

(1974) 05 AHC CK 0011

Allahabad High Court

Case No: Income-tax Reference No. 234 of 1972

Commissioner of Income Tax

APPELLANT

Vs

J.K. Cotton Spinning and
Weaving Mills Ltd.

RESPONDENT

Date of Decision: May 13, 1974

Acts Referred:

- Companies Act, 1956 - Section 208
- Income Tax Act, 1922 - Section 10(2), 10(5)

Citation: (1975) 98 ITR 153

Hon'ble Judges: R.L. Gulati, J; M.P. Mehrotra, J

Bench: Division Bench

Advocate: R.R. Misra, for the Appellant; V.B. Upadhya and S.P. Mehta, for the Respondent

Final Decision: Dismissed

Judgement

Gulati, J.

A short but interesting question of law arises in this reference u/s 66(1) of the Indian Income Tax Act, 1922.

2. The assessee is a company. The assessment years involved are 1960-61 and 1961-62 of which the relevant previous years are the calendar years ending on 31st December, 1959, and 31st December, 1960, respectively. The assessee-company is engaged in the business of production and sale of cotton textile goods and paints at Kanpur. It set up a rayon plant in a different locality at Kanpur and this new rayon plant went into production from 1st August, 1959. In its return for the assessment year 1960-61, the assessee disclosed a loss of Rs. 86,30,813 and in the return for the year 1961-62, it also disclosed a loss of Rs. 60,75,273. The returns for both the years were accompanied by audited copies of profit and loss account and the balance-sheet. There was a separate balance-sheet in respect of the rayon unit which was described as J. K. Rayon branch. The book value of buildings and

machinery of the rayon factory was shown at Rs. 3,10,03,636 on which depreciation and development rebate were claimed. The assessee-company had taken a loan of Rs. 90 lakhs from the U.P. Government for the specific purpose of setting up the rayon factory. The total cost of Rs. 3,10,03,636 upon which depreciation was claimed included a sum of approximately Rs. 25 lakhs consisting of preliminary Expenses incurred on the installation of the machinery and interest paid to the U.P. Government and to the foreign suppliers from whom the assessee had purchased machinery on deferred payment basis. The break-up of the sum of Rs. 25 lakhs as set out in the order of the Income Tax Appellate Tribunal is as under :

	Rs.
(1) Interest on loan of Rs. 90,00,000, taken from the Government of U. P. for specified purpose of netting tip of the Ruyna factory.	14,33,471
(2) Interest paid to the foreign suppliers of machinery da deferred payment terms	6,46,040
(3) Fees paid to the U." P. Government for -survey of the building and machinery of J. K. Rayon mortgaged with the U. P. Government	59,470
(4) Stamp fee and registration charges relating to mortgage deeds executed by the company in connection with the above-mentioned loan taken from the Government of U, P.	82,144

(5) Reward paid to officers and technicians for expeditious installation of J. K. Rayon	75,000
(6) Other estimated expenses of the nature of wages and salaries, marine and erection insurance premium, etc.	2,00,000
Total	24,96,125

3. Rounded by the Income Tax Officer at Rs. 25,00,000.

4. The Income Tax Officer came to the conclusion that the entire sum of Rs. 25,00,000 had to be subtracted from the total cost for purposes of depreciation and development rebate allowance. On appeal, the Appellate Assistant Commissioner of Income Tax held that only the sum of Rs. 75,000 mentioned at item No. (5) being the rewards paid to the officers and technicians for expeditious installation of the factory was to be disallowed and the remaining items totalling Rs. 24,25,000 were properly included in the total cost upon which the depreciation and development rebate was admissible. The department appealed to the Income Tax Appellate Tribunal. The Tribunal in a well-reasoned and detailed judgment agreed with the view taken by the Appellate Assistant Commissioner of Income Tax and dismissed the department's appeal. The Commissioner of Income Tax is aggrieved and, at his instance, the Tribunal has referred the following two questions for the opinion of this court:

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the sums totalling Rs. 24,25,000 formed part of the "actual cost" of the assets of the assessee ?

(2) If the answer to question No. 1 is in the affirmative, then, whether on the facts and circumstances of the case, the assessee-company was entitled to depreciation u/s 10(2)(vi) and development rebate u/s 10(2)(vib) of the Indian Income Tax Act, 1922, on the expenses of Rs. 24,25,000."

5. Before we proceed to answer the questions, it is necessary to notice the relevant provisions of the Indian Income Tax Act, 1922 (hereinafter referred to as "the Act"). Section 10 of the Act provides the mode of computation of profits and gains of a

business. Sub-section (2) of Section 10 enumerates the allowances to be made in the computation of such profits and gains. Clause (vi) of Sub-section (2) provides for allowance, on account of depreciation of buildings, machinery, plant or furniture which are used for purposes of business and Clause (vib) provides for an allowance on account of development rebate on plant and machinery. These two provisions are extracted below ;

"10(2)(vi) in respect of depreciation of such buildings, machinery, plant and furniture being the property of the assessee, a sum equivalent, where the assets are ships other than ships ordinarily plying on inland waters, to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed. "

" 10(2)(vib) in respect of a new ship acquired or new machinery or plant installed after the 31st day of March, 1954, which is wholly used for the purposes of the business carried on by the assessee, a sum by way of development rebate in respect of the year of acquisition of the ship or of the installation of the machinery or plant, equivalent to--.....

(ii) in the case of machinery or plant installed before the 1st day of April, 1961, twenty-five per cent. and in the case of machinery or plant installed after the 31st day of March, 1961, twenty per cent. of the actual cost of the machinery or plant to the assessee;....."

6. A perusal of these provisions shows very clearly that depreciation is to be allowed on the written down value of buildings, machinery, plant or furniture, while the development rebate is to be allowed on the actual cost of the plant or machinery in respect of the year in which such machinery or plant is installed. Then we pass on to Section 10(5) which defines " written down value " ; the material portion of this provision reads:

" 10. (5) In Sub-section (2),....." written down value" means-

(a) in the case of assets acquired in the previous year, the actual cost to the assessee..... and

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income Tax Act, 1886, was in force."

7. This being a newly set up factory upon which no depreciation had been allowed, in the past, the " written down value " would be the actual texts to the assessee of the rayon factory, A question then arises as to whether the sum of Rs. 24,25,000 can be said to be a part of the actual cost to the assessee of the buildings and machinery in respect of which depreciation and development rebate allowance is admissible.

8. The expression " actual cost " has not been defined in the Act so that such meanings shall have to be assigned to it as are understood in the commercial or business world because we are dealing with the computation of profits and gains of a business. When a businessman sets up a factory the cost of such factory would include the cost of the machinery and the cost of construction of the building in which the machinery is installed. The cost of machinery in turn may include not only the actual price of the machinery but also such incidental expenses as sales tax, octroi, railway freight, insurance, transportation charges, etc. Similarly, the cost of installation of the machinery will include not only the price of the building material, but also the wages, remuneration paid to labour, the supervisory staff like technicians and engineers who are employed to set up the machinery and to put it in working order. This principle is based upon pure common-sense and does not require any authority to support it. But, if one were to look for an authority one would find ample authority in the books of accountancy. It is now well known that a sound system of accounting is as much an integral part of modern business as is the production and sale of the goods. From the accountancy point of view, all preliminary expenses directly connected with acquisition of fixed business assets like buildings, plant, machinery, etc., are to be capitalized and added to the total cost. What type of preliminary expenses are to be capitalized and added to the total cost will be found in the following authorities on accountancy.

9. The Research Committee of the Institute of Chartered Accountants of India have published a book called Statement on Auditing Practices (Members' Handbook Series No. 1, New Delhi, 1964). In this book have been enumerated the preliminary expenses which may be capitalized and added to the cost of the fixed assets utilised in business. The following extracts are relevant:

In para. 2,5, page 11, is to be found the following statement:

" Fixed assets should be valued at cost and depreciation should be written off on a proper and consistent basis. Cost includes all expenditure necessary to bring the assets into existence and to put them in a working condition. By way of illustration the following may be mentioned :

- (i) legal charges and stamp duties in the case of land,
- (ii) architect's fees in the case buildings, and
- (iii) wages, salaries and installation expenses in the case of machinery. "

10. Then in paragraph 2.18 at page 14 it has been observed :

"When a new factory is being erected, the question of ten arises regarding the treatment of general administrative and overhead expenses during the construction period. All expenses directly relating to construction such as wages of workmen and salaries of technical staff and material consumed, should be capitalized. "

11. Then in paragraph 2.19 at page 15 occurs the following statement :

"The question often arises as to whether interest on borrowings can be capitalized and added to the cost of fixed assets which have been created as a result of such expenditure. The accepted view seems to be that, in the case of a newly started company which is in the process of constructing and erecting its plant, the interest incurred before production commences may be capitalized. "Interest incurred" means actual interest paid or payable in respect of borrowings which are used to finance capital expenditure"."

12. To the same effect are a large number of foreign authorities on accountancy. As for instance in F.C.A. Auditing & Practical Manual for Auditors, sixteenth edition, London: Gee & Co. (Publishers) Ltd., 1945, written by Stanely W. Rowland, LL.B. (London), it has been mentioned at page 141 :

"The actual cost, of acquiring fixed assets (i.e., stamps, conveyance, registration fees, cost of installation, etc.) is usually capitalized. This is not unreasonable as such expenses are clearly an integral part of the cost to the undertaking of acquiring the assets."

13. A. E. Cutforth, C.B.E., F. C. A. Audits, ninth edition, London : Gee & Co. (Publishers) Ltd., 1936, says at page 282:

" If interest has been paid on debentures or loans raised to meet capital expenditure and such capital expenditure is not revenue earning, as for example the construction of a new railway system, which work may be spread over a considerable period of time before the system is opened to traffic then the interest so paid could, in respect of the period in question be charged to capital, i.e., as forming part of the expenditure itself."

14. William Pickles, Accountancy, second edition in conjunction with G.W. Dunkerly (London : Sir Isaac Pitman & Sons. Ltd., 1955) at page 944 says :

" Where a company raises share capital and out of the proceeds defrays the expenses of the construction or any works of buildings or provision of plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is paid up for the period, and may charge to capital the sum so paid by way of interest."

15. Arthur W. Homes, Advanced Accounting (Chicago :

Richard D. Arwin Inc., 1947) observed at page 353 :

" When a company constructs fixed assets for its own use, there arises the question of the costs to be included in the total cost of the asset constructed.

The cost of all materials used, including such incidental costs as transportation storage and inspection of the materials should be included ; likewise wages paid to

regular employees engaged on the construction and to workers hired specifically for construction purposes.

Special charges, such as licences, architect's or designer's fees, interest on money borrowed for constructions, liability insurance premiums, and injury damages--all the result of the construction--should be capitalized as part of the cost, of the fixed asset.

These items are in the nature of directly applicable overhead charges.

Interest expense during a construction period and bond discount amortized during a construction period may properly be charged to the cost of construction, on the basis that income is not available preceding completion, and consequently all costs and expenses are related exclusively to construction. Theoretically, the practice of capitalising interest, even on own capital used during construction, can be defended. Practically, however, interest and discount are capitalized only when the funds are borrowed."

16. Robert H. Montgomery, Norman J. Lenhrt and Alvin R. Jennings, Montgomery's Auditing, seventh edition (New York: The Ronald Press Company, 1949) observed at page 225 :

" The cost of property, plant and equipment includes all expenditures necessary to make property usable by the concern on whose balance sheet it is reflected. In addition to invoice or contract prices, outlays for transportation and for installation and, in some instances, expenditures necessary to establish title are proper elements of cost.

Cost may include interest paid during the construction period on borrowed money used for construction purposes."

17. It further goes on to say at page 229 :

" It is permissible to capitalize expenditures not only for direct costs of building construction, but also for such items as permits architects" and engineers" fees, interest on borrowed money and legal fees. Overhead expense directly applicable to construction work may also be included.

The cost of machinery and equipment which, should be capitalized includes not only the cost of acquisition but also the cost of installation, including freight, labour and other items, which are as much a part of the cost as the price of the machinery itself."

18. George A. MacFarland, Robert D. Ayars and Williard E. Stone, Accounting Fundamentals, third edition (New York : McGraw Hill Book Company Inc., 1957) say3 at page 242 :

" To determine the amount of depreciation which should be written off in each fiscal period, three fundamental factors must be considered :

1. Cost: Cost includes the net purchase price or construction cost of the asset, transportation, cost of installation, repairs at the time of purchase to a property acquired in a partially worn-out condition, and (in the case of property under construction) taxes, insurance and interest .. . "

19. Lastly, Ronald A Iraish, Chartered Accountant (Aust.), Auditing for Students (Australia : The Law Book Co. of Australia Pvt., 1952) observed at page 188 :

" The Companies Act of each State provides that where a company issues shares to secure funds for construction of works or building or to provide plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of the capital for the time being paid up, for the period and subject to the restrictions in the Act, and may charge the interest so paid to the capital cost of the works, buildings or plant."

20. Section 208 of the Companies Act which reads as under also permits the capitalisation of interest on borrowed capital:

" 208. (1) Where any shares in a company are issued for the purpose of raising money to defray the expenses of the construction of any work or building, or the provision of any plant, which cannot be made profitable for a lengthy period, the company may-

(a) pay interest on so much of that share capital as is for the time being paid up, for the period and subject to the conditions and restrictions mentioned in Sub-sections (2) to (7), and

(b) charge the sum so paid by way of interest to capital as part of the cost of construction of the work or building or the provision of the plant."

21. From a perusal of the above quoted authorities it becomes immediately clear as to what type of preliminary expenses are to be capitalized and added to the total cost of a capital asset utilised in a business. All the items in dispute in the instant case are preliminary expenses of the type which could legitimately be capitalized and added to the actual cost. As has already been pointed out, the word "actual cost" has not been defined in the Act and, therefore, it can safely be presumed that when Parliament used this word in the Act it was aware of the meaning assigned to it in commercial practice and accountancy and must be understood to have used it in the same sense. As we shall show presently even the Supreme Court has hold that the expressions like " actual cost " occurring in the Act have to be construed according to the commercial and accountancy principles. The case we have In mind is the decision of the Supreme Court in [Miss Dhun Dadabhoy Kapadia Vs. Commissioner of Income Tax, Bombay](#) . That was a case u/s 12B of the Act which seeks to tax ""capital gains". Capital gain is to ho determined by subtracting from

the sale price of a capital asset its actual cost to the owner. The Bombay High Court had held that in working out the capital gain the accountancy principles were not to be taken into account. This contention was repelled by the Supreme Court in the following words at page 655 :

" The High Court, in dealing with this question, had expressed the view that principles of accountancy applicable to valuation of such right to receive new shares issued by u company are not applicable when computation has to be made for purposes of taxation ; but we are, unable to accept this proposition. In working out capital gain or loss, the principles that have to be applied are those which are a part of the commercial practice or which an ordinary man of business will resort to when making computation for his business purposes."

22. Applying the commercial and accountancy principles as enunciated by the various authorities on accountancy enumerated above, there is no difficulty in holding that items Nos. 3, 4 and 6 are preliminary expenses incurred in connection with the setting up of the rayon factory before it went into production and as such could be validly capitalized and added to the actual cost. There was, however, a lot of debate with regard to the remaining two items of interest. There is not much difficulty so far as item No. 2 is concerned. The sum of Rs. 6,46,040 has been paid by the company to foreign suppliers of machinery from whom the machinery had been purchased on deferred payment basis. As such, the interest is really the part of the price paid by the company. A seller may break up the price into various components while making out the invoice, such as landed cost, plus margin of profit, plus octroi, plus excise, plus sales tax and plus interest, if the payment is not made at the spot. All these items from the purchaser's point of view are nothing but component parts of the ultimate price which he has to pay. If the assessee-company had made payment in cash, it could have saved the sum of Rs. 6,46,040 paid by way of interest. But as it purchased the machinery on deferred payment basis, it had to pay interest also which clearly is a part of the ultimate price which the company had to pay.

23. As regards item No. 1 also we do not see much difficulty. Admittedly, the entire loan of Rs. 90 lakhs was utilised by the company for the specific purpose of setting up the rayon factory. That is a finding recorded by the Tribunal and there is no dispute about it. If the sum of Rs. 90 lakhs can be said to be a part of the cost of the factory, there is no reason why the interest paid for borrowing such capital should also not be a part of the cost. We have, therefore, no hesitation in holding that all the items in dispute were properly added to make up the actual cost upon which the assessee was entitled to depreciation and development rebate.

24. It will be noticed that depreciation is allowable on the actual cost to the assessee which means not the value of the assets but what the assessee has actually paid for it. For instance, if the machinery is worth only Rs. 1,00,00,000 but the assessee has paid to acquire it a sum of Rs. 1,50,00,000, it is the latter figure upon which depreciation would be permissible. Similarly, if the fixed asset is of a higher value,

but the assessee has paid a smaller price for it, he will get depreciation on the smaller amount, even though the value of the asset may be much more. That is the significance of the expression "actual cost to the assessee". In order that an assessee may not be deprived of depreciation when he acquires a fixed asset by inheritance or by gift, the legislature has made a specific provision as to what would be the actual cost for purposes of depreciation in such a case. That provision is to be found in Section 10(5)(c) which provides "

" In the case of assets acquired by the assessee by way of gift or inheritance, the "written-down-value" as in the case of the previous owner or the market value thereof whichever is the less."

25. It was sought to be argued that the Explanation appended to Section 10(5)(c) would apply and the sum of Rs. 90 lakhs obtained by the assessee by way of a loan from the U. P, Government will have to be excluded from the actual cost. This Explanation, so far as material, reads:

"Explanation,--For the purposes of this sub-section, the expression "actual cost" means the actual cost of the assets to the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by Government or by any public or local authority....."

26. It may be stated here that, Section 10(5)(c) and the Explanation appended thereto is an exception to the main provision contained in Section 10(2)(vi), which permits depreciation or, the actual cost to the assessee which in plain language means actual cost incurred by the assessee irrespective of the source from which the funds came to meet such cost. Now in the case of an asset inherited or acquired by gift the assessee would incur no cost and, as such, no depreciation would be allowable. Similarly, if the assessee invests borrowed capital in the acquisition of such assets, the assessee would still be entitled to the depreciation on the entire cost because the source of the capital with which the business assets were acquired is wholly immaterial. The Explanation to Section 10(5)(c) clearly envisages a case where the Government or a public or local authority gives some subsidy or grant for the acquisition of an asset. It does not apply to a case where a loan is given for that purpose.

27. Now let us examine the case law on the point. In [Commissioner of Income Tax \(Central\) Vs. Standard Vacuum Refining Co. of India Ltd.](#), a company had borrowed moneys on debentures in June, 1963, interest to run from that date, and utilised the amount along with other money financed by it for setting up a refinery which started work from September 1, 1964. The expenses incurred during the period of construction including a sum of Rs. 22,53,284 being the interest which had accrued on the aforesaid debenture from the date of the borrowing to the date of commencement of the business were capitalized and depreciation on the full amount was claimed. The Tribunal held that the assessee-company was entitled to

depreciation on the capitalized interest also. On a reference to the Calcutta High Court by the department it was held that the interest paid on the debentures issued formed part of the actual cost incurred by the assessee-company in acquiring the capital asset and, u/s 10(2)(vi), 10(2)(via), 10(2)(vib) read with Section 10(5), such interest must be taken into consideration for the purpose of depreciation and development rebate.

28. In a later decision of the Calcutta High Court in [Commissioner of Income Tax Vs. Fort Gloster Industries Ltd.](#), the assessee had placed an order with a British concern for the purchase of machinery worth Rs. 48 lakhs. The British supplier required a guarantee to be given. The Allahabad Bank Ltd. agreed to be the guarantor for the sum of Rs. 48 lakhs for a consideration of Rs. 36,000 to be paid to the bank as guarantee commission. It was held that this sum of Rs. 36,000 should be treated as part of the "actual cost" to the assessee of the new machinery acquired by it for the purpose of allowance of development rebate in terms of Section 10(2)(vib) of the Indian Income Tax Act, 1922.

29. In [Commissioner of Income Tax Vs. Challapalli Sugars Ltd.](#), the Andhra Pradesh High Court has taken a different view. While it has agreed that the words "actual cost" in Section 10(2)(vi) should include not only the invoice cost, but also the cost which the assessee incurs in transporting the machinery and erecting it for purposes of business and all expenses incurred directly or indirectly on the machinery, yet it has expressed the opinion that interest paid on borrowed capital which is used for the acquisition of machinery is not included in the expression "actual cost" on the ground that it is not intimately connected with the acquisition of the asset. In support of this view the learned judges have relied upon the following observations of Lord Atkin in *Corporation of Birmingham v. Barnes*, [1935] 3 ITR 26 :

"What a man pays for construction or for the purchase of the work seems to me to be the cost to him ; and that whether some one has given him the money to construct or purchase for himself ; or before the event has promised to give him the money after he has paid for the work; or after the event, has promised or given the money which recoups him what he has spent.....Here there are no qualifying words, and I think the phrase guides one to the conclusion that expenditure on capital improvements by the person regardless of source will be the same as "actual cost" to the person also regardless of source."

30. With great respect, the learned judges of the Andhra Pradesh High Court have not correctly appreciated the context in which these remarks were made by Lord Atkin. There the question arose as to what was the "actual cost" to the Birmingham Corporation for purposes of depreciation allowance under the English Income Tax Act of a tramway when a part of the cost was contributed by the Dunlop Company and the Government. The Inspector of Taxes claimed that the "actual cost to the Corporation" must be measured by deducting from the total expenditure the amount paid to the Corporation by the Dunlop Co. and the Government grant.

Repelling this contention Lord Atkin held that :

" In my opinion the words "the actual cost to the person by whom the trade is carried on" used in this context have no relation to the source from which that person has received the money which he has expended on the plant."

31. It is in that context that the remarks extracted above were made by Lord Atkin. This case indeed lends support to the view we have taken, namely, that the depreciation allowance is admissible to the assessee on the total cost incurred regardless of the source from which capital came, namely, whether the capital is company's own capital or borrowed capital.

32. Learned counsel for the department also placed reliance on the decision of the Delhi High Court in [VIJAY SHREE \(PRIVATE\) LTD. Vs. COMMISSIONER OF Income Tax, DELHI.](#) . There a company had taken on lease a plot of vacant land on a rental of Rs. 40,000 per annum upon which it built a cinema. The assessee claimed that a part of the rental amounting to Rs. 1,40,780 paid as rent for the earlier years should be added to the capital cost of the cinema upon which depreciation should be allowed u/s 10(2)(vi) of the Act. The Delhi High Court relying upon the decision of the Supreme Court in Commissioner of Income Tax v. Alps Theatre, [1957] 65 ITR 377 held that, as no depreciable on was allowable in respect of the cost, of the land upon which the cinema building was set up, similarly rent paid by it for the site could not be added to the cost. This case is clearly distinguishable. Here there is no dispute that any part of the expenditure incurred by the assesses pertains to the plot of land upon which the factory has been set up.

33. Reliance has also been placed on behalf of the department on the decision of the Supreme Court in [Sitalpur Sugar Works Ltd. Vs. Commissioner of Income Tax, Bihar and Orissa.](#) . There a company by the name of Sitalpur Sugar Works had shifted its factory to another site and in that connection had incurred an expenditure of Rs. 3,19,766. The company claimed this expenditure as an allowable deduction or, in the alternative, claimed depreciation upon it. The Supreme Court held that the expenditure was of a capital nature which did not bring into existence any new tangible asset and as such it was neither allowable as revenue expenditure nor was it eligible for depreciation allowance. The reason is very simple. Depreciation is allowed only on the actual cost of a business asset or any addition made thereto subsequently. Now the expenditure incurred on the shifting of the factory from one site to another can neither be said to be a part of the actual cost nor can it be said to be incurred in making any additions to the factory.

34. For the reasons stated above, we are satisfied that the view taken by the Tribunal is correct, and we cannot uphold the contention of the learned counsel for the department that the expression "actual cost" would mean merely the price of the machinery and not any preliminary and incidental expenses incurred in connection with the acquisition and installation of the machinery.

35. We accordingly answer both the questions in the affirmative, in favour of the assessee and against the department. The assessee is entitled to the costs which we assess at Rs. 400.