

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 863 of 2009**

% *Judgment Reserved On: 21st September, 2010.*
Judgment Pronounced On: 08th October, 2010.

**COMMISSIONER OF INCOME TAX-III
CENTRAL REVENUE BUILDING,
NEW DELHI**

. . . Appellant

through : Ms. Suruchi Aggarwal with
Mr. Chandramani Bharadwaj,
Advocates.

VERSUS

**SUMI MOTHERSON INNOVATIVE ENGINEERING LTD.
43, COMMUNITY CENTRE,
3RD FLOOR, BHAGERIA HOUSE,
NEW FRIENDS COLONY, NEW DELHI**

. . . Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar and Mr.
Pratap, Advocates.

CORAM :-

**HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. In this appeal, two questions of law, touching upon the interpretation which is to given to the Explanation below Section 115JB Clause (iii) of the Income Tax Act (hereinafter referred to as 'the Act'), arise for consideration. Before we reproduce the exact questions, which were formulated while admitting the appeal, we

deem it proper to dig into the relevant events that occurred leading to the said questions.

2. The assessee company/respondent is engaged in the business of manufacture and sale of injection moulded plastic parts, stamping parts/moulds and job work. The assessee filed its return of income for the Assessment Year 2002-03, relevant to the Financial Year 2001-02, declaring 'NIL' taxable income. This return was filed on 30.10.2002 along with statutory Audit Report and audited balance sheet and profit and loss account. The return was also accompanied by a report in Form No.29 B dated 22.10.2002 from an Accountant, certifying the book profits to be 'NIL' in terms of Minimum Alternate Tax (MAT) provisions of Section 115JB of the Act. This return was selected for scrutiny and notice under Sections 143(2) and 142(1) was served upon the assessee. Revised return of income was filed on 31.03.2004 again declaring a 'NIL' taxable income and 'NIL' book profits for the purposes of Section 115JB of the Act, with certain modifications.
3. While computing book profits for the purpose of Section 115JB, the Assessing Officer (AO), *inter alia*, noticed that the assessee had claimed a deduction of ₹11,14,64,874 from the net profits as adjusted. This claim of deduction was made on the strength of the provisions of Clause (iii) provided in Explanation (1) to sub-Section 2 of Section 115JB of the Act. Section 115JB of the Act, which is a MAT provision, creates special provisions for payment of tax for certain companies. In nutshell, it provides for payment of minimum tax by certain companies, if the tax paid by such

companies as per book profits is less than the minimum profit prescribed under this provision. Sub-Section (2) thereof provides a specific scheme as per which taxable MAT income is to be calculated. It stipulates that the profit and loss account for the relevant period is to be prepared in accordance with the provisions of the Companies Act. It also provides that while preparing the annual accounts including profits and loss account, provisions of Section 210 of the Companies Act are to be adhered to. Explanation (1) appended below Sub-Section (2), thereafter, stipulates the procedure for arriving at book profits. It provides for certain additions, which are to be made to the book profit as shown in the profit and loss account and also enumerates certain deductions, which are to be made therefrom. Clause (iii) to which we have referred is one of the deductions provided therein. What it means is that book profits shown in the profit and loss account prepared in the manner prescribed under Sub-Section (2) are to be increased by making additions stipulated therein and thereafter are to be reduced by certain amounts as specified therein. Clause (iii) provides that the net profit is to be reduced by the amount of loss brought forward. Relevant portion of this Explanation reads as under:

“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 (2), as increased by –

- (a) the amount of income-tax paid or payable, and the provision therefor; or

- (b) the amounts carried to any reserves, by whatever name called [other than a reserve specified under Section 33AC]; 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 [section 10 (other than the provisions contained in clause (38) thereof) or Section 11 or section 12 apply; or
- (g) the amount of depreciation,
- (h) the amount of deferred tax and the provision therefor,
- (i) the amount or amounts set aside as provision for diminution in the value of any asset,.....

If any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as 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 and 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 115JA, as the case may be; or

- (ii) the amount of income to which any of the provisions of [section 10 (other than the provisions contained in clause (38) thereof)] or section 11 or section 12 apply, if any such

amount is credited to the profit and loss account; or

(iia) the amount of depreciation debited to the profit and loss account (excluding the depreciation on account of revaluation of assets); or

(iib) the amount withdrawn from revaluation reserve and credited to the profit and loss account, to the extent it does not exceed the amount of depreciation on account of revaluation of assets referred to in clause (iia); or

(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.....

Explanation.- For the purpose of this clause, -

(a) the loss shall not include depreciation;

(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is *nil*; or.....”

4. Reverting back to the facts of the case, as on 31.03.2001, the assessee had accumulated book loss to the tune of ₹34,67,03,948 which was, purportedly, brought forward in the relevant assessment year. It so happened that on 30.08.2001, the Board of Directors of the company passed a resolution to reduce the paid up equity share capital by cancelling equity shares to the tune of ₹3245 lacs, which was passed for this purpose precisely in the following terms:

“That subject to the approval of the shareholders of the company in general meeting and further subject to the confirmation by the High Court of New Delhi, the paid up equity share capital of the company be and is hereby reduced by ₹5.00 lacs, which is not represented by available assets, by concealing ₹3,24,50,000 fully paid up equity shares of ₹10/- each aggregating to ₹32,45,00,000 and the number of the existing issued

and paid up equity shares be proportionately reduced.....”

5. This resolution was approved at the Sixth Annual General Meeting on 25th day of September, 2001. A petition was filed in this Court for approval and confirmation. On 18.02.2002 in the said petition being C.P. No.345/2001, orders were passed by the High Court, confirming the reduction of capital and approving the Minutes, which reduction was subsequently registered with the Registrar of Companies, New Delhi on 26.03.2002.
6. By virtue of this reduction of capital, the accumulated losses were wiped out. The assessee vide additional information pursuant to Part IV of Schedule VI of the Companies Act, 1956 (where balance sheet abstract and company's general profile is given) reported NIL accumulated losses.
7. The position which emerges from the aforesaid is that as on 31.03.2001, there were accumulated losses to the tune of ₹34,67,03,948 which were brought forward in the relevant Assessment Year, i.e., on 01.04.2001. However, on the close of this Financial Year, i.e., 31.03.2002, there were no accumulated losses as these were reduced to 'NIL' due to the reduction of share capital.
8. In the Assessment Year under consideration, i.e., 2002-03 (corresponding to Financial Year 2001-02), the assessee had earned a net profit of ₹7,97,45,509.88. After making necessary adjustments, as per the provisions of Section 115JB of the Act, the book profit was arrived at ₹9,30,21,510. The assessee wanted this

to be reduced by accumulated losses of ₹34,67,03,948 which according to assessee, was brought forward from the earlier years comprising of brought-forward losses and unabsorbed depreciation. According to the assessee, even if during the Financial Years, these losses were eliminated because of the reduction in the share capital, that was of no consequence, as the accumulated losses as on 31.03.2001 were to be taken into consideration. This plea of the assessee was predicated on the language used in the Explanation I, Clause (iii) extracted above, which reads “the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account”. The contention of the assessee was that once the loss of the previous years is to be brought forward, the figure of such loss which is taken into consideration has to be as on the last date of the previous Financial Year, which was 31.03.2001. This contention was not accepted by the AO. He was of the view that the relevant date would be 31.03.2002. According to him, the final accounts of the said Financial Year would be prepared as on 31.03.2002 and on that date there were no losses available to the assessee to set off, as during the year they had already been wiped out. Thus, the entire controversy which is set out above rests on the interpretation, which is given to the words “the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account”.

9. As is clear from the aforesaid discussion, it has to be found out as to whether the last date of the previous Financial Year (i.e.

31.03.2001) or the first date of the current Financial Year (i.e. 01.04.2001), is relevant for the purpose of ascertaining the amount of unabsorbed losses brought forward or it would be the last date of the Financial Year, i.e., 31.03.2002 which is to be taken into consideration to ascertain as to whether there are any accumulated book losses or not. The AO has chosen the last date of the Financial Year by giving the following reasons:

“3.6 Now since there were no losses available to company for set off, the claim of set off in the computation of income under Section 115JB is completely beyond the provisions, intent and purposes of the Act in this regard. The specious argument of the assessee that since the accumulated losses at the close of the previous year as at (sic. on) 31.3.2001 were brought forward in the beginning of the previous year relevant for the assessment year under consideration, set off should be allowed is completely mis-directed. The profit and gains as well as losses are reckoned at the end of the previous year and not at the beginning of the year. Would the assessee say that it could ascertain profits at the beginning of the year? Thus this ground is only self serving and devoid of any merit.

3.7 Intention of the Legislature has been stressed upon by the assessee company to justify its claim of set off. In this context, it is to be stated that the intention of the legislature requires to be probed where there are ambiguities in the legislation. So far as Section 115JB is concerned, it is a stand-alone extra ordinary provision whose unambiguous object is to levy tax at a specified percentage of the 'Book Profits' which is net profit as per profit and loss account prepared in accordance with the provisions of Part II and III of Schedule VI of the Companies Act, as adjusted vide Explanation (a) to (f) and (i) to (vii). The item of immediate relevance is Explanation (III) which mandates reduction of the net profit as increased by Explanation (a) to (f), by “the amount of loss brought forward or unabsorbed depreciation which ever is less as per books of accounts”. This enactment is without any ambiguity and, therefore, the words used must be given their plain grammatical meaning. The relevant words are “as per books of accounts”, which means only the accumulated losses as per books of accounts will be set off and not the brought forward losses and unabsorbed depreciation determined under the provisions of Section 72 or any other applicable provisions of the I.T. Act, 1961.”

10. The CIT(A) has concurred with the aforesaid approach of the AO as is clear from the following discussion vide orders dated 31.03.2006 passed by the CIT(A):

“3.3 I have considered the submissions of the Id. AR and the facts of the case. For the purpose of determining the book profit on which minimum alternate tax is leviable u/s 115JB, an adjustment by way of reduction of the lower of brought forward loss or unabsorbed depreciation is to be carried out. The appellant’s case is that once the loss has been brought forward and is available on the first day of the accounting period, it is this loss which is to be reduced from the book profit in terms of clause (iii) to he (sic. the) Explanation below sec. 115JB, irrespective of the fact that the los was liquidated before the close of the year. The fact is that los was available on the first day of the year, but was not available on the last day of the accounting period, when the books were made up. The appellant has laid stress on the connotation of the term “brought forward”. In its view the relevant date is the first day of the accounting period and not the last day. I am unable to agree with this interpretation of the appellant. A brought forward loss does not get adjusted on the very first day of the next accounting period. Only the *quantum* of loss available for set off is known on the first day. This amount of brought forward loss is then carried to the last day of the accounting period, when the profits, if any, available for off-set against the said loss become known. It is the book profit determined on the last day of the accounting period which we were concerned with for the purposes of sec. 115JB. The book profit can be known only when the books are written, i.e. on the last day of the year. Although the brought forward loss may be quantified on the first day of the year it is only at the end of the accounting period that such loss can be adjusted. The set-off can be effectuated only after ascertainment of the profit. If, in between the first day and the last day of the accounting period, the loss gets liquidated, noting (sic. nothing) would be left over for set-off against the profit. Hence, in my opinion, the A.O. was fully justified in not allowing the adjustment of brought forward losses, since the losses had been liquidated during the course of the year and nothing was left over, being available for set-off. Accordingly, the disallowance is sustained.”

11. The Income Tax Appellate Tribunal (hereinafter referred to as ‘the Tribunal’) in its impugned decision while overturning the opinion of the AO, has preferred to accept the contention of the assessee,

holding the view that the expression “losses brought forward” would mean the losses which existed as on the last date of the previous Financial Year and brought forward in the current Financial Year that are to be adjusted, as figure of book profit, is to be reduced thereby. In this behalf, the Tribunal took the following view:

“...Therefore, the profit shown in the Profit and Loss Account will be the starting figure for making adjustments as mentioned in the Explanation to section 115JB. This Explanation, on the facts of this case, inter-alia provides the reduction of book profits by the brought forward business losses as per books. The term “loss brought forward” can only mean the loss on the last day of the immediately preceding year and nothing else. If any adjustment is made in the aforesaid amount in the course of this year, that cannot be taken into consideration for the purpose of clause (iii) of the Explanation. Therefore, on literal interpretation of the clause, it would be clear that the Ld. CIT (A) was not right when he held that at the close of accounting period there was no loss brought forward available with the assessee for deduction from the book profits. In coming to the aforesaid conclusion, we need not enter in to the controversy as to whether any adjustment beyond the adjustments mentioned in the Explanation can be made to the book profits, as held in the case of Oriental Containers Ltd. (supra). It may only be mentioned that that can deal with notional profit or loss, credited or debited in the Profit and Loss Account. There could be a different (sic. difference) of opinion in this matter, but in the case of the assessee no such amount has been debited or credited as seen from the Profit & Loss Account itself. The other question is regarding meaning of the expression “loss brought forward”, the meaning of which has been explained by us already. Thus, we are of the view that the assessee is entitled to deduct the loss as per accounts drawn on 31.03.2001 from the book profits of this year as per Profit & Loss Account....”

12. It is in this backdrop, this appeal was admitted on the following two questions:

- (a) Whether the learned ITAT was correct in law and on merits in holding that the assessee is entitled to deduction of brought forward losses even though the

losses have been liquidated during the course of the year and nothing was left to be available for set off?

- (b) Whether for the purposes of Section 115JB of the Act, only the accumulated losses as per the books of account shall be set off for the exclusive purpose of MAT?”

13. Mr. C.S. Aggarwal, learned Senior counsel appearing for the assessee, justified the approach adopted by the learned Tribunal and argued that insofar as questions (a) and (b) are concerned, from a bare look at the statutory provisions contained in the Explanation under Section 115JB, Clause (iii), it is evident that the same provides that it is the amount of loss brought forward or unabsorbed depreciation, whichever is less as per the books of account, it is to be reduced from the book profit. Thus, whether such brought forward losses have been liquidated or not is of no consequence, since such brought forward losses as determined are to be reduced under Explanation to Clause (iii) of Section 115JB (2) of the Act from the book profit as reflected in the profit and loss account prepared. He supplemented this argument by submitting that the figure of book profits is one as is declared as per profit and loss account. From the said book profit, the assessee is to set off the amount of loss brought forward. The concept of “brought forward losses” is well established and is that such losses, as have been brought forward from the preceding year. The profit and loss account is not prepared by including brought forward losses, but such losses are carried to the balance sheet. Therefore, both conceptually and statutorily, mere look at the statutory provisions would show that from the book profit as

computed the brought forward loss is to be set off. There is no further requirement that if such brought forward loss has been liquidated, income for a MAT company would not be eligible to such a deduction as was represented by brought forward loss.

14. Ms. Suruchi Aggarwal, on the other hand, argued on the lines of approach adopted by the AO and the CITA(A).
15. We have considered the respective submissions. The AO has given his own rationale in choosing last date of the financial year, which is the subject matter of assessment for the purpose of ascertaining the amount of unabsorbed losses brought forward. On the other hand, the order of the Tribunal provides its own justification for adopting the last day of the preceding year /first day of the current financial year. Both the rationale appear to be convincing. In such circumstances, the answer to the question would depend upon the language of the provision, as that depicts the intention of the legislature. As pointed out above, decision in this respect must rest upon the provisions of the Explanation below Section 115JB (iii) of the Act. This explanation categorically and unhesitatingly uses the term 'loss brought forward'. The meaning that is to be assigned to this term would be naturally, the loss on the last date of the immediately preceding year, which is to be brought forward to the financial year in question. Clause (iii) provides for the amount of loss brought forward. What happens during the course of the year is not relevant, as under the scheme of the aforesaid provision no such contingency is taken note of. In the instant case, during the year loss is wiped out and therefore,

this controversy has arisen. What would happen if the figure of loss increases during the year? In that eventuality, the Department is not going to take into consideration the increased loss during the year, but the loss figure which was in the previous year and brought forward. It is for this reason also, we are convinced that in a case like this Rule of Literal Interpretation of the provision, which is a well recognized Rule of interpretation needs to be adopted.

16. It is a common saying that the intention of legislature is to be judged from the language used in the legislation. If the language is plain and unambiguous, effect is to be given without going behind the wisdom of the legislature and also regardless of the result. It is also a cardinal principle of interpretation of fiscal statutes that they should be construed strictly (see **Commissioner of Income Tax Vs. Kasturi**, 237 ITR 24(SC)). So long as the provision is free from ambiguity, there is no need to draw an analogy (see **Rajasthan SEB Vs. DCIT**, 200 ITR 434). The legal position is beautifully summed up by the Supreme Court in the case of **Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd.** in the following words:

“2. At the cost of some repetition, we may notice that the provisions of Sections 23 and 24 of the Act have been enacted by the Legislature with certain objects in mind. The intention of the Legislature is an important factor in relation to interpretation of statutes. The statute law and the case law go side by side and quite often the relationship between them is supplementary. In other words, interpretation is guided by the spirit of the enactment. Interpretation can be literal or functional. Literal interpretation would not look beyond *litera legis*, while functional interpretation may make some deviation to

the letter of the law. Unless, the law is logically defective and suffers from conceptual and inherent ambiguity, it should be given its literal meaning. Where the law suffers from ambiguity, its interpretation must depend upon the text and context. They are the basis of the interpretation. One may well say that if the text is the texture, context is what gives it colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the context.”

17. The upshot of the aforesaid discussion would be to answer the question by holding that the decision of the Tribunal is correct in law. Thus, we dismiss this appeal as devoid of any merit.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

OCTOBER 08, 2010

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