IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 405 OF 2003

Technova Imaging Systems Limited
a company incorporated under the
provisions of Comapanies Act, 1956
and having its registered office at
Laxmi Mille Estate, Shakti Mill Lane,
Mahalaxmi, Mumbai 400 011 … Appellant

Versus

1. Deputy Commissioner of Income Tax
Sepcial Range – 47, Mumbai
having his ofifce at R. No. 645,
6th floor, Aayakar Bhavan,
Maharshi Karve Road,
Mumbai 400 020.

2. Commissioner of Income Tax
City – V, Mumbai having
his office at Ayayakar Bhavan
Maharshi Karve Road,
Mumbai – 400 020 …. Respondents

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Mr. Pankaj Toprani a/w Ms.Krupa Toprani i/b PRH Juris Consults, for the Appellant.
Mr.Suresh Kumar, for the Respondent.

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CORAM : ALOK ARADHE, CJ &
M.S.KARNIK, J.

RESERVED ON : 03rd APRIL, 2025
PRONOUNCED ON : 09th APRIL, 2025

JUDGMENT (PER M.S.KARNIK, J.) :

1. This appeal under Section 260A of the Income Tax Act, 1961 (‘IT

Act', for short) is against the order of the Income Tax Appellate Tribunal, ('the Tribunal', for short), Mumbai Bench, 'D' Mumbai dated 10/01/2003. The appeal was admitted on 19/10/2004 on the following substantial question of law :

> "Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that in view of insertion of section 72A in the Income-tax Act, 1961, the appellant (being the amalgamated company) not having obtained approval of the Central Government was not entitled to adjust the written down value of the assets of the amalgamating companies on the basis depreciation actually allowed to them and to claim depreciation on such adjusted written down value of the assets of the amalgamating companies?"

2. Some few facts are relevant to answer the substantial question of law which arises in this appeal. The appellant is a company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of manufacture and sale of aluminium based presensitised lithographic plates, chemicals and polyester based reprographic films for printing and other allied image transfer industries. Respondent no.1 is the Assessing Officer, who has passed the assessment order for the assessment year 1992-93 and respondent no.2 is the Commissioner of Income-tax who at the relevant time had jurisdiction and administrative control over the appellant's case.

3. The appellant at the relevant time was assessed by the Assistant Commissioner of Income-tax, Circle-7 (3), Mumbai and the

Commissioner of Income-tax having jurisdiction over the appellant's case is Commissioner of Income-tax, City-VII, Mumbai.

4. TechNova Graphic Systems Pvt. Ltd. had filed a petition before this Court for being amalgamated with TechNova Platemaking Systems Limited (now known as TechNova Imaging Systems Limited) that is, the appellant. TechNova Platemaking Systems Limited (now known as TechNova Imaging Systems Limited) had also filed a petition before this Court for amalgamating Image Printmakers Pvt. Ltd. with the appellant company.

5. This Court by its oral order dated 13/11/1991 accorded its sanction for amalgamation of TechNova Graphic Systems Pvt. Ltd. and Image Printmakers Pvt. Ltd. with TechNova Platemaking Systems Limited (now known as TechNova Imaging Systems Limited) that is the appellant, with effect from 1/04/1990. This Court further ordered that the transferor companies namely TechNova Graphic Systems Pvt. Ltd. and Image Printmakere Pvt. Ltd. be dissolved without winding-up. In view of the order of this Court, the transferor company ceased to carry on the business during the previous year ended on 31/03/1991, relevant to assessment year 1991-92. According the appellant, TechNova

Graphic Systems Pvt. Ltd. (the Transferor Company) had unabsorbed depreciation for the assessment year 1990-91 amounting to Rs. 12,64,516/-. Similarly, Image Printmakers Pvt.Ltd. (the Transferor Company) had unabsorbed depreciation as per following details:

Assessment Year 1988-89 Rs.4,19,484/-
Assessment Year 1989-90 Rs.31,28,570/-
Assessment Year 1990-91 Rs.72,643/-

Since both the transferor companies were dissolved without winding-up, they were not entitled to carry forward and set off unabsorbed depreciation to the assessment year 1991-92.

6. The Appellant had filed its return of income for the year ended 31/03/1991 relevant to the assessment year 1991-92 on 31-12-1991 returning a loss of Rs. 18,76,800/- after *inter alia* claiming depreciation of Rs.63,64,949/-. The depreciation allowance was not correctly calculated. The appellant thus had filed revised return of income on 31/01/1992 claiming depreciation of Rs.63,80,841/. The appellant while calculating depreciation on the assets of the amalgamating (transferor) companies took the value of the assets on the basis of the depreciation which had been actually allowed to them and the appellant thereby enhanced the value of assets by Rs. 43,86,390/- that is to the extent of

the amount of unabsorbed depreciation. The appellant had not claimed the unabsorbed depreciation of the amalgamating companies in its return of income but had calculated depreciation by taking the written down value of the assets of the amalgamating companies on the basis of depreciation which was actually allowed to them.

7. The assessment for the assessment year 1991-92 was completed under Section 143(3) of the IT Act vide order dated 10/03/1994 determining net loss of Rs.27,25,537/-. The Assessing Officer *inter alia* restricted the depreciation allowance to Rs.48,49,643/- as against the claim of Rs. 63,80,841/- made by the appellant. The Assessing Officer held that under the provisions of Section 72A of the IT Act which specifically dealt with situation relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowances in certain cases of amalgamation, a specific order of the Central Government had to be obtained which was not obtained by the appellant. The Assessing Officer therefore ignored the unabsorbed depreciation of Rs. 48,85,213/- of the amalgamating companies.

8. On appeal, the Commissioner of Income-tax (Appeals) vide his order dated 05/07/1995 allowed the appeal of the appellant as regards

computation of depreciation allowance in respect of the assets of the amalgamating companies holding that Section 72A was not applicable in the case of the appellant as the appellant was not trying to set-off the carry forward of depreciation in the hands of the amalgamating company. It was held that the appellant's claim was with reference to the adoption of correct written down value of block of assets of the two amalgamating companies which were merged in the amalgamated company and the adjustment of "written down value" was solely under Section 32 read with Section 43(6) and Explanation 2 and 3 thereto of the IT Act. The Commissioner of Income-tax (Appeals) further held that in case of amalgamation Explanation 3 to Section 43(6) is not attracted as it exclusively deals with carry forward of unabsorbed depreciation in case of the company which is in existence in the subsequent year and in the absence of Explanation 3 one has to consider Explanation 2 (b) to Section 43(6) of IT Act according to which depreciation actually allowed has to be taken into account for calculating 'written down value'.

9. The Assessing Officer filed an appeal against the order of the Commissioner of Income-tax (Appeals) before the Tribunal. The Assessing Officer's appeal was pending before the Tribunal when the appeal for the assessment year 1992-93 was taken up for hearing.

10. The appellant filed its return of income for the year ended 3l/03/1992 relevant to the assessment year 1992-93 on 30/12/1992 declaring total income of Rs.70,98,260/- *inter alia* after claiming deduction of depreciation under Section 32 of the IT Act at Rs.81,26,400/-. The depreciation claim was arrived at after redetermining the written down value of the assets acquired from the transferor (amalgamating) companies during the assessment year 1991-92 by adding back unabsorbed depreciation which was not actually allowed due to insufficiency of income by relying upon Explanation to Section 43(6) of the IT Act.

11. The assessment for the assessment year 1992-93 was completed under Section 143(3) of the Act vide order dated 28/02/1995 determining total income at Rs.1,00,47,223/-. The Assessing Officer however *inter alia* restricted the depreciation allowance under Section 32 of the IT Act Rs.43,77,239/- as against the claim at of Rs.81,26,400/- made by the appellant. The Assessing Officer calculated the depreciation allowance on the basis of the written down value of the assets in the books of amalgamating (transferor) companies ignoring the unabsorbed depreciation, that is, depreciation which was not actually allowed.

12. Being aggrieved by the assessment order dated 28/02/1995 passed under Section 143(3) of the IT Act for the assessment year 1992-93, the appellant filed an appeal before the Commissioner of Income-tax (Appeals) on 30/03/1995.

13. The Commissioner of Income-tax (Appeals) disposed of the appeal of the appellant by order dated 18/10/1995 *inter alia* allowing the grounds of appeal regarding determination of written down value of assets acquired on amalgamation following its own order dated 05/07/1995 for assessment year 1991-92.

14. The Assessing Officer filed an appeal against the order of the Commissioner of Income-tax (Appeals) before the Tribunal.

15. Learned counsel for the appellant submits that when the appellant's authorised representative made a request for adjournment as the appeal for assessment year 1991-92 was still pending before the Tribunal, the Tribunal, rejected the appellant's request for adjournment. The Tribunal by its impugned order dated 10/01/2003 reversed the order of the Commissioner of Income Tax (Appeals) so far as it related to the issue of determination of written down value of assets acquired on amalgamation

holding that the Commissioner of Income-tax (Appeals) had allowed the plea of the appellant following the judgments which had been delivered in respect of legal position obtaining prior to insertion of Section 72A of the IT Act as amended by Finance Act, 1978 and it was not the case of the appellant that it had obtained approval of Central Government required under Section 72A of the IT Act. So far as the issue involved in this appeal is concerned, the relevant portion of the impugned order of the Tribunal and the findings are extracted for the facility of convenience which reads thus:

> "6. Ground of Appeal No. 6 reads as under:
>
> "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that unabsorbed depreciation of the amalgamated company should be added to the written down value of the block of assets disregarding the fact that the ratio of Supreme Court judgment in the case of Madeya Upendra Sinai Vs. Union of India (1975) 98 ITR 209 and Bombay High Court judgment in the case of CIT vs Hindustan Petroleum Corpn. Ltd. 187 ITR 1 relied upon are not applicable."
>
> The learned CIT(A) allowed the plea of the assessee in this respect following the judgments which have been delivered in respect of the legal position obtaining prior to insertion of section 72A as amended by the Finance Act, 1978. It is not the case of the assessee that it had obtained approval of the Central Govt. required u/s 72A. We therefore hold that the treatment given in the assessment order was correct and the learned CIT(A) erred to interfere with the same. We therefore set aside the order of the learned CIT(A) in this respect and restore the treatment given in the assessment order.
>
> 7. In the result this appeal is partly allowed."

16. We have heard learned counsel for the appellant. Learned counsel submitted that in the facts and circumstances of the case, the appeal

deserves to be allowed by answering the substantial question of law in favour of the appellant. Learned counsel relied upon the decision of the High Court of Madras in [1]**EID Parry (India) Ltd. Vs. Deputy Commissioner of Income- Tax, Special Range-I, Chennai** in support of his submissions. Learned counsel invited our attention to the findings of the Commissioner of Income-tax (Appeals). Our attention is invited to the various statutory provisions which have been discussed in the order of the Commissioner of Income-tax (Appeals).

17. On the other hand, Shri Suresh Kumar, learned counsel appearing for the Revenue supported the order of the Tribunal. It is submitted that as there was no approval of the Central Government under Section 72A and that legal position obtaining prior to insertion of Section 72A of the IT Act as amended by Finance Act, 1978 has been relied upon by the Commissioner of Income-tax (Appeals), the Tribunal rightly came to the conclusion that the order passed by the Commissioner of Income-tax (Appeals) deserves to be set aside. He submits that the impugned order does not call for any interference.

18. For a proper appreciation of controversy, we straight away refer to

1 [2012] 23 taxmann.com 348 (Mad.)

the order passed by the Commissioner of Income-tax (Appeals) on 05/07/1995 for the assessment year 1991-92. Though this appeal concerns the order dated 18/10/1995 passed by the Commissioner of Income-tax (Appeals), but the Commissioner of Income-tax (Appeals) has referred to the reasons in his order dated 05/07/1995 to decide in favour of the assessee. Hence, we refer to the relevant portion of the order dated 05/07/1995 which reads thus :

> "9.2. The Assessing Officer rejected the claim of the appellant. He refereed to the provisions of Section 72A which specifically deals with 'carry forward and set off' of accumulated loss and unabsorbed depreciation allowance' In certain case of amalgamating companies. It has been seen that as per the provisions of Section 72A the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was affected for obtaining this carry forward of depreciation in the hands of the amalgamated company, a specific order has to be given by the Central Government, It had been observed that the appellant had tried to argue that it has not claimed carry forward of depreciation, but it has only added back the unabsorbed depreciation to its opening w.d.v. enhancing the total w.d.v. However, by this exercise the appellant would be entitled for claiming depreciation at a later date in the subsequent years which tantamounts to claiming of carry forward of unabsorbed depreciation. The Assessing Officer distinguished the facts of the appellant with the facts in the case of CIT V/s. Hindustan Petroleum Corpn. Ltd, 187 ITR page 1, It has been stated by him that since the appellant company has not taken specific approval from she Central Government u/s. 72A, the unabsorbed depreciation of the amalgamating companies to the extent of Rs. 48, 85,213/-was not allowed to be carried forward.
>
> 9.3 Before me the learned counsel for the appellant, during the course of hearing, has submitted that Section 32(2}, which deals with carry forward of unabsorbed depreciation read as follows:
>
> > (2) Where, in the assessment of the assessee (or, if the assessee is the registered firm or an unregistered firm, assessed as a registered firm, in the assessment of its partners) full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to profits or gains chargeable being less than allowances, then, subject to the previsions of sub-sec. (2) of Sec. 72

and sub-sec. (3) of Sec. 73, the allowance or part of allowance to which effort has not been given, as the case may be, shall be added to the amount of 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."

Pursuant to the scheme of Amalgamation all assets and liabilities of TechNova Graphic Systems Pvt. Ltd. (TGS) and Image Print Makers Pvt. Ltd. (IPM) vested in the Appellant Company with effect from 1.4.1990 and TGS and IPM were dissolved and ceased to own assets and to carry on business, the unabsorbed depreciation could not be given effect to in their own assessments for the Asst. year under appeal in accordance with the provisions of Section 32(2) of the Act. Therefore, Section 32(2) breaks down. Attention, in context of this proposition invited to the judgment of Hon'ble Cupreme Court in the case of CIT Vs. B.C. Shrinivasa Shetty, reported in (1981) 128 ITR 294. On page 299 of the report the Hon'ble Supreme Court observed as follows:

"The character of the computation provisions in each case bears a relationship to the nature of charge. Thus, the charging sanction and computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all it is evident that such case was not intended to fall within the charging sanction "

This brings us to the provisions of Sec. 43(6) , the relevant part of which is reproduce hereinbelow:

"(6) "written down value" means --

(a) …….

(b)…….

(c) in the case of any block of assets --

(i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the w.d.v. of all the assets falling within that block of assets at the beginning of the previous year and adjusted,

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year, and

(D) By the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so however, that the amount of such reduction does not exceed the w.d.v. as so increased and

(ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April,. 1989, the w.d.v. of that block of assets in, the immediately preceding

> year as reduced by the depreciation actually allowed in respect of that block of assets in relation to said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i)

Explanation 1. ……

Explanation 2…… were in any previous year, any block of assets is transferred, --

> (a) by a holding company to …….
>
> (b) by the amalgamating company to the amalgamated company in a scheme of amalgamation and the amalgamated company is an Indian Company.

then, notwithstanding anything contained in clause (1), the actual cost of block of assets in the case of the transferree company or the amalgamated company, as the case may be, shall be the w.d.v. of the block of assets as in the case of the transferor-company or the amalgamating company for the Immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.

Explanation 3. Any allowance in respect of any depreciation carried forward under sub-section (2) of Section 32 shall be deemed to be depreciation "actually allowed".

9.4 It has been further argued that Explanation 3 deems depreciation carried forward under Section 32(2) to be actually allowed. In view of this it has been argued that Explanation 3 to Section 43 (6) becomes inoperative and redundant for the purpose of the appellant where amalgamating companies have merged into the amalgamated company. (the assessee) by order of the Bombay High Court. My attention was also invited to the observations of the Supreme Court in the case of Madeya Upendra Sinal v/s. Union of India, reported in (1975) 98 ITR 209, wherein at page 223 it has been observed as under :

> "The pivot of the definition of "written down value" is the "actual cost of the assets, where the assets are acquired and also used for the business in the previous year, such value would be its full actual cost and the depreciation for that year would be allowed at the prescribed rate on such cost. In the subsequent year, depreciation would be calculated on the basis of actual cost less depreciation actually allowed. The key word in the clause (b) is "actually". It is the antithesis of that which is merely speculative, theoretical or imaginary. "Actually" contra-indicates a deeming construction of the word "allowed" which it qualifies. The connotation of the phrase "actually allowed" is thus limited to depreciation "ACTUALLY TAKEN INTO ACCOUNT OR GRANTED AND GIVEN EFFECT TO," i.e. debited by the Income tax Officer against the incomings of the business in computing the taxable income of the assessee, it cannot be stretched to mean "notionally allowed or merely

allowable on a notional basis.

9.5 The main basis of the appellant's submission is on the ratio of judgment of Bombay High Court in the case of CIT Vs. Hindustan Petroleum Corpn. Ltd. 187 ITR 1. It has been stated that relevant Explanation 2A to sec. 43(6) was deleted with effect from 1-4-1988 and incorporated in clause (b) of Explanation 2. The above decision is very much practically in full turns with and the case of the appellant. It was observed by their lordships of Bombay High Court that

> "The case is, of course, covered by the Explanation 2A. But for this Explanation, the w.d.v. of the assets taken over by the assessee during the previous year from Lube India, would have been their actual cost to the assessee. In view of the Explanation 2A, however, it would be the same as it would have been if Lube India Ltd., had continued to hold the assets for its business. Thus, Explanation 2A creates a fiction whereby though in fact at the end of the previous year the assets are not held by Lube India Ltd. the company having amalgamated and thus, ceased to exist, the said company will be deemed to hold the assets for its business. However, there is no further fiction created by the Explanation 2A, that unabsorbed depreciation determined to the extent of Rs..21,62,815, though actually not carried forward u/s.32(2), will be treated to be so for the purpose of Explanation 3. Under the circumstances, application of Explanation 2A does not automatically mean application of Explanation 3, the applicability of which depends upon the existence of a particular situation in which alone unabsorbed depreciation becomes depreciation “actually allowed”.

It was further observed that --

> "Accordingly, in our judgment, Explanation 3 is not attracted in the present case. In this view of the matter, it has to be held that the written down value of the assets in this case will be the actual cost of the assets to Lube India Ltd., less depreciation actually allowed to the Company. The unabsorbed depreciation which is not to be set off or carries forward should not be taken into account.

9.6. With regard to the assessing officer taking resort to Section 72A, It has been stated by him that Section 72A of the Act is a very specific section for carry forward of unabsorbed depreciation and unabsorbed losses, the assessee is entitled to carry forward the same only if it is approved by the Central Government. It has been stated by the appellant that the provisions of said section are not applicable to the facts of its case. Section 72A of the Act is an enabling provision for "carry forward and set off" of accumulated losses and unabsorbed depreciation allowance. It may be noted that the Appellant did not claim carry forward of unabsorbed depreciation of amalgamating Companies in its own assessment. The Appellant's claim was with reference to the adoption of correct “written down value” of the block of assets of the

amalgamating companies which vested in the Appellant pursuant to the Scheme of Amalgamation.
The provisions of section 72A operates on satisfaction of conditions in sub-sec. (1), which are as follows :

Sec. 72A (1) Where there has been an amalgamation of a company owning an industrial undertaking or ship with another company and the Central Government, on the recommendation of the specified authority, is satisfied that the Following conditions are fulfilled, namely :

(a) The amalgamating company was not, immediately before amalgamation financially viable by reason of its liabilities, losses, and other relevant factors;

(b) The amalgamation was in the public interest;

(c) Such other conditions as the Central Govt. may by notification in Official Gazette, specify to ensure that the benefit under this section is restricted to the amalgamations which would facilitate the rehabilitation or revival of the business of the amalgamating company.

On application being made, the specified Authority has to satisfy itself that the conditions referred to above have been fulfilled. The appellant submits that the provisions of Section 72A are not applicable it its case, for the reasons explained below :

(a) None of the amalgamating company, namely TechNova Graphic Systems Pvt. Ltd. And Image Print Makers Pvt. Ltd. were not financially non-viable. Thus, very first condition remains unsatisfied.

(b) The “public interest” has to be adjudged from the point of view of the shareholders, the banks, and financial institutions, the creditors and the consumers.

It has been submitted that it would not have been possible for the Appellant to satisfy the Specified Authority that the amalgamation was in public interest for following reasons :

(i) All the shares of the amalgamating companies and of the Appellant company were held by the members of one family only, in more or less in same proportion. Though the amalgamation may be in interest of the shareholders, it cannot be said that it was in the interest of investing public.
(ii) The Banks and financial institutions had granted term koan and cash credit facilities to the amalgamating companies, which were secured by hypothecation of all fixed assets such as leasehold land, factory building, plant and machinery, book debts and inventory and also personal

guarantee of the Directors. The market value of the assets hypothecated to the banks far exceeded the outstanding loans. All the companies were prompt in meeting their obligations of repayment of installments and interest. There were no outstanding installments or any default in payment of interest. In view of this, it cannot be said that the amalgamation was in interest of banks, as their interest was never in jeopardy.

(iii) The amalgamating companies were prompt in payment to their creditors for goods and services. Even if they were not amalgamated with the Appellant, they were in a position to meet their obligations.

(iv) TechNova Graphic Systems Pvt. Ltd. was engaged in manufacture of polyster based reprographic films for printing and other allied industries, such as tracing film, masking film. These products were substituted for paper based products.

But for amalgamation, if said company had discontinued its activities, the interest of consumers would not have sufferer, as they could very well use paper based similar products which are available in market in sufficient quantity. It may also be noted that under Import & Export Policy, these products were listed in Open General Licence List and any consumer could freely import the same without obtaining any specific licence.

Image Print Makers Pvt. Ltd., was engaged in business of undertaking printing of magazines on job work basis. Had the company discontinued its activities. the magazine publishers could have got their magazines printed from other printers. Moreover, it was printing magasines such as Stardust, Debonair, Savvy Car & Bike Etc. which could not be considered as essential commodities.

From the above facts, it is apparent that the Appellant could not have satisfied the Specified Authority that the amalgamation was in public interest. Even if the Appellant would have approached the specified Authority, its application would have been rejected at threshold itself.

9.7 I have considered the argument of the learned counsel for the appellant and the various decisions cited by them alongwith the contention of the Assessing Officer embodied in the assessment order. I tend to agree with the view of the learned counsel for the appellant that Section 72-A was not applicable in the case of the appellant as the appellant was not trying to set off the carry forward of depreciation of the amalgamating companies in the hands of amalgamated company. The appellant's claim was with reference to the adoption of correct 'written down value’ of block of assets of the two amalgamating companies which were merged in the amalgamated company. From the argument of the learned counsel for the appellant it is clear that the appellant had satisfied none of the conditions described in Sub-sec. (1)

of S.72-A. Moreover, when no carry forward was actually claimed It was not open for the A.G. to take shelter of Sec. 72-A which is not applicable in the case of the appellant at all and the adjustment of “written down value” was solely U/s. 32 read with Sec.43(6), Explanation 2 and 3.

9.8 In so far as the claim of the appellant regarding “W.D.V.” u/s. 43(6). Expln. 2 is concerned, it is clear that the Legislature has used the words, “as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year".
Expln, 3 to Sec. 43(6) is a deeming provision which states that “Any allowance in respect of any depreciation carried forward u/sub-sec. (2) of Section 32 shall be deemed to be depreciation “actually allowed". I agree with the appellant that since the Company is amalgamated there is no question of carry forward of depreciation U/0.32(2) and therefore, it breaks down. In so far as the case of amalgamation is concerned, it has been clearly pointed out by the Bombay High Court in the case of CIT V/s. Hindustan Petroleum Corporation Ltd. (187 ITR 1) that Expln. 3 to Sec. 43 (6) would not be attracted in the case of the appellant as it is not the case of carry forward of depreciation U/s.32(2). Since the two Companies have merged without winding up with the appellant Company, they cease to be Companies on which Sec.32(2) is applicable. Explanation 3 to Section 43 (6) exclusively deals with carry forward of unabsorbed depreciation in case the Company is in existence in the subsequent year. Thus the applicability of Explanation 3 is also ruled out in the case of the merging companies. In the absence of Explanation 3, we are left with Explanation 2(b) where depreciation actually allowed had to be taken into consideration for calculating “written down value” in the case of amalgamation. Actually allowed has been defined, an pointed out by the appellant in the case of Madeva Upendra Sinai v/s. Union of India & Ors. (98 ITR 209 (SC), as “Actually taken into account or granted and given effect to” in contrast to notional allowance on notional basis. The dictionary meaning of the word "actually" is "really", “in actual fact”, and the word "actual" i.e. “real, existing in fact.” (State of Kerala & Others, v/s. Annam & Others, reported in AlR 1969 Kerala 38(V 56) page 49. The word "allowed” taken its colour from the word "actually” which means, what has really been allowed to the assessee rather than anything which is notional or anything which it may be allowed in future years like unabsorbed depreciation. Thus, what is not to be allowed has to be included in the “written down value” of the appellant. It may be worth mentioning here that while interpreting taxing statute, one has to go by what is clearly stated in unequivocal or unambiguous language. The basic assumption in the interpretation of the taxing statutes is that Legislature has no dirth of words and if a particular word is being used, its grammertitical meaning should get first priority. As per Judge, Rowlet in the case of Lube Cape Brandy Syndicate (1971) 241 LR 39. The privy counsel has been quoted in CIT V/s. Aggarwal Bros. 1980 Pun.L.J.207, "in interpreting a taxing statute, one has to look

> fairly as to what is stated…….. There to no room in any intendment, and there is no presumption as to tax. Nothing is to be read in and nothing is to be implied, one can only look fairly at the language used.".
>
> 9.9. I find that the Assessing Officer's order has been contrary to the basic rules of interpretation of taxing statute. Hin claim that the assessee has indirectly taken the benefit of carry forward is incorrect and uncalled for. If the appellant fulfills the requirement of the Expln. 2 to Sec. 43(6), there is no reason for the Assessing Officer to deny the appellant's claim of “written down value” which would be including of depreciation which was to be carried forward in the future years. Taking into consideration the definition of “written down value" in Sec. 43 (6) read with Expln. 2(b) and considering the judgment of the jurisdictional High Court in the case of Hindustan Petroleum Ltd, (187 ITR, 1) alongwith the various Supreme Court Judgments defining the term 'actually allowed', I hold that the unabsorbed depreciation of the amalgamating company should be added to the W. D. V. of the block of assets. In view of this appellant's claim succeeds."

19. The analysis of the relevant provisions of the IT Act is necessary. Section 43 of the IT Act provides the definition of certain terms relevant to the profits and gains of business or profession. Section 43(1) of the IT Act provides for definition of “actual cost”. Section 43(6) provides for the definition of “written down value”. As far as the assets which are transferred under the scheme of amalgamation or merger is concerned, Explanation 2 of sub-section (6) is relevant. Explanation 2 substituted the original Explanation 2 and 2A by the Taxation laws (Amendment and Miscellaneous Provisions) Act, 1986 with effect from 01/04/1988. Explanation 2A was later on inserted by Finance Act, 2000 with effect from 01/04/2000. Explanations 2 and 3 which are relevant to the case in hand are already reproduced hereinbefore which form part of paragraph

9.3 of the order passed by the Commissioner of Income-tax (Appeals).

20. At this stage a reference needs to be made to the decision of **High Court Madras in EID Parry (India) Ltd.** *(supra).* *W*e are in respectful agreement with this decision which squarely covers the issue involved. Paragraphs 15, 16, 17, 19, 20, 21, 22, 23, 27, 28 of the said decision are relevant and hence extracted :

> "15. A reading of Explanation 2 shows that in the case of an amalgamation, the cost of the block of assets at the hands of the amalgamated company would be the written down value of the block of assets of the amalgamating company for the immediately preceding previous year, after the amount of depreciation actually allowed in relation to the said preceding previous year.
>
> (emphasis supplied)
>
> 16. Belore going into the said Explanation in depth, we need to consider the decision in Hindustan Petroleum Corpn. Ltd. (supra) which considered a question similar to the one on hand. The Bombay High Court in Hindustan Petroleum Corpn. Ltd. (supra) deals with the issue relating to assessment years 1975-76 and 1979-80. The question raised therein in that case was with reference to the written down value of the assets on the amalgamation of companies. The Bombay High Court considered the scope of Explanation 2A, as it stood then, prior to the substitution, under the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, with effect from 1.4.1988 and Explanation 3, which remain unchanged and hence, relevant for the present year under consideration.
>
> 17. Before going into the decision of the Bombay High Court, it is necessary that we extract Explanation 2A and Explanation 3 relevant to the assessment years considered in the Bombay judgment in Hindustan Petroleum Corpn. Ltd. (supra):
>
> "Explanation 2A.-Where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company, and the amalgamated company is an Indian company, the written down value of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamated company had continued to hold the capital asset for the purposes of its business.
>
> Explanation 3.-Any allowance in respect of any depreciation carried

forward under sub-section (2) of section 32 shall be deemed to be depreciation 'actually allowed'.

(emphasis supplied)

19. Thus Explanation 3 was not attracted to the present case. The Bombay High Court pointed out that going by Explanation 2A, the written down value of the assets at the hands of the amalgamated company would be the actual cost of the assets to the amalgamating company, less depreciation actually allowed to the company. The unabsorbed depreciation, which was not to be set off for carry forward, could not be taken into account.

20. In coming to the conclusion, the Bombay High Court pointed out that the legal position about the unabsorbed depreciation is that, under normal circumstances, it is not carried forward as such, but is added to the depreciation for the following previous year and deemed to be a part of that allowance. This would be possible only if the assessee continued to carry on business in the following years. Thus, when the company is not in existence, the unabsorbed depreciation could not, under Section 32(2), be treated and/or allowed as depreciation of the current year.

21. The Bombay High Court further pointed out that the main purpose of Explanation 3 was to avoid an anomaly, which would have otherwise resulted, but for Explanation 3. After narrating the anomales that Explanation 3 seeks to cure, the High Court further pointed out that the fiction created in Explanation 3 operates in a particular situation, i.e., a case in which any allowance in respect of any depreciation is carried forward under Section 32(2). In the context of the fact that the amalgamating company is no longer in existence, the situation necessary for the application of the fiction did not arise. Thus the High Court pointed out that the case therein had to be approached independent of Explanation 3, which had no relevance to the case. As per Section 43(6)(b), the written down value is the actual cost of the asset to the assessee, less depreciation actually allowed. The expression "actually allowed" means not including notional allowance, vide CIT v. Dharampur Leather Co. Ltd. [1960] 60 ITR 165 (SC) Read with Explanation 3, it would mean the actual cost reduced both by depreciation allowed and depreciation notionally allowed i.e., carried forward under Section 32(2). Referring to Explanation 2A, the Bombay High Court held that the written down value of the assets taken over by the amalgamated company during the previous year, would be the written down value of the amalgamating company, if it had continued to hold the assets for its business. Thus Explanation 2A created a fiction that the amalgamating company could be deemed to hold the assets and for the limited purpose of arriving at the cost of the assets at the hands of the amalgamated company, the written down value at the hands of the amalgamating company is adopted. Beyond this fiction, Explanation 2A did not travel further to consider the unabsorbed depreciation, a position which is

considered only under Explanation 3.

22. Referfing to Section 72A, the Bombay High Court pointed out that in cases falling under Section 72A, Explanation 3 would undoubtedly apply as a pre-condition, that the unabsorbed depreciation in the hands of the amalgamating company could be carried forward under Section 32(2) in the hands of the amalgamated company. Thus, the Bombay High Court held "it would be in order if Explanation 3 is applied to a case covered by Explanation 2A only if the pre-condition for its application is found to exist and not otherwise. Even otherwise, applying the provisions of Explanation 3 to a case like the one before us in which allowance in respect of a depreciation is not actually carried forward, is likely to cause injustice. Thus, Explanation 3 was not attracted to the case and the written down value of the assets would be the actual cost of the assets to the amalgamating company, less depreciation actually allowed to the company and the unabsorbed depreciation, which is not to be set off or carried forward should not be taken into account.

23. As far as the present case is concerned, it is no doubt true that Explanation 2 is not similarly worded as Explanation 2A, which was considered by the Bombay High Court. The provisions contained in Explanation 2, applicable to the present case, in fact, brings out the intention better and is crisp in its language, as is evident from a reading of Explanation 2. As per Explanation 2, the actual cost of the block of assets at the hands of the amalgamated company is "the written down value of the block of assets" as in the case of the transferor company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said immediately preceding previous year. The use of the phrase "for the immediately preceding previous year" with reference to the written down value at the hands of the transferor company and the amount of depreciation actually allowed assumes significance in understanding what should be the cost of the block of assets at the hands of the amalgamated company.

27. In the background of the said discussion, which was also applied by this Court in the decision in Silical Metallurgic Ltd. (supra) we agree with the assessee's contention that the written down value of the assets at the hands of the amalgamated company will be the written down value at the hands of the amalgamating company for the immediate preceding previous year arrived at after reducing the depreciation actually allowed in the said preceding previous year and Explanation 3 will have no relevance for the purpose of finding out the written down value of the amalgamating company, which, in turn, is that of the amalgamated company. In thus arriving at the value, the question of a further reduction by invoking Explanation 3 does not arise. In the light of the above discussion, one has to see the scope of Section 72A.

(emphasis supplied)

> 28. Section 72A is a specific provision to deal with cases of carry forward and set off of accumulated loss and unabsorbed depreciation allowance in cases of amalgamation or demerger. As per sub section (1), the accumulated loss and unabsorbed depreciation of the amalgamating company is deemed to be the loss or the allowance of depreciation to the amalgamated company for the previous year in which the amalgamation is effected. Unabsorbed depreciation is defined in the Explanation to mean share of allowance of an amalgamating company which remains to be allowed and it would have been allowed to the amalgamating company under the provisions of the Act as if the amalgamation had not been effected. The benefit available under Section 72A was also considered by the Bombay High Court. Going by the reasoning, we have no hesitation in agreeing with the same."

21. Let us now consider the contention of Shri Suresh Kumar, learned counsel for the Revenue that the Assessee had not obtained approval of the Central Government under Section 72A of the IT Act and hence, in terms of Section 72A unabsorbed depreciation should not be taken into account. We find that the Tribunal as well as the Assessing Officer proceeded on the footing that Section 72A of the IT Act is a very specific section for carry forward and set off of unabsorbed depreciation and accumulated loss and the assessee is entitled to carry forward only if there is approval by the Central Government. On the other hand, it is the case of the appellant that Section 72A of the IT Act is not applicable to the facts of this case. The appellant did not claim carry forward of unabsorbed depreciation of amalgamation of amalgamating companies in its own assessment. The appellant's claim was with reference to the adoption of "correct written down value" of the block of assets of the

amalgamating company which vested in the appellant pursuant to the scheme of amalgamation. According to learned counsel for the appellant, provisions of Section 72A are not applicable as none of the amalgamating companies namely TechNova Graphic Systems Pvt. Ltd. and TechNova Imaging Systems Limited was not financially nonviable. Secondly, if public interest has to be adjudged from the point of view of the share holders, bank financial institution, creditors, consumers, then for the sound reasoning in paragraph 9.6 in the order of the Commissioner of Income-tax (Appeals), we are satisfied that there was no element of public interest involved in the amalgamation.

22. Thus, this is not a case where the appellant was trying to carry forward and set off of accumulated loss and unabsorbed depreciation of the amalgamating company in the hands of amalgamated company. We have no hesitation in observing that the Tribunal erred in holding that because the assessee had not obtained approval of the Central Government required under Section 72A, the order passed by the Commissioner of Income-tax (Appeals), impugned before the Tribunal calls for interference. The Commissioner of Income-tax (Appeals) had in paragraph 9.8 held that the unabsorbed depreciation of the amalgamating companies should be added to the written down value of

the block of assets of the amalgamated company with which we are in agreement with. We are in respectful agreement with the view of Madras High Court in **EID Parry (India) Ltd.** *(supra)* which covers the present case.

23. We therefore answer the substantial question of law framed by this Court in favour of the assessee and against the Revenue to hold that the Tribunal was not justified in law in holding that in view of insertion of Section 72A in the Income Tax Act, 1961, the appellant (being the amalgamated company) not having obtained approval of the Central Government was not entitled to adjust the written down value of the assets of the amalgamating companies on the basis of depreciation actually allowed to them and to claim depreciation on such adjusted written down value of the assets of the amalgamating companies.

24. In the result, the appeal succeeds.

25. The impugned order of the Tribunal is quashed and set aside. The order dated 18/10/1995 of Commissioner of Income-tax (Appeals) in case of the assessee for the assessment year 1992-93 is restored.

(M.S.KARNIK, J.) **(CHIEF JUSTICE)**