



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on August 28, 2014
Judgment delivered on December 22, 2014

+ **INCOME TAX APPEAL NO. 190/2002**

DE NORA INDIA LIMITED (EARLIER KNOWN AS M/S
 TITANOR COMPONENTS LTD.) Appellant

Through Mr. C.S. Jain and Mr. G. Tushar
 Rao, Advocates.

versus

CIT AND ANOTHER Respondent
 Through Mr. Sanjeev Sabharwal, Sr. Standing
 Counsel & Ms. Swati Thapa,
 Advocates.

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CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J.

1. These two appeals filed by the assessee DENORA India Ltd. (earlier known as M/s Titanor Components Ltd.) under Section 260A of the Income Tax



Act, 1961 ('Act' in short) relate to assessment years 1990-91 and 1991-92, wherein challenge has been made to the common order dated December 21, 2001 passed by the Income Tax Appellate Tribunal, Delhi Bench ('Tribunal' in short) in ITA No.1730/Delhi/1999 and ITA No.1356/Delhi/1995, whereby the Tribunal has dismissed the appeals of the appellant assessee on the question of determination of actual cost paid by the appellant to M/s Wimco Ltd. on acquisition of fixed assets.

2. The common substantial question of law which was framed vide order dated 15.09.2003 in these appeals is as under:-

“Whether on the facts and in the circumstances of the case the Tribunal was correct in law in placing reliance on surveyor’s report for the purpose of determining the actual cost of the asset acquired by the assessee from M/s Wimco Ltd.?”

3. The relevant facts necessary for the disposal of these appeals are that the appellant company was incorporated on 07.06.1989 for establishment of an industrial undertaking for manufacture of coated metal electrodes, cathodic protection systems and chloralkali cells. The appellant company on 30.11.1989 entered into an agreement with M/s Wimco Ltd. to purchase its metal anode division, a going concern, with all its assets, liabilities and obligation specified in the agreement of even date. The purchase price agreed and paid by the appellant assessee to M/s Wimco Ltd. was Rs.6,03,21,910/- to be paid in cash; the purchase price fixed was for acquisition of a running undertaking with all assets and liabilities. The first assessment year of the appellant company was



assessment year 1990-91. The actual cost of fixed assets acquired was examined by the Assessing Officer and assessment made was completed at 'nil' income. The matter regarding determination of actual cost was considered for the first time by the Assessing Officer during the assessment year 1991-92. Relying upon surveyor's report, the value of the said assets was taken as Rs.3,50,37,238/-. We note that the said surveyor was appointed by the appellant company. The appellant company carried out the matter in appeal to the Commissioner of Income Tax (Appeals) [CIT(Appeals), for short] for both the assessment years 1990-91 and 1991-92. The CIT (Appeals) did not agree and held that the Assessing Officer had rightly computed the cost of fixed assets acquired at Rs.3,50,37,238/- as against Rs.6,10,02,641/- claimed by the assessee. He directed the Assessing Officer to make fresh assessment for the assessment year 1990-91 after considering the claim of depreciation of assets acquired from M/s Wimco Ltd. in the light of his findings in the assessment year 1991-92. Thereupon the Assessing Officer passed an appeal effect order under Section 143(3) read with Section 250 of the Act for the assessment year 1990-91 dated January 27, 1995, whereby he held that the actual cost of fixed assets acquired for the purpose of depreciation should be taken at Rs.3,50,37,328/- as per surveyor's report. On appeal, the CIT (Appeals) affirmed the said findings observing that the Assessing Officer merely followed the earlier order in appeal for the assessment year 1991-92. The appellant being aggrieved filed appeals before the Tribunal against the order of the CIT



(Appeals) for the assessment year 1990-91 and 1991-92, which appeal dismissed by a common impugned order December 21, 2001.

4. The contention of the assessee is that depreciation is to be allowed on the actual cost incurred and this is the mandate of Section 32 read with Section 43(6) and 43(1) of the Act. It is submitted that the surveyor's report was an internal document and cannot disturb and override the actual cost incurred or paid for the fixed assets. At best, the surveyor's report was hypothetical or an estimate and should not be equated with the actual cost. Reliance is placed on the judgment of the Supreme Court in *Challapalli Sugars Ltd. Vs. Commissioner of Income Tax, A.P.* [1975] 98 ITR 167 (SC).

5. We may record that before the Assessing Officer, the assessee had computed "actual cost" for acquisition of fixed assets at Rs.6,10,02,641/-. In the alternative it was submitted that Rs.4,60,99,228/- be treated as "actual cost" of fixed assets. The said figure was computed by assessee after reducing net current assets, loss for the period 01.12.1989 to 30.3.1990, capital work-in-progress and addition to plant and machinery between 01.12.1989 to 30.3.1990. Assessee had also submitted that there was no dispute in respect of various obligations amounting to Rs.1,49,03,413/- as these were revenue expenditure in the years when actually paid.

6. In order to appreciate the controversy, we will like to reproduce the



computation made on the question of “actual costs” enclosed by t
 appellant assessee with the present appeal as Annexure-B. It is stated that
 the said computation was also filed before the Tribunal. The same is as
 under:-

**“CASE AS PLEADED BEFORE ASSESSING OFFICER AND
 COMMISSIONER (APPEALS)**

<u>PARTICULARS</u>		<u>AMOUNT (Rs.)</u>	<u>AMOUNT (Rs.)</u>
TOTAL	CASH	6,03,21,910/-	
CONSIDERATION PAID			

ADD: OBLIGATIONS

NRDC ROYALTY	75,00,000/-	
WARRANTIES	72,96,000/-	
GRATUITY	1,07,413/-	

LESS: OTHER ALLOCATIONS

LOSS FOR THE PERIOD 1.12.89 TO 30.3.90	11,57,339/-	
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CAPITAL	WORK-IN-		
PROGRESS NEW PROJECT	39,74,515/-		
WORKING CAPITAL	89,75,211/-		
PLANT & MACHINERY NEW ADDITION	1,42,22,682/-		
COST OF FIXED ASSETS CLAIMED IN THE BALANCE SHEET	6,10,02,641/-	6,10,02,641/-	

CASE NOW PUT FORWARD BEFORE HONOURABLE TRIBUNAL

LESS: OBLIGATIONS WHICH CANNOT LEGALLY BE CAPITALISED (NRDC, WARRANTIES, AND GRATUITY) CLAIMED AS REVENUE EXPENDITURE AS AND WHEN ACCRUED/INCURRED		<u>1,49,03,413/-</u> 4,60,99,228
INTEREST ON UNPAID PURCHASE CONSIDERATION FOR THE PERIOD 1.12.89 TO 29.3.90 NOW CLAIMED AS REVENUE EXPENDITURE FOR THE ASSESSMENT YEAR 1990-91		<u>21,53,714/-</u>



COST OF FIXED ASSETS NOW CLAIMED BEFORE THE HON'BLE TRIBUNAL	4,39,45,514/-
COST OF FIXED ASSETS ESTIMATED BY THE DEPARTMENT	3,50,37,238/-
ADD: ESTIMATED INTEREST COST FOR THE IMPLEMENTATION PERIOD AS PER SUPREME COURT DECISION 98 ITR 167, 173	60,00,000/-
ESTIMATED ESTABLISHMENT COST DURING IMPLEMENTATION PERIOD AS PER DECISION ABOVE	<u>24,00,000/-</u> 4,34,37,238/- ”

7. The aforesaid chart would indicate that Rs.1,49,03,413/- i.e. obligations relating to NRDC royalty, warranties and gratuity were to be claimed as “business expenditure” as and when incurred or accrued. With regard to the interest of Rs.21,53,714/-, we are not concerned as the matter was remanded. The last two figures i.e. Rs.60,00,000/- and Rs.24,00,000/- have not been argued and raised before us.

8. What was acquired and paid for by the appellant-assessee was for on-going or a running undertaking. An undertaking was acquired in terms of the agreement dated 30th November, 1989 between the assessee and Wimco Ltd. The consideration paid was not bifurcated and divided into different heads, as it was a case of a purchase of a running business with all assets and liabilities. The assessee had taken over all obligations and rights including advantages, handicaps, distribution network, long-term debts, investments, patent, trademarks, know-how etc. The agreement stipulates



that the assessee would acquire the assets including the land allotted district Rampur, buildings comprising coating shop, fabrication shop, DG set room etc., plant and equipments as per the details, stock-in-process, stock-in-trade, raw materials, contractual rights with customers and suppliers, receivables from trade or others and petty cash related to the said business. The assessee was also to get benefit of all permits, consents and approvals and all benefits attached thereto or occurring to the said business including rights, title, benefits, interests and advantages under the industrial licence, import licences and other licenses, quotas whether registered or otherwise, import and export entitlements. In addition, the assessee had also taken over rights, title, benefits and advantages, duties, liabilities and obligations under various agreements, arrangements and understandings pertaining or relating to business with customers, suppliers and others including the goodwill. Thus, the consideration paid of Rs. 6,03,21,910 was for a running and going concern and to acquire an undertaking. Rs.6,03,21,910/- was not sub-divided or bifurcated under the said agreement under different heads. Value of the fixed assets, which were transferred and on which depreciation was earlier claimed by Wimco Ltd. and after acquisition by the assessee was not specified or so stated in the agreement itself. It was lump sum payment.

9. The appellant had however filed before us details of final purchase consideration paid to Wimco Ltd., which is as under:-



“PARTICULARS	AMOUNT (in Indian Rupees)
Basic purchase, consideration based on Net Operating Assets as on 31.3.1989.	56580256
Increase in purchase consideration @ 17% on the unpaid amount for the period 1.12.89-29.3.90	2153714
Interest on delayed payments	7560
Increase/(Decrease) in purchase consideration due to movements with effect from 1.4.89	
i) On account of fixed assets	3781995
ii) On account of working capital	7088869
iii) Loss for the period 1.4.89-30.3.90	3423556
iv) Corporate overheads	1200000
v) Increase @ 17% on the next monthly movement of above	103578
Fifty per cent stamp duty paid at Bombay	160140
TOTAL	60321910”

10. Another chart enclosed with the appeal by the assessee, pertains to and give details of balance to be allocated on fixed assets, reads as under:-

“BALANCE TO BE ALLOCATED ON FIXED ASSETS				
PARTICULARS	MARKET VALUE	STAMP DUTY	TOTAL	FACTORED VALUE
LAND	1357500	20497	1377997	2367962
BUILDING:				
-RESIDENCE	3300480	49835	3350315	5757212
-FACTORY	5947898	89808	6037706	10375249
PLANT & M/C	24043043		24043043	41315782
FURNITURE	388317		388317	6672387
MOTOR CAR (WDV)	13417		13417	23056
PATENT (WDV)	288693	160140	35499488	61002641”

11. A reading of the aforesaid chart would indicate that the appellant- assessee had factored value of land at Rs.23,67,962/-. It is obvious; depreciation is not to be allowed on land. The aforesaid chart also gives details of the market value, stamp duty and the total value of the fixed



assets purchased. The same was Rs.3,54,99,488/- including value of la
taken at Rs.13,77,997/-.

12. It is evident that what was purchased by the appellant assessee was an undertaking there being slump sale and the entire business including assets and liabilities were transferred for a lump sum amount. There was no break-up or division of the said amount in the agreement itself. The amount paid would be the sale consideration paid after taking into account value of the plant, machinery, dead stock as well as work in progress, stock in trade etc., and intangible items like goodwill, manpower, values of different licences etc. This cost paid would be for both depreciable and non-depreciable assets. In such cases, difficulties do arise in computing the actual cost of the assets on which depreciation is to be allowed to the purchaser i.e. the appellant assessee. There are decisions which hold that the lump-sum price cannot be attributed for different items if no bifurcation or division being made by the assessee or by the purchaser. But in the facts of the present case, there is evidence that the appellant assessee and the seller had evaluated the plant and machinery on the date of the sale. Therefore, the authorities and the Tribunal deemed it appropriate to rely upon the surveyor's report for computing actual cost and we agree with the said conclusion.

13. *CIT vs. Artex Manufacturing Co.* (1997) 227 ITR 260, was a case of slump sale on lump-sum price, but the Supreme court held that the



balancing charge under Section 41(2) of the Act could be computed, in spite of the fact what was payable by the assessee was the difference between written down value and the actual cost of the depreciable asset on sale. This, it was held, was possible in the said case, as necessary information was furnished by the assessee before the Assessing Officer. The Supreme Court rejected the contention of the assessee that the value of the plant, machinery and dead stock was not mentioned in the agreement for slump sale and therefore no value could be attributed to different items, observing that the assessee had himself furnished the information to the Assessing Officer and, therefore, it cannot be said that the price attributed to the items transferred was not indicated. In the same volume, the Supreme Court in *CIT vs. Electric Control Gear Mfg. Co.* (1997) 227 ITR 278, concluded otherwise in case, again of slump sale with a lump-sum consideration being paid for a going concern, on the ground that the assessee had not furnished the bifurcation or information in this regard.

14. This distinction was noticed by the Supreme Court in *PNB Finance Ltd. vs. CIT* (2008) 307 ITR 75 (SC). This was a case relating to capital gains under Section 45 of the Act. The Supreme Court reversed the decision of the High Court holding that Section 45 was not applicable, for it was not possible to apply the computation provision which was inextricably linked and together with the charging section constituted an integrated code. Thus, an undertaking cannot be confused with its parts or



assets and in case lump sum payment was made, it cannot be earmark item wise. However, in the said decision Supreme Court noticed the decision in *Artex Manufacturing Co.* (supra) where in the case of slump sale for lump-sum amount, bifurcation was accepted on the ground that there was evidence on record submitted by the assessee. The sale consideration for plant, machinery, dead stock etc. was arrived at and computed. The valuation report in *Artex Manufacturing Co.* (supra) was used for computing liability under Section 41(2) of the Act. In the present case, as noticed above, the assessee had appointed a surveyor who had computed and valued the fixed assets to be transferred. This information was furnished by the assessee, bifurcating a purchase price. Thus, the valuer's report etc. was treated and constituted as the actual cost paid by the appellant assessee in respect of fixed assets for the purpose of depreciation. Actual cost as per the assessee was ascertainable with reference to the said document i.e. the surveyor's report. To hold to the contrary, would be ignoring the information and material which formed the very basis of the transfer and relied by the appellant assessee.

15. In *Challapalli Sugars Ltd.* (supra), the Supreme Court has held that the expression 'cost' is not synonyms with 'price' and would include the actual cost paid by the assessee, to acquire the asset in question and other expenses such as freight, warehouse charges or insurance and interest to bring the asset into existence and put them into working condition. Interest



on monies borrowed for purchase of fixed asset prior to asset coming in production i.e., till the erection stage should be capitalised. It was held as under:-

“15. It would appear from the above that the accepted accountancy rule for determining the cost of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition. In case money is borrowed by a newly started company which is in the process of constructing and erecting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalised and added to the cost of the fixed assets which have been created as a result of such expenditure. The above rule of accountancy should, in our view, be adopted for determining the actual cost of the assets in the absence of any statutory definition or other indication to the contrary”.

16. The aforesaid decision does not help or assist the assessee in the present case, for we are not concerned with what should be capitalised, but we have to answer what was the actual cost of the fixed assets on which depreciation should be claimed and allowed i.e. the actual cost paid by the assessee for the depreciable assets acquired from Wimco Ltd. For computing the value of the said assets, the appellant-assessee and Wimco Ltd. had both relied upon the surveyor's report dated 16th January, 1990



and 6th March, 1990. The said surveyor had valued all buildings, boundary wall and other plant and equipments. The aforesaid valuation report is detailed and elaborates and is also the basis on which Wimco Ltd. had paid tax on the resultant transfer.

17. We note for benefit the judgment of Supreme Court in the case of **Jogta Coal Co. Ltd. vs. CIT** AIR 1959 SC 1232, wherein the Supreme Court has held as under:-

“12. The words which require to be considered are "on the original cost thereof to the assessee". It has been held by the Privy Council in Commissioner of Income-tax v. Buckingham & Carnatic Co. Ltd., that the word assessee in section 10(2)(vi) refers to the person who owns the property in question and who is being assessed and not the predecessor and depreciation allowance is to be based on the original cost of such property to such person (i.e., assessee) and therefore the cost to be considered for the purpose of calculating the depreciation allowance is the original cost of the purchaser who is being assessed and not the written down value to his predecessor. We do not think that there is any doubt on the wording of the section or on the interpretation that has been put upon those words that the cost to be calculated for the purpose of depreciation allowance is the cost to the assessee and not to the person who makes the sale but still the question remains whether the Appellate Tribunal has the jurisdiction to hold that what the appellant has actually paid as the price of a particular



asset is not its real price and the price paid includes the price of some other asset which must have been purchased.”

Further, in *Deputy Commissioner of Income Tax, Ahmedabad vs. Core Health Care Ltd.* [2008] 2 SCC 465, the Supreme Court has held as under:-

“12. Section 43 groups together all provisions in the nature of definitions or interpretations relevant to the computation of income under the head "Profits and Gains of Business". Section 43(1) defines "actual cost". The definition of "actual cost" has been amplified by excluding such portion of the cost as is met directly or indirectly by any other person or authority. Explanation 8 has been inserted in Section 43(1) by Finance Act, 1986 (23 of 1986), with retrospective effect from 1.4.1974. It is important to note that the words "actual cost" would mean the whole cost and not the estimate of cost. "Actual cost" means nothing more than the cost accurately ascertained. The determination of actual cost in Section 43(1) has relevancy in relation to Section 32(depreciation allowance); Section 32A(investment allowance), Section 33(development rebate allowance), and Section 41 (balancing charge).

13. "Actual cost" of an asset has no relevancy in relation to Section 36(1)(iii) of the 1961 Act. This reasoning flows from a bare reading of Section 43(1). Section 43 defines certain terms relevant to income from profits and gains of business and, therefore, the said section commences with the words



"In Sections 28 to 41 and unless the context otherwise requires" "actual cost" shall mean the actual cost of the assets to the assessee, reducing by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. In other words, Explanation 8 applies only to those Sections like Sections 32, 32A, 33 and 41 which deal with concepts like Depreciation. The concept of Depreciation is not there in Section 36(1)(iii). That is why the legislature has used the words "unless the context otherwise requires". Hence, Explanation 8 has no relevancy to Section 36(1)(iii). It has relevancy to the aforementioned enumerated sections. Therefore, in our view Explanation 8 has no application to the facts of the present case.

18. In these circumstances, we do not find any merit in the submission made by the assessee. The question of law is accordingly answered against the appellant-assessee and in favour of the respondent-Revenue.

The appeals are dismissed. There will be no order as to costs.

(V. KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

DECEMBER 22, 2014

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