

(2002) 07 KL CK 0085

In the High Court Of Kerala

Case No : Income Tax A. No. 66 of 1999

Commissioner of Income Tax

APPELLANT

Vs

Dynamic Orthopedics P. Ltd.

RESPONDENT

Date of Decision : 05-07-2002

Acts Referred:

Companies Act, 1956 — Section 349(4), 350, 355
Income Tax Act, 1961 — Section 115, 115(1A), 32

Citation : (2002) 257 ITR 446

Hon'ble Judges : S. Sankarasubban, J;K. Padmanabhan Nair, J

Bench : Division Bench

**Advocate : P.K. Ravindranatha Menon and George K. George, for the Appellant;
P. Balachandran, for the Respondent**

Judgement

S. Sankarasubban, J.—This appeal has been filed by the Commissioner of Income Tax, Cochin, u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), against the order passed by the Income Tax Appellate Tribunal, Cochin Bench, Cochin, in I. T. A. No. 115/Coch of 1993 dated January 13, 1999. The assessment year in question is 1990-91. The appellant is a private limited company engaged in manufacturing and sale of orthopedic appliances like compression bandages, fixation bandages, etc. In the return of income filed, the assessee returned an income of Rs. 1,50,730. In the profit and loss account, depreciation was provided at the rates specified in the Income Tax Rules. While completing the assessment of income, the Assessing Officer recomputed the book profit for the purpose of Section 115J of the Act after allowing depreciation as per Schedule XIV to the Companies Act read with Section 350 at a lower rate. Against that order, the assessee took up the matter before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) allowed the assessee's appeal. The Department took up the matter before the Tribunal. The Tribunal dismissed the appeal. It is against that that the present appeal is filed.

2. The only question that arises for consideration is whether, on the facts and in

the circumstances of the case, the book profit estimate u/s 115J with depreciation as per the provisions of the Income Tax Act is not in accordance with law and the Tribunal is justified in interfering with the same ? For this purpose, we will have to look into Section 115J of the Act. Section 115J of the Act states as follows :

"115J. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company (other than 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)".

3. Sub-section (1A) of the Act says that every assessee, being a company, shall, for the purpose 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. The argument of learned counsel for the assessee is that the respondent being a private company, the preparation of its profit and loss account for the relevant previous year in accordance with the provisions of Part II of Schedule VI to the Companies Act is not applicable. Section 350 of the Companies Act, 1956, states as follows : "The amount of depreciation to be deducted in pursuance of Clause (k) of Sub-section (4) of Section 349 shall be the amount calculated with reference to the written-down value of the assets as shown by the books of the company at the end of the financial year expiring at the commencement of this Act or immediately thereafter and at the end of each subsequent financial year at the rate specified in Schedule XIV". What is submitted by learned counsel is that u/s 355 of the Companies Act, nothing in Section 349 shall apply to a private company unless it is applicable to the private company. Hence, learned counsel contends that his client has calculated the depreciation on the basis of the provisions of the Income Tax Act. We are afraid, this explanation cannot be accepted. Section 115J has to be looked into for the following reasons Commissioner of Income Tax Vs. Mussadilal Ram Bharose, : "It is only fair and proper that the prosperous should pay at least some tax. The phenomenon of so-called "zero-tax" highly profitable companies deserves attention. In 1983, a new Section 80VVA was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby every company will have to pay a "minimum corporate tax" on the profits declared by it in its

own accounts. Under this new provision, a company will pay tax on at least 30 per cent. of its book profits. In other words, a domestic widely held company will pay tax of at least 15 per cent, of its book profit. This measure will yield a revenue gain of approximately Rs. 75 crores". Section 115J of the Act broadly makes applicable to the ascertainable depreciation at the rates prescribed in Schedule VI. Thus, this provision is incorporated in the Act. Section 355 of the Companies Act cannot be made applicable in such cases. We are of the view that depreciation has to be calculated as stated in Section 350 of the Companies Act.

4. In the above view of the matter, we are of the view that the book profit estimate u/s 115J with depreciation shall be calculated on the basis of Schedule VI to the Companies Act and not as per the provisions of the Act. The order of the Tribunal to the above point is set aside and the appeal is allowed. The Assessing Officer is directed to reassess, on the basis of the provisions laid down above.

5. The appeal is disposed of as above.