IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEALS NO. 47, 48, 49, 50 AND 51/2006

TAX APPEAL NO. 47/2006

Titanor Components Ltd.,
having its office at Plot
Nos. 184, 185 & 189,
Kundaim Industrial Estate,
Kundaim, Goa. ….. Appellant.

Versus

Commissioner of Income Tax,
having his Office at Ayakar Bhavan,
Patto-Plaza, Panaji, Goa. ….. Respondent.

TAX APPEAL NO. 48/2006

Titanor Components Ltd.,
having its office at Plot
Nos. 184, 185 & 189,
Kundaim Industrial Estate,
Kundaim, Goa. ….. Appellant.

Versus

Commissioner of Income Tax,
having his Office at Ayakar Bhavan,
Patto-Plaza, Panaji, Goa. ….. Respondent.

TAX APPEAL NO. 49/2006

Titanor Components Ltd.,
having its office at Plot
Nos. 184, 185 & 189,
Kundaim Industrial Estate,

Kundaim, Goa. ….. Appellant.

Versus

Commissioner of Income Tax,
having his Office at Ayakar Bhavan,
Patto-Plaza, Panaji, Goa. ….. Respondent.

TAX APPEAL NO. 50/2006

Titanor Components Ltd.,
having its office at Plot
Nos. 184, 185 & 189,
Kundaim Industrial Estate,
Kundaim, Goa. ….. Appellant.

Versus

Commissioner of Income Tax,
having his Office at Ayakar Bhavan,
Patto-Plaza, Panaji, Goa. ….. Respondent.

TAX APPEAL NO. 51/2006

Titanor Components Ltd.,
having its office at Plot
Nos. 184, 185 & 189,
Kundaim Industrial Estate,
Kundaim, Goa. ….. Appellant.

Versus

Commissioner of Income Tax,
having his Office at Ayakar Bhavan,
Patto-Plaza, Panaji, Goa. ….. Respondent.

Mr. P. J. Pardiwalla, Senior Advocate with Mr. S. G. Bhobe, Advocate for the appellant.

Mr. S.R. Rivonkar, Advocate for the respondent.

CORAM : B.P. DHARMADHIKARI &
U.D. SALVI, JJ.

Date of reserving Judgment : 21.4.2009

Date of pronouncing Judgment : 29.4.2009

J U D G M E N T : (Per B.P. DHARMADHIKARI, J.)

All these appeals by same assessee raise same question of law which has been formulated while admitting the appeals on 19.9.2006. The said question is as under ;

> "Whether the Tribunal was justified in law in holding that the appellant was entitled to depreciation on the assets acquired from M/s. Western India Match Company Ltd. (WIMCO) based on the value placed in the surveyors report and not on the actual cost incurred by the appellant for acquisition of the assets".

2. We have heard Senior Advocate P.J. Pardiwalla with Advocate S.G. Bhobe for the appellant and Advocate S. R. Rivonkar for the respondent/Department.

3. The appellant Company came to be incorporated on

7.6.1989 with its registered office in New Delhi. It acquired metal anodes division by name M/s. Western India Match Company Ltd. (WIMCO) by agreement dated 30.11.1989. On 29.11.1996, in the return filed with the Assessing Officer at New Delhi it claimed depreciation under Section 32 of the Income Tax Act, 1961 ("Act" for short) on written down value of the acquired assets. The said written down value was stated on the basis of actual costs incurred by the appellant for acquisition i.e. of Rs.6,10,02,641/-. The Assessing Officer completed the assessment under Section 143(3) of the Act. But then for the assessment year 1990-91 adopted the written down value of those assets to be at Rs.3,50,37,238/- by placing reliance upon the surveyor's report. The appellants then filed appeals before the Commissioner of Incometax (Appeals) and on 31.12.1999, the appellate authority, confirmed the order passed by the Assessing Officer. The appellants then approached the Income Tax Appellate Tribunal (ITAT) and the Delhi Bench of ITAT decided the appeals for two assessment years i.e. 1990-91 and 1991-92 upholding the orders of the Assessing Officer. The appellants approached Delhi High Court which admitted on 15.09.2003 their appeals on the question of law as mentioned above. ITA 191/2002 (A.Y. 1990-91) & ITA 190/2002 (A.Y. 1991-

92) are still pending in Delhi High Court.

4. It appears that in the meanwhile, registered office of the appellant Company was shifted to Goa and the other appeals came up for consideration from the ITAT at Goa. In those appeals, the appellants filed declaration under Section 158-A for keeping the issue pending till it was decided by the Delhi High Court. The applications were opposed by the Assessing Officer who, in reply, stated that the Income Tax Act treated each year as self contained accounting period and its provision is applied in relation to specific assessment year because income tax was an annual levy and each "previous year" is distinct from any other "previous year", the doctrine of *res judicata* was, therefore, not applicable. The ITAT at Goa, Panaji Bench then delivered the impugned order on 7.4.2006 and upheld the orders passed by the Assessing Officer and the appellate authority. It is this order, which is a common order in appeals pertaining to assessment years 1993-94, 1997-98, 1995-96, 1996-97 and 1992-93, which forms subject-matter of the present 5 appeals.

5. The learned Senior Advocate, after narrating the facts as

mentioned above, has contended that there is failure on the part of ITAT to exercise jurisdiction in accordance with law. He contends that Section 158A has been added to statute book with some design and that design has been frustrated because of the impugned order. According to him, the learned ITAT did not apply Section 158-A because it found that the Assessing Officer did not agree with the declaration submitted by the appellant Company and as the D.R. before it opposed the said declaration, it did not consider it. He points out that the only reason for such opposing and finding was that each assessment year needed to be treated as an independent assessment year and doctrine of r*es judicata* was not applicable. However, while considering the controversy on merits, the ITAT found that the issue was covered by the decision of its Delhi Bench, and, therefore, it sustained the orders of the assessment along with the reasons mentioned therein. The learned Senior Advocate, therefore, contended that the approach of ITAT shows clear dichotomy and the matters need to be sent back to the Assessing Officer to await adjudication by Delhi High Court. He contends that the reasons for not accepting the actual costs for the purpose of calculating depreciation and for relying upon the surveyor's report are contained in the order of Delhi ITAT only.

6. As against this, Advocate Rivonkar, has contended that section 158-A clearly stipulates that declaration made by the assessee can be accepted only if the other side agrees to it. He points out that if there is any opposition, recourse to Section 158-A is not possible. He further points out that because of this arrangement only, sub-section (6) makes the order passed under sub-section (3) final and no appeal or revision or reference against it is maintainable. He contends that in view of this position, the arguments, as advanced, are liable to be rejected and the appeal deserves to be dismissed.

7. The appellant Company wants depreciation to be calculated on the amount of actual costs incurred by it for acquiring assets from WIMCO. The Department has obtained surveyor's report about valuation of those assets and has granted the benefit of depreciation as per Section 32 on the valuation as worked out in the said valuation report by the surveyor. This exercise for the first assessment years i.e. 1990-91, and 1991-92 is already under consideration of the Delhi High Court. It is to be noted that if the order of Delhi ITAT is maintained, the appellant Company will not be

entitled to any benefit for subsequent assessment year in relation to which appeals have been filed before this Court. However, if the said order of Delhi ITAT is set aside and depreciation under Section 32 is held to be admissible on actual costs for acquisition, the benefit of additional amount of depreciation every year becomes available to the appellant Company. It is, therefore, apparent that the subject-matter of appeal is pending before the Delhi High Court. The purpose of Section 158-A needs to be looked into in this background. Its bare perusal shows that it has been enacted to avoid necessity of filing fresh challenge, every year, either before the appellate forums prescribed under the Act itself or then before the High Court or the Hon'ble Apex Court. The proceedings pending before the Delhi High Court constitute "other case" for the purpose of this provision and the cases pending before the ITAT Panaji Bench were "relevant case". The sub-section contemplates application of final adjudication in the other case to the question of law in such relevant case. If the Assessing Officer or the appellate authority agrees to apply in the other case the final adjudication on the question of law in the other case, the assessee need not raise such a question of law in relevant case in appeal before any appellate authority or in appeal before the High Court under Section

260-A or in appeal before the Supreme Court under Section 261. As per sub-section (5), after decision on question of law in "other case" becomes final, it has to be applied to the "relevant case" by the Assessing Officer or the appellate Authority as the case may be and the assessment order can be amended suitably. Sub-section (2) of Section 158A states that when such a declaration is furnished to the appellate authority, the appellate authority has to call for report from the Assessing Officer and that report has to be on the correctness of the claim made by the assessee. In other words, the contention of the assessee that the question of law raised in relevant case is pending for consideration in other case needs to be ascertained by calling report from such Assessing Officer. The said provision permits the appellate authority to grant opportunity of hearing to the Assessing Officer. Sub-section (3) requires the appellate authority to pass an order, in writing, admitting the claim of the assessee or then rejecting his claim if it is not so satisfied. Sub-section (4) states that when the claim is admitted, the appellate authority may dispose of the relevant case without awaiting the final decision on the question of law in the other case and the assessee is not entitled to raise, in relation to that case, such question of law in appeal before any appellate authority or the

High Court or the Supreme Court.

8. Thus, if in the present circumstances the claim of the assessee/present appellant was accepted by the ITAT, its appeals could have been disposed of in terms of Section 158(4)(a) and he would not have been required to file Appeals before this Court as contemplated by clause (b) of sub-section (4). The provisions clearly show that the ITAT is required to pass an order after ascertaining the claim made by the assessee about "other case". In the facts before this Court, the ITAT has overlooked the provisions of sub-section (2)(3)(4) and (5) of Section 158A totally and has considered only the following portion of Section 158A(1) :

> "a declaration in the prescribed form and verified in the prescribed manner, that if the [Assessing] Officer or the appellate authority, as the case may be, agrees to apply the in the relevant case the final decision on the question of law in other case, he shall not raise such question of law in the relevant case in appeal before any appellate authority or [in appeal before the High Court under section 260A or in appeal before the Supreme Court under section 261]".

9. Thus salutary provisions made by the Parliament to put an end to unnecessary litigation and to reduce number of cases required to be followed in letter and spirit, have been defeated in the present matter. The word "agrees" used in Section 158A(1) does not mean that the Assessing Office or the appellate authority has been given any unbridled authority not to agree. The subsequent provisions clearly require the authority to consider the facts and thereafter to either admit the declaration filed by the assessee or then reject it. The appellate authority is therefore required to judicially evaluate the reasons for "not agreeing" given by Assessing Officer and pass a reasoned Order keeping in mind the design in adding Section 158A to the Act. It is because of this application of mind envisaged by Section 158A that an order passed by the appellate authority or the assessing officer has not been made amenable to further challenge either by way of an appeal or revision or reference. The Parliament expects the authorities empowered under the said provisions to act in accordance with the spirit of the provisions made and, therefore, only after an order is made either way with due application of mind, the order has been made "not appealable" or "not revisable". As already observed above, the ITAT here has failed to apply its mind as required and

therefore, the very purpose of putting Section 158A in the statute book has been frustrated.

10. Mr. Rivonkar has argued that the order passed under Section 158A(3) is not open to challenge in the present appeals. The learned Senior Advocate has contended that the impugned order is under Section 254(1) of the Act. The scheme of Section 158A clearly shows that after declaration as contemplated by Section 158A(1) is filed either before the Assessing Officer or the appellate authority, a separate order is required to be passed as contemplated under Section 158A(3) either admitting the claim or rejecting the claim. There is no question of hearing the parties on merits, in appeal, at that stage. If arguments on such a declaration and also arguments on appeal are heard together and ultimately, the declaration is accepted as required by Section 158A(3)(i), the arguments on merits heard by the authority would be an exercise into futility. Even the provisions of Section 158A(6) also show that the legislature contemplated passing a separate order either admitting the claim of the assessee or rejecting his claim. In the present circumstances, there is no order passed as required by Section 158A(3). The order passed is only one and under Section

254(1) on 7.4.2006. The said order is a common order in all appeals as mentioned above. As the issue was found to be covered by the order of ITAT, Delhi Bench, the ITAT Panaji Bench has not gone into the merits of the controversy and the appeals filed by the assessee were dismissed straight away. The impugned order, therefore, cannot be read as an order under Section 158A(3) against which no appeal is provided.

11. The ITAT, Panaji Bench has not recorded any separate reasons of its own while upholding the orders passed by the Commissioner (Appeals) or the Assessing Officer. The impugned order, therefore, does not reveal why, as contended by the assessee, the actual costs incurred by it for acquisition of relevant assets could not have been accepted as base for computing depreciation. In view of absence of this material on record, it is apparent that the impugned order cannot be sustained. As the ITAT here chose to rely upon the order of Delhi ITAT, it is clear that in view of the scheme of Section 158A, it would have been proper for it to wait till the question of law is adjudicated by the Hon'ble Delhi High Court in the appeals pending before it. In this situation, we find it appropriate to remand the matter to the ITAT, Panaji Bench, before whom declaration under Section

158A was filed by the appellant with direction to admit the claim of assessee in the said declaration and to proceed further as per section 158A(5) of the Act after the Hon'ble Delhi High Court adjudicates the appeals pending before it.

12. The appeal filed before us under Section 260A are, accordingly, allowed. The impugned orders of ITAT are quashed and set aside and the appeals being ITA NO.4258/DEL/1999, ITA NO.4290/DEL/2000, ITA NO.2076/DEL/2000, ITA NO.2077/DEL/2000, and ITA NO.3786/DEL/1999 are restored back to its files for further action in terms of Sections 158A(3)(i) and 158A(5) of the Act. However, in the circumstances of the case, there shall be no order as to costs.

B.P. DHARMADHIKARI, J.

U.D. SALVI, J.

**ssm.**