent**)

Revenue by: Shri Mahesh Kumar -DR

Assessee by: S/Shri Dhanesh Bafna and Aliasgar Rampurwala-AR

सुनवाई की तारीख / **Date of Hearing: 08/03/2017**

घोषणा की तारीख / **Date of Pronouncement:08/03/2017**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the direction of the Dispute Resolution Panel (DRP), Mumbai dated 27.11.14,the Assessing Officer (AO) has filed the present appeal.The assessee has filed cross objection and has challenged the order of the AO dated 29.1.15.Assessee-company,engaged in the business of trading and manufacturing of glass filed its return of income on 15.10.2010 showing nil income under normal provisions and book profit of Rs.9.21 crores u/s. 115 JB of the Act.The AO issued a draft order u/s.143(3) r.w.s. 144C(1),vide letter dt.26.2.14,proposing following additions:

i.Adjustment on account of Transfer Pricing (TP)-Rs.34.49 crores

ii.Disallowance out of repairs and maintenance – Rs.31.63 lakhs

iii.Rejection of claim for set off of brought forward unabsorbed depreciation-Rs.2.86 crores.

2.Challenging the order of the TPO/AO,the assessee filed his objection before the DRP.Vide its letter dt.27.11.14 DRP issued direction u/s. 144C(5) of the Act.In pursuance of the same,the AO completed the assessment u/s 143(3) r.w.s. 144C(13) of the Act determining the income of the assessee at Rs.Nil under normal provisions and book profit of Rs.9.21 crores.

3.First two grounds of appeal are about excluding losses in Solar Trial in computing PLI of manufacturing segment and not identifying separate segment in respect of Solar Test.While going through the transfer pricing study report,the Transfer Pricing Officer(TPO) found that the assessee had benchmarked its transaction after segmentaligation of the activities into manufacturing and indenting,that there were only two segments as per the segmental accounting,that while computing the margin (PLI) it had divided the segmental accounting into three parts,that it separated out Solar Test (ST)as separate segment from the manufactur - ing segment,that same was not so presented in the audited segmental accounting. The segmented PLI computed by it was a under:

"Manufacturing Activity-Net Cost Plus Markup Ratio-18.79%".

The TPO held that the third segment i.e. ST was not recognised by the auditor, that it could not be considered a separate segment,that the assessee was also receiving income in the ST segment from its Associated Enterprise (AE), that it had not furnished the details of ST segment.Therefore, he rejected the PLI computation of the assessee in the manufacturing and indenting segment and held that ST was part of manufacturing segment. The PLI of the manufacturing segment was computed as under:

Schott Glass	(Rs.)
I. Income:	
Indenting segment	38,330,635
Manufacturing	1,459,245,318
Total Income	1,497,575,953
II. Expenditure	
Indenting segment	29,491,872
Manufacturing	1,529,003,400
Total Expenditure	558,4985,271
Manufacturing segment -non operating expenditure	120,912,768
Manufactuirng segment-total operating expenditure	1,408,090,632
Operating profit-manufacturing segment	51,154,686
Manufacturing-net cost+mark-up	3.63
Manufacturing- operating profit/operating revenue	3.51

The TPO considered three comparables and computed PLI of comparables at 25.83%.The assessee had benchmark manufacturing segment by adopting TNMM,net cost plus markup as EBIT/total cost is PLI. The PLI disclosed by the assessee in its own case was 18.79% as

compared to 1.60% of the comparable namely M/s. Triveni Glass Ltd.(TGL)and claimed that international transactions entered into by it were at arm's length.
The TPO observed that TGL was consistently loss-making concern, that same was to be rejected. He identified three new comparables that were rejected by the assessee.Taking these three companies as comparables, he determined the PLI of OP/OC at 25.83%. Accordingly an adjustment amounting two Rs. 10.26 crores was proposed in the Manufacturing segment.
Aggrieved by the proposed adjustment,the assessee filed objections before the DRP and contended that the TPO was wrong in including the ST cost was operating in nature, that it was an extraordinary cost, that it had undertaken trial run for production of solar receiver tubes during the year under consideration, that the economy conditions turned unviable and there was no demand for the solar tubes, that the assessee stopped manufacturing the tubes, that it had incurred huge costs with respect to ST test activity,that the AE had paid compensa -tion to the assessee to recover from the losses, that the activity resulted in loss,that same had to be excluded in the PLI computation of manufacturing segment,that even if it was part of manufacturing activity it had to be excluded as an unusual event, that the TPO had not excluded the non-operating expenditure and income while computing the PLI, that if the non-operating expenditure/income was considered the net cost plus markup ratio would be 17. 39% and operating margin ratio would be 14.81%,that the assessee had considered the neutral glass tube segment of TGL,that TGL was not a consistently loss-making company, that the other three comparables were manufacturing different products from the assessee.

3.1. After considering the order of the TPO and the objections of the assessee,the DRP held that in schedule 20 the revenue from ST activity was shown at Rs. 10.27 crores as against cost of Rs. 11.58 crores resulting in net loss of Rs. 1.31 crores, that in the notes to accounts (schedule 22-item number 21) revealed that company had undertaken ST test activity to produce solar receiver tubes, that the activity was undertaken from 09/10/2009 to 23/11/2009, that the companies regular business was production of tubes for pharmaceutical packaging, that the solar trial activity was an exception to its regular business, that the company had made provision for impairment of assets of Rs. 13.90 crore as per AS – 28, that the expenses were exceptional. The DRP directed the TPO to exclude the losses in ST run-up in computing the PLI of manifesting segment. It was further held that expenses/income under the head non-operating transactions had to be excluded for arriving at the correct PLI. The DRP issued further directions to re-compute the adjustments.

3.2. During the course of hearing before us, the Departmental Representative (DR) referred to the pages 10,25,160 and 162 of the paper book and stated that the auditor had mentioned only two segments, that assessee had shown three segments, that loss of Rs. 1.31 crores was taken to P&L account, that it had not been taken separately, that the auditor had not qualified the ST activity as extraordinary item. The Authorised Representative (AR) contended that the directors report and in the notes of accounts there was specific mention about extraordinary event i.e.ST activity,that it was non-operating item, there was impairment of assets,that the assessee had suffered losses, that the DRP had rightly held that ST activity had to be excluded for computing PLI.

3.3. We have heard the rival submissions and perused the material before us.We find that the basic issue to be decided is as to whether the direction of the DRP with regard to ST activity were justiciable. We would like to refer to notes to the accounts number 21 (page 39 of the PB) and it reads as under:

"SOLAR TRIAL TEST

> *The Company has, during the year, undertaken solar trial test activity to produce solar receiver tubes. The activity was undertaken from 9 October 2009 to 23 November 2009. The Company's regular business is production of tubes for pharmaceutical packaging and the solar trial activity was exception to its regular business. The Solar trial was conducted looking into opportunity of high profitable solar receiver tubes production which is a component of concentrated solar power plant.*
>
> *However, during the year under review, the economic ambience turned for the worse across the globe creating uncertainties for the ultimate consumption of solar receiver tubes. The Company therefore decided to provide for impairment of the assets used for the solar trial activity considering no use in near future and having regard to the principles of Accounting Standard on Impairment of Assets (AS 28), the company has made the provision of Rs. 1 39, 063, 509 in respect of such impairment."*

Under the head modernisation and expansion (page 42 of the PB) the assessee has, in the Directors Report, mention as follow:

> *"Your company has, during the year, undertaken solar trial test activity to produce solar receiver tubes. The activity was undertaken from 9 October 2009 to 23 November 2009.The Company's regular business is production of tubes for pharmaceutical packaging and the solar trial activity was exception to its regular business. The Solar trial was conducted looking into opportunity of high profitable solar receiver tubes production which is a component of concentrated solar power plant.*

However, during the year under review, the economic ambience turned for the worse across the globe creating uncertainties for the ultimate consumption of solar receiver tubes. The Company therefore decided to provide for impairment of the assets used for the solar trial activity considering no use in near future."

Considering the above,we are of the opinion there is no need to interfere with the order of the DRP with regard to computation of PLI.It had rightly held that ST activity was an extra -ordinary item and was not part of the regular business of the assessee and that there was impairment of assets.Therefore,upholding the order of the DRP,we dismiss both the grounds.

4.Next two grounds of appeal are about claim for set off of brought forward unabsorbed depreciation.During the assessment proceedings, the AO found that the assessee had claimed set off of unabsorbed depreciation aggregating Rs. 2.86 crore (Rs. 1.93 crore brought forward from AY. 1999-2000 and Rs. 93.5 lakhs from AY. 200- 01), that it had also carried forward the balance unabsorbed depreciation of AY. 2000-01 and 2001-02.Referring to the decision of the Special Bench of the Tribunal in the case of Times Guarantee Ltd. (40 SOT14), the AO held that the claim of set off and carryforward of balance unabsorbed depreciation pertaining to AY.s 1997-98 to 2001-02 to was not allowable, that the unabsorbed depreciation of the same period could be carried forward for set off for a maximum period of eight AY.s starting from the year in which loss was first written, that set off in respect of unabsorbed depreciation of AY.s 1999-2000 and the subsequent AY.were not allowable against the income assessable for the year under consideration. He further held that the claim made by the assessee to carry forward the balance unabsorbed depreciation pertaining to AY. 1996-97 to 2001-02 had to be rejected.

4.1. Aggrieved by the proposed draft order of the AO, the assessee filed objections before the DRP. Before it, the assessee relied upon the cases of General Motors India Private Ltd (354 ITR 244) Hindustan Unilever Ltd (22 ITR- Trib-737) and argued that because of the amendments claim made by the assessee was allowable. After considering the submission of the assessee and the draft assessment order, the DRP referred to the case of General Motors India Private Ltd (supra) and directed the AO to allow the adjustment of unabsorbed depreciation and carryforward of unabsorbed depreciation claimed by the assessee.

4.2. During the course of hearing before us, the representatives of both the sides agreed that the issue stands covered in favour of the assessee by the judgment of the honorable jurisdictional High Court delivered in the case of Hindustan Unilever Ltd. (72 taxmann.com 325) and the judgment of honorable Gujarat court in the case of General Motors India Private

Ltd.(supra).We would like to reproduce the relevant portion of the order of the above mentioned judgment of the Gujarat High Court and same reads as under:

> "*32. The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to the assessment year 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by section 32 as amended by the Finance Act, 2001 ? The reason given by the Assessing Officer under section 147 is that section 32(2) of the Act was amended by the Finance (No. 2) Act of 1996, with effect from the assessment year 1997-98 and the unabsorbed depreciation for the assessment year 1997-98 could be carried forward up to the maximum period of eight years from the year in which it was first computed. According to the Assessing Officer, eight years expired in the assessment year 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of the assessment year 1997-98 for being carried forward and set off against the income for the assessment year 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs. 43,60,22,158 for the assessment year 1997-98, which was not eligible for being carried forward and set off against the income for the assessment year 2006-07.*
>
> *33. Prior to the Finance (No. 2) Act of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance (No. 2) Act of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of eight years, from the assessment year 1997-98. Circular No. 762, dated February 18, 1998 (see [1998] 230 ITR (St.) 12), issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.*
>
> *34. So, the unabsorbed depreciation allowance of the assessment year 1996-97 would be added to the allowance of the assessment year 1997-98 and the limitation of eight years for the carry forward and set off of such unabsorbed depreciation would start from the assessment year 1997-98.*
>
> *35. We may now examine the provisions of section 32(2) of the Act before its amendment by the Finance Act, 2001. The section, prior to its amendment by the Finance Act, 2001, read as under :*
>
> > *"Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any pre vious year owning to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be,—*
> >
> > > *(i) shall be set off against the profits and gains, if any, of any busi ness or profession carried on by him and assessable for that assess ment year ;*
> > >
> > > *(ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year ;*
> > >
> > > *(iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year, and—*
> > >
> > > > *(a) 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 ;*
> > > >
> > > > *(b) if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first com puted :*

> *Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Company (Special Provisions) Act, 1985 (1 of 1986), and ending with the assess ment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.*
>
> *Explanation.—For the purposes of this clause, 'net worth' shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985."*

36. The aforesaid provision was introduced by the Finance (No.2) Act, 1996, and further amended by the Finance Act, 2000. The provision introduced by the Finance (No. 2) Act was clarified by the Finance Minister to be applicable with prospective effect.

37. Section 32(2) of the Act was amended by the Finance Act, 2001, and the provision so amended reads as under :

> *"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 sec tion 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 of that previous year, and so on for the succeeding previous years."*

38. The purpose of this amendment has been clarified by the Central Board of Direct Taxes in Circular No. 14 of 2001 (see [2001] 252 ITR (St.) 65, 90). The relevant portion of the said Circular reads as under :

> *"Modification of provisions relating to depreciation*
>
> > *30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for eight assessment years.*
> >
> > *30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of eight years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.*
> >
> > *30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.*
> >
> > *30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.*
> >
> > *30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."*

39. The Central Board of Direct Taxes Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of eight years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from the assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on the 1st day of April, 2002 (the assessment year 2002-03), will be dealt with in accordance with the provisions of section 32(2) as amended by the Finance Act, 2001, and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation

allowance worked out in the assessment year 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by the Finance Act, 2001, it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence, keeping in view the purpose of the amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing the 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. However, Circular No. 14 of 2001 had clarified that under section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by the Finance Act, 2001, would allow the unabsorbed depreciation allowance available in the assessment years 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the assessment year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

40. Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. 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. We are of the considered opinion that any unabsorbed depreciation available to an assessee on the 1st day of April, 2002 (the assessment year 2002-03), will be dealt with in accordance with the provisions of section 32(2) as amended by the Finance Act, 2001. And once Circular No. 14 of 2001 clarified that the restriction of eight years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from the 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 the Finance Act, 2001, and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever."

Respectfully following the above judgement, we dismiss both the grounds raised by the AO.

CO./12/Mum/2016/

5.In its CO,the assessee has agitated the issue of computation of PLI. Before us, the AR stated that if the appeal filed by the AO was to be dismissed,the CO would become infructuous.

As a result,appeal filed by the AO is dismissed and the CO of the assessee is treated infructuous.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है और निर्धारिती का प्रत्याक्षेप निष्प्रभावी माना जाता है.

Order pronounced in the open court on 8th,March, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 8 मार्च, 2017 को की गई ।

Sd/-	Sd/-
(पवन सिंह /Pawan Singh)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated :08.03.2017.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR " K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**