



## **The expenses incurred during a 'no-income period' would be considered as allowable under Section 37(1) of ITA'61 or 34(1) of ITA'25 and unabsorbed depreciation would be allowed also under Section 32(2) of ITA'61 or 33(11) of ITA'25**

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Section 37(1) of Income Tax Act 1961 (ITA'61) provides that "Any expenditure (not being expenditure of the nature described in sections 30 to 36 1[\*\*\*\*] and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

Section 34(1) of Income Tax Act 2025 (ITA'25) provides that "(1) Any expenditure (not being an expenditure of the nature specified in sections 28 to 33, 44 to 49, 51 and 52 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

As regards unabsorbed Depreciation, both the Acts provide as follows –

Section 32(2) of Income Tax Act 1961 (ITA'61) provides that

Section 32(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.]

Section 33(11) of Income Tax Act 2025 (ITA'25) provides that

Sec 33(11) (a) Where the profits and gains chargeable for the tax year before allowing the deduction under sub-sections (1) to (10) is less than such allowable deduction, then--

(i) if such profits and gains is not a loss, the deduction under sub-sections (1) to (10) shall be allowed to the extent of the available profits and gains;

(ii) if such profits and gains is a loss, no deduction under sub-sections (1) to (10) shall be allowed;

(b) the amount of deduction which has not been allowed under clause (a) shall be added to the allowable deduction under this section, whether available or not, for the succeeding tax year and the total amount shall be deemed to be eligible for deduction in that year, and so on for the succeeding tax years; and

Hence as per both ITA'61 and ITA'25 the position remains the same that Any expenditure laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed as an expenditure. Also that unabsorbed Depreciation shall allowable as deduction for the succeeding tax years.

Many MNCs set up business in India as they get a contract for sometime and thereafter there

is a lull as there are no further contracts even as the Company keeps trying. However, it stays put in India to try to revive if proper circumstances arise, even though managing most of the operations from another Country say, Dubai. The question is that whether the expenses incurred during this 'no-income period' would be considered as allowable under Section 37(1) of Income Tax Act 1961 (ITA'61).

The period of temporary lean phase can be called a "lull in business" and not a phase when business was discontinued. When the intention of the assessee was never to go completely out of business, it cannot be concluded that the assessee had discontinued its business. The expression 'for the purpose of business' is wider in scope than the expression 'for the purpose of earning profits'. Its range is wide: it may take in not only the day-to-day running of a business but also the rationalisation of its administration.

Now what in a case that assessee himself declares that in India it has no "permanent establishment" so that its other incomes are not taxable in India. Here one has to appreciate that whether there is a permanent establishment in India or not, has to be determined as per the provisions of the relevant DTAA. As per the DTAA, the assessee may not have a permanent establishment in India, but that does not necessarily lead to the conclusion that the assessee is not in business. The assessee can be in business, depending upon the facts and circumstances of the case de hors' the permanent establishment. Hence, It makes no difference if the business was primarily managed by the a foreign Country's Office (say Dubai Office).

Hence, as held by The Hon'ble Apex Court in the case of PRIDE FORAMER S.A. Vs COMMISSIONER OF INCOME TAX [2025-VIL-09-SC-DT], the expenses incurred during a 'no-income period' would be considered as allowable under Section 37(1) of ITA'61 or 34(1) of ITA'25. Also unabsorbed depreciation would be allowed.

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