M/S. SURANA STEELS PVT. LTD. ETC. ETC. A

v.

THE DEPUTY COMMISSIONER OF INCOME TAX AND ORS.

APRIL 13, 1999

[S.P. BHARUCHA AND R.C. LAHOTI, JJ.] B

Income Tax Act, 1961 : S. 115-J—Assessee—Book profit—Previous years 'loss' after depreciation—Set off against current year's profit—Validity of—Held, 'loss' occurring in clause (b) of the proviso to S. 205(1) of Companies Act means 'loss' arrived at after depreciation—Assessee entitled to set off C *earlier years' loss against current years profit—Object of S. 115-J Explained—Companies Act, 1956—S. 205(1) proviso clause (b).*

Interpretation of statutes

Legislation by incorporation—Held, the provision is to be read plainly D *and rules of interpretation to be applied if any ambiguity arises.*

Words & Phrases :

"Loss"—Meaning of in the context of S. 205(1), proviso clause (b) of the Companies Act, 1956 read with S. 115-J of Income Tax Act, 1961. E

Appellant-assessee, a private limited company earned profit for the assessment year 1989-90. However, as it had incurred loss after depreciation in earlier years, it filed returns disclosing 'nil' income after setting off arrears of depreciation against the current year's profit. The Income Tax F **Officer took the view that for arriving at the adjusted book profit, unabsorbed depreciation or business loss, whichever was less, was to be adjusted and since there was no business loss in earlier years as per books of accounts, no amount could be allowed to be set off. The said view was upheld by Commissioner of Income Tax (Appeals) and the Tribunal. On reference, High Court held that in case there was profit in a year but after adjustment of** G **depreciation it resulted in loss, no adjustment in the book profit under S. 115-J of the Income Tax Act, 1961 can be allowed. Hence the present appeals by the assessees.**

In one of the appeals, the rejection of Reference under S. 256(1) by the High Court and its upholding the Tribunal's rejection of Reference, raising H

A the same questions as in the other appeals, the assessee challenged these orders. Revenue has filed an appeal and two SLPs in connected matters.

Allowing the appeals preferred by the assessees and dismissing the appeal and SLPs preferred by the Revenue, this Court.

B HELD : 1. Appellant-assessees were entitled to set off earlier year's loss after depreciation against current year's profit.

2. S. 205(1), proviso clause (b) of the Companies Act, 1956 provides that if any loss is incurred in any previous year/years, then the amount of C the loss or an amount which is equal to the amount provided for depreciation for that year/years whichever is less is to be set off against current year's profit. The words "the amount provided for depreciation" and "arrived at in both cases after providing for depreciation" make it abundantly clear that in this clause 'loss' refers to the amount of loss arrived at after taking into account the amount of depreciation provided in the profit and loss account. D Then alone the formula prescribed in clause (b) would make sense and it would be consistent with the object sought to be achieved by enacting S. 115-J of the Companies Act. If 'loss' were to be taken as pre-depreciation loss then the resultant computation will not be in conformity with the tenor of the provisions for Sec. 205. Thus, High Court erred in holding that in case there E is profit in a year but after adjustment of depreciation it results in loss, no adjustment in the book profit under S. 115-J of the Income Tax Act, 1961 can be allowed. [598-C-D-E]

Garden Silk Weaving Factory v. *Commissioner of Income Tax,* (1991) 189 ITR 512, referred to.

F

3. The provisions of S. 205 proviso clause (b) of the Companies Act, stand bodily lifted and incorporated into the body of S. 115-J of the Income Tax Act. S. 115-J, Explanation clause (iv) is a piece of legislation by incorporation. The provision is to be read plainly and rules of interpretation G should be applied if any ambiguity survives. Thus, there is no reason to assign to the term 'loss' as occurring in S. 205 proviso clause (b) of the Companies Act a meaning different from the one in which it is understood there at solely because it is being read alongwith S. 115-J of the Income Tax Act. High Court was not justified in holding that having lifted S. 205(1)(b) from the Companies Act into S. 115-J of the Act, there is no occasion to H refer to the Companies Act at all. [598-C-D; 597-E; 599-D-E]

Justice G.P. Singh, 'Principles of Statutory Interpretation' **7th Edn., 1999, referred to.**

4. S. 115-J of the Income Tax Act was introduced in the assessment year 1988-89 to take care to the phenomenon of prosperous zero tax companies which had continued inspite of the enactment of S. 80 VVA. There were companies which were paying no income-tax though they had profits and were declaring dividends. A plain reading of S. 115-J shows that if the assessee be a company and its total income determined under the Income-Tax Act in respect of a previous year be less than thirty per cent of its book profit, fictionally it will be deemed that its total income chargeable to tax for the relevant previous year was an amount equal to thirty percent of such book profit. The total income of the assessee shall first be computed in accordance with provisions of Income-Tax Act and if the total income so computed be less than thirty per cent of the book *profit then profit and loss* account of the company for the relevant previous year shall have to be prepared under sub-section 1A of S. 115-J in accordance with Parts II and III of Schedule VI of the Companies Act. The book profit so arrived at under the Companies Act shall be suitably adjusted so as to satisfy the requirement of the Explanation to S. 115 of the Income Tax Act. [595-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4471 of 1995 Etc. Etc.

From the Judgment and Order dated 31.12.93 of the Andhra Pradesh High Court in W.P. No. 5408 of 1993.

K. Parasaran, T.L.V. Iyer, A.K. Chitale, Dr. V. Gauri Shanker, O.P. Dua, A. Subba Rao, A.D.N. Rao, K. Maruthi Rao, Ms. Radha, G. Prabhakar, A.V. Rangam, Neeraj Sharma, Neeraj Srivastava, (S. Rajappa, G. Venkatesh) for B.K. Prasad, S.K. Gambhir, Vivek Gambhir, Vijay Kumar, C. Jaykar, Abhijit Puri and Ms. V. Mohana for the appearing parties.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. This is a batch of eight matters before this Court. The routes through which the different matters travelled up to the High Court were different. Some were reference applications under Section 256(1) of the Income-tax Act, 1961 and some were writ petitions filed before the High Court. All the matters have stood disposed of consistently with the view taken by the Division Bench of the High Court of Andhra Pradesh in the leading judgment

A which is reported as *V.V. Trans-Investments (Pvt.) Ltd.* v. *Commissioner of Income-tax,* 1994 (207) ITR 508 and also impugned herein. In all the matters the question arising for decision is in substance only one : whether the term 'loss' as appearing in Section 205(1), first proviso, clause (b) of the Companies Act, 1956 read with Section 115 J of the Income-tax Act, 1961 means "including depreciation."

B

In order to appreciate the bone of contention it would suffice to state the facts relevant to one of the assessee's namely M/s V.V. Trans-Investments (P) Ltd., Hyderabad, a private limited company. The figures of net profit and loss as per the profit and loss account of the company were as follows :

C

Assessment year	profit/ loss	Depreciation debited to P & L account
	Rs.	Rs.
1987-88	(+) 3,087	
1988-89	(+) 35,79,997	67,75,759
	(profit before depreciation) (-) 31,95,762	
	(loss after depreciation)	
1989-90	(+) 28,37,947	3,534

D

E

The assessee-company had filed its return of income disclosing 'nil' income after setting off a part of arrears of depreciation against the current year's profit of Rs. 28,37,947. The contention of the assessee was that for the accounting year relevant to the assessment year under consideration there was no book profit after adjustment of the earlier year's loss against the current year's profit. The Income-tax Officer, however, computed the book profit under section 115 J of the Income-tax Act at Rs. 8,51,380, being 30 per cent of the current year's profit of Rs. 28,37,947 as per the profit and loss account. According to the Income-tax Officer, for arriving at the adjusted book profit, unabsorbed depreciation or business loss, whichever is less, is to be adjusted. Since there was no business loss in earlier years as per the books of account, the amount to be set off was considered as 'nil', whereas the assessee contended that earlier year's loss of Rs. 31,94,136 which in fact was unabsorbed depreciation, was to be deducted from current year's profit

F

G

H

of Rs. 28,37,947 before arriving at the book profit under section 205 (1), first proviso, clause (b) of the Companies Act, 1956. A

The Commissioner of Income-tax (Appeals) and the Tribunal have upheld the view of the Income-tax Officer. On an application made by the assessee, question of law were framed and referred for the opinion of the High Court. In a few other matters, a special bench was constituted by the Tribunal forming an opinion that there was conflict in decisions of the Tribunal on this issue. The Special Bench of the Tribunal has formed an opinion for the assessee. The High Court has answered the reference made by the Tribunal in favour of the department and against the assessee. In the opinion of the High Court the term 'loss' as used in Section 205 (1), first proviso, clause (b) of the Companies Act, 1956 read with section 115 J of the Income-tax Act, 1961 does not mean "including depreciation". In other words, the High Court has held that the assessee is entitled to deduct depreciation or loss whichever is less only in the eventuality when in a given year there is loss as well as depreciation. In such a case, the lesser of the two amounts will be available for deduction as per the provisions of Income-tax Act. In case there is profit in a year but after adjustment of depreciation it results in loss, no adjustment in the book profit under Section 115 J can be allowed. B C D

The relevant provisions to the extent relevant for the purpose of this order are extracted and re-produced hereunder :- E

INCOME-TAX ACT, 1961

Section 115J : Special provisions relating to certain companies :- (1) Notwithstanding anything contained in any other provision of this Act, wherein 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. F G

(1A) Every assessee, being a company shall, for the purposes of this section, prepare its profit and loss account for the relevant previous H

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 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 (1A), as increased by-

xxx xxx xxx

and as reduced by-

xxx xxx xxx

(iv) the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous years as if the provisions of clause (b) of the first proviso to sub-section (1) of section 205 of the Companies Act, 1956 (1 of 1956), are applicable.

(2) Nothing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause (ii) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A or sub-section (3) of section 80J.

COMPANIES ACT, 1956

S. 205. Dividend to be paid only out of profits. -(1) No dividend shall be declared or paid by a company for any financial year except out of the profits of the comapny for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2) or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with those provisions and remaining undistributed or out of both or out of moneys provided by the Central Government or a State Government for the payment of dividend in pursuance of a guarantee given by that Government :

Provided that—

xxx xxx xxx

(b) if the company has incurred any loss in any previous financial

year or years, which falls or fall after the commencement of the Companies (Amendment) Act, 1960, then, the amount of the loss or an amount which is equal to the amount provided for depreciation for that year or those years whichever is less, shall be set off against the profits of the company for the year for which dividend is proposed to be declared or paid or against the profits of the company for any previous financial year or years, arrived at in both cases, after providing for depreciation in accordance with the provisions of sub-section (2) or against both;

xxx xxx xxx

Section 115J was introduced in the assessment year 1988-89 to take care of the phenomenon of prosperous zero tax companies which had continued inspite of the enactment of section 80 VVA. There were companies which were paying no income-tax though they had profits and were declaring dividends. A minimum corporate tax was sought to be ensured on prosperous companies. A plain reading of Section 115J shows that if the assessee be a company and its total income determined under the Income-tax Act in respect of a previous year be less than thirty per cent of its book profit, fictionally it will be deemed that its total income chargeable to tax for the relevant previous year was an amount equal to thirty per cent of such book proft. The total income of the assessee shall first be computed in accordance with provisions of Income-tax Act and if the total income so computed be less than thirty per cent. of the book profit than profit and loss account of the company for the relevant previous year shall have to be prepared under sub-section 1A of Section 115 J in accordance with Parts II and III of Schedule VI of the Companies Act. The book profit so arrived at under the Companies Act shall be suitably adjusted so as to satisfy the requirements of the explanation. We are in this case concerned with the interpretation of clause (iv) under the Explanation to Section 115.

Mr. Parasaran, the learned senior advocate appearing for one of the assessees has submitted that the court should assign such meaning to the language of statute as would best serve the purpose sought to be achieved by an enactment. He further submitted that speech of Finance Minister moving the bill can be referred to for ascertaining the object behind. Finding out and making use of parliamentary history for construing statutes is a modern trend which is gaining ground. Under the rule laid down in *Pepper* v. *Hart,* (1993)

A 1, All ER 42 (HL) a Minister's speech is admissible as an external aid to construction. In India the decided cases have attempted at drawing a distinction between using the Minister's speech as a material for finding out the mischief to be remedied and the object or purpose of a legislation and using it for finding out the legislative intent. The distinction has been criticised as artificial and inappropriate with a suggestion that a time has now come to abandon it.

In the Budget Speech of 1987, the Minister of Finance referring to the proposed Section 115J explained the rationale behind its introduction in these words :-

> "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 'minimum cooporate tax' on the profits declared by it in its own accounts. Under this new provision a company will pay tax on at least 30% of its book profit. This measure will yield a revenue gain of approximately Rs. 75 crores."

It appears that representations were made by and on behalf of the companies pointing out certain hardships to companies of new projects which have just begun to make profits and companies which having fallen sick were just turning around the corner. The Finance Minister introduced an amendment during the passage of the Finance Bill and said :-

> "The Finance Bill inserts a new Section 115J in the Income-tax Act, 1961, to levy a minimum tax on book profits of certain companies. Representations have been received that in computing book profits for the purpose of determining the minimum tax, losses and unabsorbed depreciation pertaining to earlier years should be allowed to set off. Otherwise, new projects that have just begun to make profits after some years of losses and sick companies that have just turned the corner, will become subject to minimum tax. There is merit in this suggestion. Under Section 205 of the Companies Act, 1956, past losses or unabsorbed depreciation, whichever is less, are allowed to be set off against the book profits of the current year for determining

profits for the purpose of declaring dividend. It is proposed to allow the same adjustments in computation of book profits for purposes of the new provision for levy of minimum tax." A

Mr. Parasaran also referred to a passage from A. Ramaiya's Companies Act (14th edition 1988, at page 1498), wherein the learned author has referred to the established corporate practice and opined that the word 'loss' in proviso (b) to Section 205 (1) would include 'depreciation'. In accounting parlance and in commercial sense, the word 'loss' is always taken as including 'depreciation'. If depreciation were to be excluded the legislature would have used the term 'cash loss'. A comparison may be with language employed in Section 3 (o) of the Sick Industrial Companies (Special Provisions) Act, 1985 wherein a distinction is made between "accumulated loss" and "cash loss". The learned senior counsel also referred to *Garden Silk Weaving Factory* v. *CIT,* 1991 (189) ITR 512 wherein this Court has held that unabsorbed depreciation was part of loss. The learned counsel also referred to Section 349(4)(1) of the Companies Act which uses expression "excess of expenditure over income" which is narrower in scope and excludes depreciation. We find substance in the submission. There is no reason to assign to the term 'loss' as occurring in Section 205 proviso clause (b) of the Companies Act a meaning different from the one in which it is understood there-at solely because it is being read along with Section 115J of the Income-tax Act. B C D E

Section 115J, Explanation clause (iv), is a piece of legislation by incorporation. Dealing with the subject, Justice G.P. Singh states in Principles of Statutory Interpretation (7th edition,1999)—

> "Incorporation of an earlier Act into a later Act is a legislative device adotped for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been "bodily transposed into it". The effect of incorporation is admirably stated by LORD ESHER, M.R. : "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it. " (p.233) F G

> "Even though only particular sections of an earlier Act are incorporated H

into later, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by LORD BLACKBURN: "When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the sections meant, though those other sections are not incorporated in the new Act". (p.244)

Once we have ascertained the object behind the legislation and held that the provisions of Section 205 quoted hereinabove stand bodily lifted and incroprotaed into the body of Section 115J of the Incom-tax Act, all that we have to do is to read the provisions plainly and apply rules of intrerpretation if any ambiguity survives. Section 205 (1), proviso clause (b), of the Companies Act brings out the unabsorbed portion of the amount of depreciation alreday provided for comupting the loss for the years. The words "the amount provided for depreciation" and "arrived at in both cases after providing for depreciation" make it abundantly clear that in this clause 'loss' refers to the amount of loss arrived at after taking into account the amount of depreciation provided in the Profit and Loss Account. The significance of the formula prescribed in clause (b) of the proviso to Section 205 (1) of the Companies Act can well be demonstrated by two examples as given hereunder :-

Example	amount of profit/loss	amount of depreciation provided	loss for the year after taking into account the depreciation
(1)	(+) 1 lac	3 lacs	2 lacs
(2)	(-) 1 lac	3 lacs	4 lacs

In example - (1) Rs. 3 lacs is the depreciation. Rs. 2 lacs is the loss after taking into account the depreciation. The loss being lower than the amount of depreciation, it will be taken into account for set off against the profit of the year in which dividend is to be declared. In example - (2) Rs. 3 lacs is the depreciation. Rs. 4 lacs is the amount of loss after taking into account the depreciation. The depreciation being lower than the amount of loss, Rs. 3 lacs

is to be taken into account for set off against the profit of the year for which dividend is to be declared. We are of the opinion that the term 'loss' as occurrig in clause (b) of the proviso to Section 205 (1) of the Companies Act has to be understood and read as the amount arrrived at after taking into account the depreciation. Then alone the formula prescribed in this clause would make sense and it would be consistent with object sought to be achieved by enacting Section 115J of the Companies Act, 1961. If 'loss' were to be taken as pre-depreciation loss then the resultant computation will not be in conformity with the tenor of the provisions of Section 205. The language of clase (b) of the proviso to Section 205 (1) is clear. It applies to those cases where the depreciation has been provided in accordance with the provisions of sub-section (1) of Section 205. The depreciation is provided for in the Profit and Loss Account. The loss is arrived at after taking into account the depreciation provided. It is therefore clear that the word loss as used in proviso clause (b) to Section 205 (1) singifies the amount arrived at after taking into account the amount of depreciation and it has to be so read and understood in the context of Section 115J of the Income-tax Act, 1961. We do not agree with the view taken by the High Court that in case there is profit in a year but after adjustment of depreciation it results in loss, no adjustment in the book profit under Section 115J can be allowed. The view taken by the High Court would partially defeat the object sought to be achieved by Section 115J of the Income-tax Act, 1961. We also do not agree with the High Court saying that having lifted Section 205 (1)(b) from the Companies Act into Section 115J of the Income-tax Act, there is no occasion to refer to the Companies Act, 1956 at all.

For the foregoing reasons, C.A. Nos. 4471 of 1995, 4472 of 1995 and C.A. Nos.180-181 (NT)/95 filed by (1) M/s Surana Steels Pvt. Ltd., (2) V.V. Trans-Investment (P) Ltd., Hydrabad and (3) M/s Binjusaria Metal Box Co. Pvt. Ltd., Hyderabad, respectively are allowed. The order under appeal passed by the High Court of Andhra Pradesh is set aside.

C.A. No. 7589 (NT) of 1997 is directed against order dated 31.7.96 passed by the High Court rejecting the application under Section 256(2) of the Income-tax Act, 1961 filed by the assessee seeking a reference on similar questions of law and upholding rejection of similar application under Section 256(1) by the Tribunal. The High Court and the Tribunal both have opined

A that no referrable question of law arose. The appeal stands allowed and the questions sought to be referred by the assessee stand answered in accordance with the view taken by us hereinabove.

C.A. No. 1663/97, SLP Nos. 12388/97 and 13429/97, all preferred by the
B Revenue, are dismissed.

S.V.K.I. Appeal dismissed.