

(2011) 08 DEL CK 0257

In the Delhi High Court

Case No : ITR 164 of 1995

CIT

APPELLANT

Vs

SRF Ltd.

RESPONDENT

Date of Decision : 04-08-2011

Acts Referred:

Companies Act, 1956 — Section 210

Income Tax Act, 1961 — Section 115(J), 115(JB), 30, 31, 37(3)

Income Tax Rules, 1962 — Rule 6(D), 6(D)(2)

Citation : (2011) 7 AD 514 : (2012) 250 CTR 349 : (2011) 182 DLT 435

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Kamal Sawhney, for the Appellant; S. Ganesh Satyen Sethi and Arta Tarna Panda, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Shakdher, JJ.—The captioned reference pertains to assessment year 1989-90.

The reference has been made at the behest of the Revenue for adjudication of the following questions of law:

1. Whether on the facts and in the circumstances of the case, the ITAT is correct in holding that the disallowance u/s 37(3) read with Rule 6D of the income tax Act/Rule should be worked out by consolidating all of the travel undertaken by each of the employee in a year.
2. Whether on the facts and in the circumstances of the case, the ITAT is right in holding that the expenses in respect of rent, repair and other expenditure on the guest house which are normally allowed u/s 30, 31 of the I.T. Act could not be disallowed u/s 37(4) of the I.T. Act.
3. Whether on the facts and in the circumstances of the case the ITAT is correct in law in holding that the credit given to the profit and loss account by the

amount withdrawn from re-valuation reserve account is to be reduced.

QUESTION NO. 1

2. The Assessee at the relevant time was in the business of manufacturing and selling nylon yarn, tyre cord fabrics, flours chemical etc. which was carried on through four divisions. In the course of business incurred expenses on travel undertaken by its employees. In consonance with provisions of Section 37(3) of the Income Tax Act, 1961 (hereinafter referred to as "I.T. Act") read with Rule 6D of the Income Tax Rules, 1962 (hereinafter referred to as "Rules"), the Assessee had calculated the following disallowances for each of its four units:

ISD/HD

7,65,514

IFD

2,16,722

LD

1,334

FCD

34,537

10,18,107?

3. The disallowance had been computed by the Assessee by aggregating trips made by an employee during the year. Thus, if there was any surplus amount, according to the limits prescribed under Rule 6D, the same got adjusted against the deficit if any, arising viz-a-viz a subsequent visit of the same employee in the same year.

ITR No. 164/1995 Page 2 of 29 The Assessing Officer, however, rejected this method of computation of disallowance. On a re-computation the Assessing Officer came to the conclusion that the disallowance had to be pegged at Rs. 12,97,632/-. The break-up of the disallowance of each of the four units was as under:

Division

Disallowance taken for the year

ISD/HD

9,60,184

IFD

2,89,540

LD

1,781

FCD

46,127

12,97,632

4. Aggrieved by the same the Assessee preferred an appeal in respect of this issue to the Commissioner of Income Tax (Appeals) [hereinafter referred to as "CIT(A)"]. The CIT(A) following his own order passed in the earlier assessment year, i.e., assessment year 1988-89, sustained the decision of the Assessing Officer.

5. The Assessee carried the matter in appeal to the Tribunal. The Tribunal following its own decision in ITA 6322/Del/85 in the matter of reversed the view taken by the authorities below.

6. Aggrieved by the decision of the Tribunal a reference was sought to this Court, as indicated above. Before us the learned Counsel for the revenue has relied upon the following judgments: Commissioner of Income Tax Vs. Alfa Laval (I) Ltd., and The Commissioner of Income Tax Vs. Bajaj Auto Ltd., Based on the aforesaid judgments it has been contended by the learned Counsel for the Revenue that, the view taken by the Tribunal cannot be sustained. According to the counsel the disallowance under Rule 6D is to be calculated with reference to each trip made by the employee and not by aggregating the trips made by the employee during the course of the relevant assessment year.

7. As against this Mr. Ganesh, learned senior counsel, who appeared for the Assessee, contended that in Rule 6D there was No. mention of the expression "per trip". Mr Ganesh submitted that if the interpretation, as accorded by the revenue, is accepted then, it would amount to re-writing Rule 6D(2). According to him the wording of the Rule left No. doubt in the mind that the disallowance had to be calculated bearing in mind the aggregate number of trips that an employee undertook in the assessment year in issue. Mr Ganesh in support of his contention placed reliance on the judgment of the Division Bench of the Calcutta High Court in the case of Commissioner of Income Tax Vs. General Electric Co. of India Ltd.,

8. We have heard the learned Counsel for the parties. In order to adjudicate upon this issue, it would be necessary to extract relevant portion of Rule 6D(2):

(2) The allowance in respect of expenditure incurred by an Assessee in connection with travelling by an employee or any other person within India outside the headquarters of such employee or other person for the purposes of the business or profession of the Assessee shall not exceed the aggregate of the amounts computed as hereunder:

(a) in respect of travel by rail, road, waterway or air, the expenditure actually incurred;

(b) in respect of any other expenditure (including hotel expenses or allowances paid) in connection with such travel, and amount calculated at the following rates or the period spent outside such headquarters:

(i)

in respect of any employee Whose salary is Rs 1000 per month or more

Rs. 150 per day or part thereof

(ii)

in respect of any other employee

Rs. 75 per day or part thereof

(iii)

in respect of any other person

an amount calculated at the rates applicable in the case of the highest paid employee of the assessee

Provided that if the stay of such employee or other person outside his headquarters is at Bombay, Calcutta or Delhi, the amount computed at the aforesaid rates shall be increased by a sum equal to (thirty-three and one-third) per cent of such amount:

Provided further that in a case where such employee or other person on any day of his stay outside his headquarters, stays free of charge in a guest house maintained by the Assessee, the amount under this clause shall be calculated at one-third of the aforesaid rates and where the employee or such other person is provided lodging only free of charge, at one-half of the aforesaid rates.

9. It is not in dispute that we are presently concerned with expenditure incurred by the Assessee in connection with travel undertaken by its employee within India for the purposes of its business. A plain reading of Rule 6D(2) would show that the expenditure incurred by an Assessee which is given by way of an allowance to an employee or any other person in respect of travel within India outside the headquarters of such employee or any other person, for the purposes of business or profession of the Assessee, are broadly classified under two heads. Under Clause (a) of Sub-rule (2) actual expenditure incurred on the mode of travel, i.e., whether it be rail, road, waterway or air is a permissible allowance. Clause (b) of Sub-rule (2) lays down limits in respect of expenditure incurred in connection with such travel, which includes expenditure on hotel expenses or allowances paid, on a per diem basis depending on whether the expenditure is incurred on an employee or a person other than an employee. If the expenditure is incurred on an employee whose salary is Rs. 1000 per month or more then the

limit prescribed is Rs. 150 per day or part thereof, while in case of any other employee it is Rs. 75 per day or part thereof. Similarly, in case of a person other than an employee the limit is calculated keeping in mind the rates applicable to a highest paid employee.

10. As noticed above, there are two provisos to Rule 6D(2). The first proviso specifies that the limits prescribed in the Rule (which are referred to hereinabove by us) shall stand increased by a sum equal to 33.33% if the stay of the employee or any other person outside the headquarters is in Bombay (now Mumbai), Calcutta (now Kolkata) and Delhi. The second proviso enters a further caveat, which is, that if such an employee or other person stays outside his or her headquarters, in a guest house maintained by the Assessee then the limits prescribed shall be pegged at 1/3rd of the rates prescribed, and where, the employee or such other person is provided only free lodging, the limits prescribed shall stand reduced to one-half.

11. To our minds, clearly the disallowance will have to be worked on per journey basis. The reason being: it is quite possible that an employee or any other person may embark on a journey say in the first instance, to a place other than Bombay (now Mumbai), Calcutta (now Kolkata) and Delhi, while a subsequent journey may take him on a visit to one of the three places referred to in the first proviso, i.e., Bombay (now Mumbai), Calcutta (now Kolkata) and Delhi. The maximum limit would vary where the first proviso gets triggered. Similarly, it is quite possible that in one city the Assessee may maintain a guest house where food and lodging is provided to such an employee or any other person undertaking a journey for the purposes of business of the Assessee, while in the another city the Assessee may maintain a guest house where only lodging is provided. Here again the limits would change. There could be another situation where an employee may take yet another trip during the same year to a place where the Assessee does not have a guest house.

11.1 There are thus myriad possibilities, in respect of journeys undertaken by an employee or any other person on behalf of the Assessee for the purpose of business. Therefore, the intrinsic evidence which is available in the Rule demonstrates that the disallowance available qua an employee or such other person ought to be calculated in respect of each of the journey undertaken. This, according to us, is the most straightforward and uncomplicated way of reading the Rule.

12. Broadly, a similar view has been taken by the Bombay High we respectfully agree with.

12.1 We may only mention at this juncture that Mr Ganesh had argued that the observations made in the Aorow India Ltd. (supra) to the effect that it would make No. difference whether the disallowance is calculated based on each journey or trip, as against the aggregate of all trips, is something that we have not factored in, while coming to the conclusion we have arrived at hereinabove.

We, therefore, respectfully disagree with the view taken by the Calcutta High Court in the case of Commissioner of Income Tax Vs. General Electric Co. of India Ltd., .Thus, the question in issue is answered in the negative and against the Assessee.

QUESTION NO. 2

13. The counsels, of both the Assessee and the revenue, concur that this question is covered against the Assessee by virtue of the decision rendered in the case of Britannia Industries Ltd. Vs. Commissioner of Income Tax, West Bengal, Kolkata and Another,

QUESTION NO. 3

14. In so far as the aforesaid question is concerned, it may be noted that the Assessing officer during the course of scrutiny noticed that the computation of book profits submitted by the Assessee, as required under the provisions of Section 115J of the I.T. Act, vide its letter dated 31.03.1992, showed loss of Rs. 10,50,90,557/-. The Assessing Officer came to the conclusion that the Assessee in calculating the figure of loss had not taken into account the amount transferred from the re-valuation reserve account in respect of two of its divisions, which according to him, ought to have been included so that depreciation debited in the books of accounts continued to be provided on original cost. According to the Assessing Officer what the Assessee had done was that it had provided depreciation in its books of accounts on revalued assets but had not credited the profit and loss account with the difference between depreciation charged on the revalued account and that which was chargeable on the original cost. This, according to the Assessing officer, had resulted in a higher amount of depreciation being charged to the accounts which resulted in the book profits being deflated. The Assessing Officer also noted that prior to the insertion of Section 115J in the I.T. act (i.e., prior to assessment year 1988-89) the Assessee used to reflect the amount transferred from re-valuation reserve above the line, i.e., in the profit and loss account itself. However, from the assessment year 1988-89 the Assessee had been reflecting the transfer from re-valuation reserve below the line, i.e., in the profit and loss appropriation account. In view of the above, the Assessing officer made the following observations, while re-working the book profits of the Assessee under the provisions of Section 115J:

As per the explanation below Section 115-J(1A) amount transferred to any reserve by whatever name called is to be added to net profit and any amount withdrawn from reserves is to be reduced if such amount is debited to P&L A/c. For the purpose of applicability of Section 115-J it is important to determine the nature of a particular reserve. A reserve is different from a provision in so far as the former is an appropriation of profit while the later is a charge against the profit. The revaluation reserve stands on a different footing altogether from other reserves which are appropriations of profit and which would have to be adjusted in accordance with the explanation below Section 115-J(1A). The transfer from

valuation reserve is essentially an equalization device meant to ensure that depreciation continues to be provided in the books at the original costs prior to such revaluation and that the accounts present a true and fair picture of the net profit. The amount of transfer from revaluation reserve will therefore have to be either credited to P&L A/c or reduced from the depreciation provided in the books of accounts on the revalued cost of assets. The amount withdrawn from revaluation reserve would therefore not be covered under Clause (i) of explanation below Section 115-J(1A) of the I.T. Act. What the Assessee company had done in (SIC) to attempt to bend the well recognized principles of accountancy and to circumvent the law. It could obviously not have been the intention of the legislature to permit companies to revert to this kind of accounting jugglery with a view to getting out of the mischief of Section 115-J.

14.1 With aforementioned preface, the Assessing Officer calculated the taxable profits u/s 115J at Rs. 2,15,90,554/-

15. Aggrieved by the decision of the Assessing Officer, the Assessee carried the matter in appeal to the CIT(A). Various submissions were made to bring home the point that Assessing Officer had erred in computing the taxable profits u/s 115J at Rs. 2,15,90,554/-as against the returned income which was declared as "nil". The CIT(A) after recording in detail the submissions of the Assessee came to the conclusion that since the assessment order was passed on the same day on which the computation of book profits was handed over by the Assessee, i.e., 31.03.1992, the Assessing officer was not able to devote sufficient time with regard to the issue at hand, which in turn had prevented the Assessee from putting forth his argument before the Assessing Officer, and hence, in the fitness of things the order of the Assessing officer ought to be set aside on the said issue, and the matter remanded for a de novo adjudication.

16. The Assessee, however, carried the matter in a further appeal to the Tribunal. Before the Tribunal it was contended that the issue involved, was a pure question of law, and hence, the Tribunal could hear and decide the issue. The Tribunal agreed with the contention of the Assessee. The Tribunal on the merits agreed with the contention of the Assessee that the amount withdrawn from the revaluation reserve account would have been reduced in consonance with the provision of Section 115J of the I.T. Act in order to arrive at the correct figure of book profits as envisaged under the said Act. The reasoning supplied in the impugned order of the Tribunal is largely contained in paragraph 27; the same being relevant, is extracted here in below: the taxable profits under

Section 115J at Rs. 2,15,90,554/-ITR No. 164/1995 Page 10 of 29 ITR No. 164/1995 Page 11 of 29 Section 115J of the Act, is a specific code by itself, and required drawing up of the profit and loss account uniformly as on 31st March, 1989, by all companies irrespective of whether their accounting year ends on that date or not. It starts with the profit as per the profit and loss account drawn in accordance with Part II and III of schedule VI to the Companies Act, 1956 and describes various adjustments for arriving at the end result "book profit". The

transfer to and from the reserve from the profit are as a matter of accounting practice reflected or shown in the profit and loss appropriation account.

The amendment has been explained earlier, consists of two parts, namely, reserves created before 1.4.1988 and reserves created on or after 1.4.1988. In regard to reserves created before 1.4.1988, since, Section 115J of the Act was not applicable to those years, the words "and have gone to increase the book profits in any year when the provisions of Section 115J of the Act were applicable", have not been made part of it. The reason is obvious because, for all the assessment years up to 1987-88, the income was to be computed with reference to the normal provisions of the Act, and depreciation on the fixed assets were allowable at the rates prescribed in the I.T. Rules and the charging of depreciation to the profit and loss account, on the revalued cost had No. effect in the computation of income.

There is No. denial that, but for the charge of depreciation on the revalued cost of assets, to the profit and loss account in the previous year relevant to the assessment year under appeal, the profit or the year would have been higher because of depreciation on the historical cost would be lower, because historical cost is lower than the revalued cost. But, the charge of depreciation of the revalued cost is not the same thing as creation of the reserve, because, creation of the reserve means debit to the profit and loss account by an amount and giving credit to the reserve by an equivalent amount.

According to the amendment made effective from 1.4.1988 the credit to the profit & loss account by the amount withdrawn from the reserve account, created in the previous year relevant to the assessment year commencing on or after 1st day of April, 1988, by debit to the profit and loss account, shall not be allowable to be reduced from the book profit, unless the book profit of such year has been increased by those reserves. Since, the revaluation reserve was created before 1.4.1988, and by not debiting to the profit & loss account, in the light of the explanation rendered at the time of the amendment, giving the intent of the legislature (reproduced above), and by virtue of the conclusion of the Special Bench (supra), the credit that has been given to the profit & loss account by the amount that is withdrawn from the revaluation reserve account, count not have been considered at all for arriving at the figure of the book profit.

If, it is proceeded as if the reference to the net profit as per profit and loss account, is that figure after all adjustments on account of transfers to and from the reserves, then, since the revaluation reserve was not created by any debit to the profit & loss account, in the previous year relevant to the assessment year under appeal, then, by virtue of the explanation rendered at the time of amendment, as reproduced earlier, then, the amount withdrawn from the revaluation reserve account, is to be reduced to give the figure of book profit. This is obvious because, all adjustments as are provided in the Section 115J, has to be necessarily to be given effect to.

If, it is proceeded on the basis that, the figure of net profit is that, before any adjustments from it for transfer to and from the reserves, by whatever name called, then, in view of the Special Bench decision (*supra*) which has been given after considering the explanation to the amendment, the amount withdrawn from revaluation reserve could not be added, but given a reduction, for the reason that, that reserve was not created in the previous year, relevant to the assessment year under appeal.

In either case, from the figure of net profit, adjustments as envisaged by the section for adding to the profit and reducing from the figure of profit have to be given, after which adjustments only, the amount of book profit would be the result.

The AO had taken the figure of profit below the line, i.e., after all adjustments for transfers to and from reserves, including the amount withdrawn from the revaluation reserve, but had not allowed reduction of the amount withdrawn from the revaluation reserve account that the credited to the profit & loss appropriation account. Since the AO has to apply the provisions of Section 115J in the like manner as was intended to by the legislature, he could have only reduced the amount withdrawn from the reserve from the profit amount taken by him.

The Special Bench (*supra*) in para 17 of the order has given this salient finding.

However, the explanation to Section 115J provides for the book profit to be increased by the amounts carried to any reserves, by whatever named called in item (b), that is to say, if the Reserve is created out of current years book profits. If out of current year profit, any amount is transferred to Reserve Account it would diminish the Book Profits. Therefore, the Explanation provided that the book profits be shown at their original level, by bringing back to the profit and loss account the amount transferred to reserve account. The Revenue, when it insisted on bringing back to the profit & loss account, the amount transferred to Reserve account, it postulates that the reserve was a transfer out of current profits, which was not a fact.

The above is suggestive of the position that, notwithstanding that, the profit & loss account has been credited with the amount that has been withdrawn from revaluation reserve account, it could not be added to the book profit, because, the prerequisite for such an addition postulates that, the reserve was created out of current years profits, which is not a fact in the instant case too. Therefore, the Special Bench decision, squarely provides answer on the issue, that, the addition to the book profit, by the amount withdrawn from the revaluation reserve is not tenable, because the credit to the reserve account was not by means of any debit to the profit & loss account in the current year, but, by the enhancement of the value of the assets, that too, in the earlier years, viz, 1983 & 1986. Respectfully following the Special bench (*supra*) decision, we hold that, the AO, having introduced his own criteria of adjustments, not intended by the legislature, of

taking the profit figure after credit of withdrawal from the revaluation reserve without deducting that amount of withdrawal of revaluation reserve, for calculating the books profit, is clearly contrary to both the provisions and the intent of the legislature and hence, is erroneous and without any sanction. We therefore hold that, the credit given to the profit & loss account by the amount withdrawn from ITR No. 164/1995 Page 15 of 29 revaluation reserve account is to be reduced for arriving at the figure of books profit.

17. In support of the reference on this question the learned Counsel for the revenue submitted that the Tribunal had erred in allowing the Assessee to reduce the amount withdrawn from the revaluation reserve account by taking recourse to the provisions of Clause (i) of the explanation contained in Section 115J of the Income Tax Act. It is argued by the learned Counsel for the revenue that the Assessing officer had taken a correct view in law. In support of his submissions the learned Counsel placed reliance on the judgment of the Supreme Court in the case of Indo Rama Synthetics (I) Ltd. Vs. Commissioner of Income Tax , New Delhi,

18. On the other hand Mr Ganesh argued that the Tribunal had taken the correct view in law. It was contended that the Assessing Officer had committed an error in as much as it had lost sight of the fact that the revaluation reserve was created much before the insertion of Section 115J. It was stated that, as found by the Assessing Officer, the revaluation reserve was created in 1983 and 1986; therefore, as mandated by provisions of Clause (i) of the explanation appended in Section 115J, any withdrawal from the revaluation reserve had to be reduced in arriving at the taxable book profit since, the only situation in which the said clause would not get triggered when a reserve is created on and after 1st April, 1988. This, according to Mr Ganesh, was clear on a bare reading of the proviso to Clause (i) of the explanation appended to Section 115J.

18.1 Mr Ganesh submitted that the judgment of the Supreme Court in the case of Indo Rama Synthetics (supra) had No. application in view of the fact that the facts obtaining therein would clearly demonstrate that the reserves were created after the insertion of Section 115JB, which is, 01.04.1997. Therefore, according to the learned Counsel the proviso appended to Clause (i) of the explanation contained in Section 115JB had got triggered in that case, whereas in the present case, the proviso had No. application as the revaluation reserves have been created prior to 01.04.1988.

19. We have heard the learned Counsel for the parties on this issue as well. In order to decide this issue it would be pertinent to bear in mind that Minimum Alternate Tax (in short "MAT") was introduced in the I.T. Act only to get over a situation whereby, companies which were otherwise earning large profits and distributing huge amounts in the form of dividend to its shareholders were paying No. tax or a negligible amount of tax by virtue of deductions and exemptions made available to them under various provisions of the I.T. Act. The Legislature, therefore, devised a methodology whereby at least 30% of the book

profits were made taxable by insertion of such like provisions. The MAT provisions have been amended from time to time. The history of MAT has been pithily noted by the Supreme Court in the judgment rendered in Indo Rama Synthetic case. Therefore, we need not reiterate the same. However, since much stress was laid by the revenue on the observations it would be relevant to note what it dealt with and the observations made therein.

19.1 It is not disputed as it cannot be that the provision of the I.T. Act dealt with in Indo Rama Synthetics case is somewhat similar if not identical. What is however, to be discerned is whether the principle enunciated in Indo Rama Synthetic case would apply to the facts obtaining in the instant case. If it does then the question will have to be answered against the Assessee.

19.2 Therefore, it would be important at this stage to notice what Indo Rama Synthetics (supra) case concerned itself with. First and foremost the Supreme Court was dealing with the provisions of Section 115JB. The said provision as indicated above is *pari materia* with the provision we are called upon to examine, i.e., Section 115J with some variation which we will notice as we go along, and its impact, if any. It may be perhaps therefore be useful to extract the relevant portions of both Section 115JB as well as Section 115J:

CHAPER XII-B

SPECIAL PROVISIONS RELATING TO CERTAIN COMPANIES

115J. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of a company engaged in the business of generation or distribution of electricity), the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1988 [But before the 1st day of April, 1991], (hereafter in this section referred to as the relevant previous year), is less than thirty per cent of its book profit, the total income of such Assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit.

(1A) Every Assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956).

Explanation: For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year [Prepared under Sub-section (1A)], as increased by (a) The amount of income tax paid or payable, and the provision therefore ;or

(b) The amounts carried to any reserves (other than the reserves specified in Section 80HHD, or Sub-section (1) of Section 33AC) by whatever name called; or

(c) The amount or amounts set aside to provisions made for meeting liabilities,

other than ascertained liabilities; or

(d) The amount by way of provision for losses of subsidiary companies; or

(e) The amount or amounts of dividends paid or proposed; or

(f) The amount or amounts of expenditure relatable to any income to which any of the provisions of Chapter III applies; or

(g) The amount withdrawn from the reserve account u/s 80HHD, where it has been utilised for any purpose other than those referred to in Sub-section (4) of that section; or

(h) The amount credited to the reserve account u/s 80HHD, to the extent that amount has not been utilised within the period specified in Sub-section (4) of that section;

(ha) The amount deemed to be the profits under Sub-section (3) of Section 33AC;

if any amount referred to in Clauses (a) to (f) is debited or, as the case may be, the amount referred to in Clauses (g) and (h) is not credited to the profit and loss account, and as reduced by, -

(i) The amount withdrawn from reserves (other than the reserves specified in Section 80HHD) or provisions, if any such amount is credited to the profit and loss account:

Provided that, where this section is applicable to an Assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1988 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation;

115JB. Special provision of payment of tax by certain companies. -

(1) Notwithstanding anything contained in any other provision of this Act, total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the Assessee and the tax payable by the Assessee on such total income shall be the amount of income tax at the rate of seven and one-half per cent.

(2) Every Assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):

Provided that while preparing the annual accounts including profit and loss account,

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of Section 210 of the Companies Act, 1956 (1 of 1956.....

Explanation. - For the purpose of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under Sub-section(2), as increased by -....

(b) the amounts carried to any reserves, by whatever name called, other than a reserve specified u/s 33AC; or if any amount referred to in Clause (a) to (f) is debited to the profit & loss account and is reduced by -

(i) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997, otherwise than by way of a debit to the profit and loss account, if any such amount is credited to the profit & loss account:

Provided that where this section is applicable to an Assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997, shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation or Explanation below the second proviso to Section 115JAA, as the case may be;

20. As would be evident on a bare perusal of both Section 115JB and Section 115J the explanation defines as to the manner in which book profit for the purposes of levy of MAT is to be calculated. Broadly, in both Sections, book profit means net profit as shown in the profit and loss account which is to be increased and reduced in terms of provisions contained therein. Book profits are required to be calculated bearing in mind the provisions part II and III of Schedule VI of the Companies Act, 1956.

21. Before we proceed further we may notice the relevant distinction in Clause (i) of the Explanation appended to Sections 115JB and 115J, respectively. In Clause (i) of the explanation in Section 115JB, in the bracketed portion, the following words appear "excluding a reserve created before the 1st day of April, 1997, otherwise than by way of a debit to the profit and loss account. There is no such mention in Clause (i) to the explanation contained in Section 115J. Furthermore,

in the proviso appended to Clause (i) to the explanation in Section 115JB, there is a reference to the effect that where the section is applicable to an Assessee in any previous year, the amount withdrawn from reserves created or provisions made in the previous year relevant to the assessment year commencing on or after 1st April, 1997, shall not be reduced from the book profit unless the book profit of such year has been increased by the reserves or provisions. As against this in the proviso to Clause (i) of the explanation contained in Section 115J, the wording is identical save and to the extent date mentioned in the proviso is: "on or after 1st day of April, 1998". A conjoint reading of Clause (i) to the explanation appended to Section 115JB, read with, the proviso gives a clear clue that it covers period both prior to 01.04.1997 as well as that which commences on or after 01.04.1997. As indicated above, the bracketed portion, which appears in Clause (i) to the explanation appearing in Section 115JB, does not find mention in Section 115J.

21.1 This is in so far as the distinction in the two Sections goes. The issue, therefore is, whether the Assessee ought to be allowed to deduct the amount withdrawn from the revaluation reserves by invoking the provisions of Clause (i) of the explanation given in Section 115J. It is not disputed that when the revaluation reserves were first created in 1983 and 1986, the increase in the value of the assets was reflected by debiting the asset account and crediting the revaluation reserve account. The profit and loss account by this methodology was kept undisturbed. In these circumstances, can it be said that when the amount is withdrawn from the reserves it reflects the difference in the depreciation calculated on the revalued or the enhanced value of the assets and that which is calculated on the historical cost. In other words can the Assessee be permitted to reduce the amount withdrawn from the revaluation reserve if in the first instance was created not by crediting any amount to the profit and loss account but to the revaluation reserve account.

22. Mr Ganesh has argued that Clause (i) appended to the explanation appearing in Section 115J would have to be given its full play. As noticed above, it was his contention that the only situation in which such a reduction is not permissible where reserves are created by an Assessee on or after 01.04.1988. Therefore, his contention is, that since, the revaluation reserves were created in 1983 and 1986 the Assessee ought to be allowed a reduction of the amounts drawn from the revaluation reserve. In our view at first blush this argument appears to be both plausible and attractive as well. However, a closer scrutiny would show that Clause (i) appended to the explanation appearing in Section 115J would get triggered only if amount is withdrawn from reserves or provisions, if such reserve or provision was created by crediting the amount to the profit and loss account. Admittedly, such is not the situation in the instant case. The intention of the legislature in inserting Clause (i) appended to the explanation to Section 115J is to counter a situation where credit is made to the profit and loss account in the first instance at the time of creation of the reserve. When such a situation arises the book profit would stand increased and thus consequently, any withdrawal

from the revaluation reserve would stand squared off by reducing the amount from the book profit. Since such a situation did not arise in the instant case, the Assessee in our view cannot be allowed reduction in the amount. To that extent the Assessing Officer is right in his conclusion. We are fortified in our view by the observations made in this regard by the Supreme Court. The Supreme Court has considered the matter from various angles. One such angle from which the matter has been considered and the resultant view and the observations made by the supreme court completely negate, in our opinion, the submissions made by Mr Ganesh before us. We can do No. better than extract the observation of the Supreme Court in that regard:

The matter could be examined from another angle. To recapitulate the facts, the fixed assets of the Assessee were revalued in the earlier assessment year 2000-01 (i.e., financial year ending March 31, 2011) and amount of enhancement in valuation was Rs. 288,58,19,000 which was credited to the revaluation reserve. In other words, at the time of revaluation of assets, the said figure of Rs 288,58,19,000 was added to the historical cost of assets on the assets side of the balance sheet and in order to equalize both sides of the balance sheet the revaluation reserve to that extent was created on the liabilities side. Thus, the figure of profit remained untouched so far as the revaluation of assets to the tune of Rs 288,58,19,000 is concerned. The profits were not increased by the said amount when the asset was revalued. During the assessment year in question, i.e., the assessment year 2001-02, an amount of Rs 26,11,74,000, being the differential depreciation, was transferred out of the said revaluation reserve of Rs 288,58,19,000 and credited to the profit and loss account which the Assessing Officer disallowed by placing reliance on the proviso to Clause (i) of the Explanation to Section 115JB(2). Consequently, the Assessing officer added back the said amount of Rs 26,11,74,000 to the net profits. We agree with the Assessing Officer. Under the provisions, as they then existed certain adjustments were required to be made to the net profit as shown in the profit and loss account. One such adjustment stipulated that the net profit shall be reduced by the amount(s) withdrawn from any reserves, if any such amount is credited to the profit and loss account. Thus, if the reserves created had gone to increase the book profits in any year when the provisions of Section 115JB were applicable, the Assessee became entitled to reduce the amount withdrawn from such reserves if such withdrawal is credited to the profit and loss account. Now, from the above facts, it is clear that neither the said amount of Rs 288,58,19,000 nor Rs 26,11,74,000 had ever gone to increase the book profits in the said year ending march 31, 2000 (being the financial year). Thus, when such amount(s) has not gone to increase the book value at the time of creation of reserve(s), there is No. question of reducing the amount transferred from such revaluation reserves to the profit and loss account. Thus, the proviso to Clause (i) of the Explanation to Section 115JB(2) comes in the way of the claim for reduction made by the Assessee. In our view, the reduction under Clause (i) to the Explanation could have been availed of only if such revaluation reserve had

gone to increase the book profits.

(emphasis is ours)

23. Mr Ganesh had tried to take advantage of the fact that in the observations extracted hereinabove there is a reference to the proviso appended to Clause (i) of the explanation to Section 115JB. A closer scrutiny of the observations made by the Supreme Court would show that the main burden of the rationale supplied by the Supreme Court is not pivoted on the proviso. As noticed by us hereinabove Clause (i) of the explanation appearing in Section 115JB read with the proviso covers the period both before and after 01.04.1997. Even though this is not specifically mentioned in Clause (i) to the explanation to Section 115J, the plain reading of the said clause would show that it only applies in those situations where credit is made to the profit and loss account at the time of creation of the reserve or the provision.

24. If there was any doubt it stands clarified by having regard to the "Memorandum Explaining the Provisions in the Finance Bill, 1989" (in short the memorandum). The memorandum, according to us, clearly indicates that the proviso was inserted to Clause (i) of the explanation appended to Section 115J to deal with a situation where some delinquent companies were taking advantage of Clause (i) of the explanation appended to Section 115J by reducing their net profit by the amount withdrawn from the reserve created or provision made in the same year itself, though the reserve when created was not added to the book profit. It was to clarify this position that the memorandum stated that Clause (i) to the explanation contained in Section 115J would apply to amounts withdrawn from the reserves or provision only if reserves had been created before 01.04.1988 or where reserves or provisions have been made after 01.04.1988 and have gone to increase the book profits in any year when the provisions of Section 115J of the income tax Act were applicable.

25. A close reading of the memorandum to the amendment would show that the initial object of allowing reduction under Clause (i) to the explanation contained in Section 115J was not diluted. In other words the reduction of the amount withdrawn from the reserves created or provisions made was only available if such an amount in the first instance have been credited to the profit and loss account. This is clear if one adverts to the following extract from the memorandum:

... Under the existing provisions certain adjustments are made to the net profit as shown in the profit and loss account. One such adjustment stipulates that the net profits is to be reduced by the amount withdrawn from reserves or provisions, if any, such amount is credited to the profit and loss account

(emphasis is ours)

26. Therefore, the submission of Mr Ganesh that it is only when the proviso is attracted that the Assessee would be disabled from seeking reduction in terms of

Clause (i) to the explanation appended to Section 115J even though the reserves when created or provision made did not get reflected in the profit and loss account, is a submission, according to us, that cannot be accepted.

27. For the foregoing reasons, we set aside the order of the Tribunal in respect of this issue as well. The question of law is thus answered in the negative and against the Assessee.

28. The reference is disposed of accordingly. The cost shall follow the result of the reference.