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

Reserved on : 17th December, 2012.
% **Date of Decision** : 28th February, 2013.

\+ **W.P.(C) No.3126/2010**

WHIRLPOOL OF INDIA LIMITED AND ANR ..... Petitioners
Through Mr. Tapas Ram Misra and Mr. Ashu Kansal, Advs.

versus

UOI AND ORS ..... Respondents
Through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Puneet Gupta, Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

In this writ petition, the petitioner challenges the retrospectivity of the amendment made to Section 115 JB of the Income Tax Act, 1961 by the Finance (No.2) Act, 2009 by insertion of clause (i) to Explanation 1 with retrospective effect from 01.04.2001.

2. The petitioner is a public limited company incorporated under the Companies Act, 1956 and is engaged in the business of manufacture and

trading/export of consumer items such as refrigerators, washing machines, etc. It was assessed to income tax on the "book profit" computed in accordance with the provisions of Section 115 JB of the Act. This section was inserted into the Act by the Finance Act, 2000 w.e.f. 01.04.2001. It made special provision for payment of tax by certain companies. The gist of the section, shorn of the details, is that certain companies were liable to pay tax on their "book profit" if the total income computed in accordance with the provisions of the Act was less than 18% of its book profit. In that case, book profit was deemed to be the total income of such companies. These companies were required to prepare their profit and loss account in accordance with the provisions of parts –II and III of Schedule VI to the Companies Act, 1956. Explanation 1 to the section permitted certain adjustments to be made to the figure of book profit as shown in the profit and loss account prepared as per the Companies Act. The first part of the Explanation provided for certain additions to be made to the book profit and the second part provided for certain reductions to be made from the book profit. In the present petition we are not concerned with the second part, but are concerned only with the first part of

Explanation 1 which provided for certain upward adjustments to the book profit. For the purposes of the present petition therefore, it would only be necessary to reproduce the first part of the Explanation, which reads as under: -

> *"Explanation [1].— 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,"

It may be noticed that under clause (c) *"the amount or amounts set aside to provisions made for meeting liabilities, other than the ascertained liabilities"* was/were to be added to the book profit as shown in the profit and loss account. A controversy arose as to whether the provision for bad and doubtful debts made in the profit and loss account can be added to the book profit under the aforesaid clause. The income tax authorities took the view that such a provision was made for meeting a liability other than an ascertained liability and therefore the book profit had to be increased by the amount of the provision. The case of the companies which were liable to tax under Section 115 JB was that a provision for bad and doubtful debts cannot be regarded as a provision made for meeting a liability, let alone an unascertained liability, because a debt is not a liability but is an asset of the company and what in effect the company does, when making the provision for bad and doubtful debts, is only to provide for a possible non-recovery of the debt; according to the companies, a provision made for the diminution in the value of the debt due to possible non-recovery or the debt going bad cannot be treated as a

provision made for meeting an unascertained liability. The matter ultimately reached various benches of the Income Tax Appellate Tribunal and on account of the importance of the issue, a Special Bench of the Tribunal was constituted which ruled in ***JCIT Vs. Usha Martin Ltd. (2006) 105 TTJ (Kol.) 543 (SB)*** that such a provision cannot be considered as a provision for meeting an unascertained liability and that in truth and substance it was a provision for the diminution of the value of the debt and therefore, it fell outside clause (e) of the Explanation and the book profit cannot be increased by the amount of the provision. This view of the Special Bench of the Tribunal was upheld by the Delhi High Court in a case where a similar issue had arisen and this judgment is reported as ***CIT Vs. Eicher Ltd. (2006) 287 ITR 170***. The controversy was eventually resolved by the Supreme Court in the judgment reported as ***CIT v. HCL Comnet Systems & Services Ltd. (2008) 305 ITR 409***. This judgment was rendered on 23.09.2008. It was observed as under: -

> *"For the purposes of section 115JA, the Assessing Officer can increase the net profit determined as per the profit and loss account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto. As stated above, the said Explanation has*

provided six items, i.e., item Nos. (a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit. In this case, we are concerned with item No. (c) which refers to the provision for bad and doubtful debts. The provision for bad and doubtful debts can be added back to the net profit only if item (c) stands attracted. Item (c) deals with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities. The assessee's case would, therefore, fall within the ambit of item (c) only if the amount is set aside as provision ; the provision is made for meeting a liability ; and the provision should be for other than an ascertained liability, i.e., it should be for an unascertained liability. In other words, all the ingredients should be satisfied to attract item (c) of the Explanation to section 115JA. In our view, item (c) is not attracted. There are two types of "debt". A debt payable by the assessee is different from a debt receivable by the assessee. A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others. In the present case, the "debt" under consideration is a "debt receivable" by the assessee. The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of the asset, i.e., debt which is an amount receivable by the assessee. Therefore, such a provision cannot be said to be a provision for a liability, because even if a debt is not recoverable no liability could be fastened upon the assessee. In the present case, the debt is the amount receivable by the assessee and not any liability payable by the assessee and, therefore, any provision made towards irrecoverability of the debt cannot be said to be a provision for liability."

3. After the judgment of the Supreme Court was rendered in favour of the company-assessees, the Finance (No.2) Bill, 2009 was introduced in the Lok Sabha on 06.07.2009 to give effect to the financial proposals of the Central Government for the financial year 2009-10. The Bill proposed an amendment to Section 115 JB as follows: -

> *"**45. Amendment of section 115JB** - In section 115JB of the Income-tax Act,—*
>
> *(a) in sub-section (1), with effect from the 1st day of April, 2010,—*
>
> *(i) for the words, figures and letters "the 1st day of April, 2007", the words, figures and letters "the 1st day of April, 2010" shall be substituted;*
>
> *(ii) for the words "ten per cent.", at both the places where they occur, the words "fifteen per cent." shall be substituted;*
>
> *(b) in sub-section (2), after the second proviso, in Explanation 1, after clause (h), for the words, brackets and letters "if any amount referred to in clauses (a) to (h) is debited to the profit and loss account, and as reduced by—", the following shall be substituted and shall be deemed to have been substituted with effect from the 1st day of April, 2001, namely:—*
>
> *"(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,—".”

The notes on clauses appended to the Bill provided as follows: -

“Clause 45 of the Bill seeks to amend section 115JB of the Act relating to special provision for payment of tax by certain companies.

Under the existing provisions contained in the said section 115JB, in case of a company, if the tax payable on the total income as computed under the income-tax Act in respect of any previous year relevant to the assessment year commencing on or after the 1st April, 2007, is less than ten per cent. of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable for the relevant previous year shall be ten per cent. of such book profit.

It is proposed to amend sub-section (1) of said section 115JB to provide that if the income-tax payable on the total income as computed under the Income-tax Act in respect of any previous year relevant to the assessment year commencing on or after 1st April, 2010 is less than fifteen per cent. of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable for the relevant previous year shall be fifteen per cent. of such book profit.

This amendment will take effect from 1st April, 2010 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years.

It is further proposed to insert a new clause (i) after clause (h) in the Explanation 1 to sub-section (2) of said section so as to provide that any provision for diminution in

the value of any asset will also be included in the computation of book profit under the said section.

This amendment will take effect retrospectively from 1st April, 2001 and will, accordingly, apply in relation to the assessment year 2001-02 and subsequent assessment years."

4. In the memorandum explaining the provisions in the Finance (No.2) Bill, 2009 the Central Board of Direct Taxes stated as follows: -

"Clarification regarding add back of "provision for diminution in the value of asset", while computing book profits

Section 115JB of the Income-tax Act provides for levy of Minimum Alternate Tax (MAT) on the basis of book profits of a company. As per Explanation 1 after sub-section (2), the expression "book profit" means net profit as shown in the profit and loss account prepared in accordance with the provisions of Part-II and Part-III of Schedule-VI to the Companies Act, 1956 as increased or reduced by certain adjustments, as specified in that section.

It is proposed to insert a new clause (i) in Explanation 1 after sub-section (2) of the said section so as to provide that if any provision for diminution in the value of any asset has been debited to the profit and loss account, it shall be added to the net profit as shown in the profit and loss account for the purpose of computation of book profit.

Similar amendment is also proposed in section 115JA of the Income-tax Act by way of insertion of a new clause (g) in the Explanation after sub-section (2) of the said section.

The amendment to section 115JA is proposed to be made effective retrospectively from 1st day of April, 1998

and will, accordingly, apply in relation to assessment year 1998-99 and subsequent years.

The amendment to section 115JB is proposed to be made effective retrospectively from 1st day of April, 2001 and will, accordingly, apply in relation to assessment year 2001-02 and subsequent assessment years."

5. The petitioner filed its returns of income for the assessment years 2002-03, 2003-04 and 2009-10 on 31.10.2002, 28.11.2003 and 29.09.2009 respectively. It is averred in the petition that the petitioner was advised to re-compute its book profit for these years by taking into account the provision for diminution in the value of assets, including any provision made for bad and doubtful debts, in view of the retrospective amendment. The petitioner accordingly, recomputed its book profit and deposited ₹1,08,64,425/- on 30.10.2009 towards additional taxes for these years consequent to the re-computation.

6. The challenge in this writ petition is not to the amendment as such but is confined to the retrospectivity of the same. The prayer in the writ petition is for quashing the retrospectivity of the amendment on the ground that it is unreasonable, discriminatory and therefore, unconstitutional. It is also prayed that the respondents be directed to

refund the tax deposited *suo motu* by the petitioner on 30.10.2009 as a result of the retrospective amendment along with applicable interest.

7. Counsel for the petitioner put forward the following arguments in support of the challenge to the retrospectivity of the amendment: -

(a) the insertion of clause (i) by the Finance (2) Bill, 2009 to Explanation I below Section 115 JB has in effect imposed a new tax; it is not clarificatory provision and therefore, cannot be made retrospective;

(b) no justification has been shown as to why the clause should be inserted retrospective;

(c) the legislature cannot take back with retrospective effect any benefit which it had granted;

(d) the retrospective amendment affects different assessees differently and is discriminatory;

(e) the amendment travels far beyond the scope of Section 115 JB and hence invalid.

8. There is no merit in the contention of the petitioner that the amendment has brought into effect a new tax or a new levy which is outside the scope of Section 115JB. As pointed out earlier, Explanation 1 below section 115JB contains several clauses. If the profit and loss account prepared by the company contains any debit which answers to the description of any of those clauses, the amount of the debit can be added to the book profit and the book profit shall stand increased by the said amount. The purpose of the Explanation is to broaden the base amount on which tax is payable by the company. No new levy is imposed. The tax-base stands widened by the amendment in as much as the amount or amounts set aside as provision for diminution in the value of any asset and debited to the profit and loss account shall be added to the book profit. It is well settled that income tax is only one tax on the total income of the assessee. The book profit of a company as shown in the profit and loss accounts prepared in accordance with the Companies Act, 1956 and as adjusted by the various clauses of Explanation 1 is deemed to be the total income of the company on which tax is payable. It is, therefore, a misnomer to refer to the amendment as imposing a new tax or levy. Since

the amendment does not provide for any new levy of income tax, there is no question of it being struck down on the ground of retrospectivity.

9. The argument of the petitioner that no justification has been shown for introducing the amendment is also unacceptable. It was pointed out that the "statement of objects and reasons" to the Finance (No.2) Bill, 2009 did not contain anything to show why clause (i) was introduced into the Explanation. The memorandum explaining the provisions of the Finance Bill, 2012 (2012) 342 ITR (St) 234 at page 265 contained a detailed justification as to why certain amendments were being proposed in section 9 of the Act in order to rationalise the international taxation provisions. There is, it was pointed out, reference, to judicial pronouncements which had created doubts about the scope and purpose of sections 9 and 195. It was further stated in the memorandum that there were certain other issues in respect of the income deemed to accrue or arise in India on which there were conflicting decisions of various judicial authorities and, therefore, there was a need to make a clarificatory retrospective amendment to restate the legislative intent and to provide for certainty in law. It is submitted that in contrast, the statement of objects

and reasons to the Finance (No.2) Bill, 2009 did not contain any reason nor did it justify the introduction of clause (i) to Explanation 1. The contention, therefore, was that the amendment was arbitrary and whimsical.

10. The petitioner is right to the extent that the statement of objects and reasons did not contain any justification or reason for making the amendment. Not only the statement of objects and reasons, but the memorandum explaining the provisions of the Bill and the notes on clauses appended to the Bill too did not show any justification or reasons for the amendment. The question, however, is whether this invalidates the amendment. That takes us to the question as to what is the importance and relevance accorded to the statement of objects and reasons in the process of examination of the constitutional validity of an amendment. There can be no doubt that the statement of objects and reasons may be employed as an external aid to construe the statute; it can also be referred to for the purpose of comprehending the factual background, the prior state of legal affairs, the surrounding circumstances in respect of the statute and the evil which it seeks to remedy. The usefulness of the

statement of objects and reasons is limited to these aspects and no authority has been cited before us to show that the absence of any reason or justification given in the statement of objects and reasons for an amendment would invalidate the legislative action and would render the amendment unconstitutional on that ground alone. It would be relevant to refer to the judgment of the Supreme Court in ***Bakhtawar Trust & Ors. Vs. M.D. Narayan & Ors. (2003) 5 SCC 298***. That was not a case where the statement of objects and reasons did not say anything with regard to the reason for the amendment. In that case it was urged that the statement of objects and reasons for the validation Act under challenge showed that the intention of the legislature was rather to render the decision of the High Court infructuous than to correct any infirmity in the legal position. Rejecting the argument, the court observed as under:-

> *It was then urged on behalf of the respondents that a perusal of the Statement of Objects and Reasons for the Validation Act shows that the intention of the legislature was rather to render the decision of the High Court infructuous than to correct any infirmity in the legal position. For this, reliance was sought to be placed on the Statement of Objects and Reasons of the impugned enactment. It is well settled by the decisions of this Court that when a validity of a particular statute is brought into question, a limited reference, but not*

reliance, may be made to the State of Objects and Reasons. The Statement of Objects and Reasons may, therefore, be employed for the purposes of comprehending the factual background, the prior state of legal affairs, the surrounding circumstances in respect of the statute and the evil which the statute has sought to remedy. It is manifest that the Statement of Objects and Reasons cannot, therefore, be the exclusive footing upon which a statute is made a nullity through the decision of a Court of law.

11. The aforesaid observations were applied and followed by the Supreme Court in ***ITW Signode India Ltd. v. Collector of Central Excise (2004) 3 SCC 48*** and it was held that the statement of objects and reasons for enacting a statute can be read for a limited purpose. The following passage from the judgment of **Patanjali Sastri, J**. (as he then was) in ***Rex v. Basudeva AIR 37 1950 FC 67*** (a judgment of 5 judges of the Federal Court) clinches the point:-

"Stress was laid on the reference in the preamble of the Act to the maintenance of public order as showing that the Legislature was not unmindful of the limitation on its power with respect to preventive detention, and it was urged that, if the Legislature thought that prevention of a particular activity was expedient in the interest of maintenance of public order, it was not for the court to canvass the degree of connection between the two, as that was a matter of policy and not of vires. We cannot accept this wide proposition. Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the

nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of vires, where the Legislature concerned has powers to legislate on certain specified matters only. The court must still see, in such cases, whether the subject-matter of the impugned legislation is really within those powers. For the reasons indicated we are of opinion that s. 3 (1) (i) of the Act is not within the power of the Provincial Legislature to enact, and we accordingly dismiss the appeal."

12. The legal position that emerges appears to be that the constitutionality of a law has to be examined and judged on its own terms having regard to the judicially well-recognised limitations on the legislative powers. If the law offends any provision of the Constitution, it is liable to be struck down. Several other limitations on the legislative powers have been judicially recognised and the law has to fall within those limitations. The statement of objects and reasons may be looked into merely to ascertain the intention of the legislature, the mischief sought to be remedied, and the state of affairs prevailing prior to the amendment. It is thus only an external aid to construction and by no means a touchstone to judge the validity or constitutionality of the statute. That should be decided on the terms of the statute and the statement of objects and reasons can have no decisive influence on the question.

Reading more into the statement of objects and reasons would lead to this absurd result, namely, that if sufficient justification for the law is shown in the statement of objects and reasons, then the law must be held to be valid and constitutional irrespective of the question whether it offends the relevant provisions of the Constitution or exceeds the judicially recognised limitations on the legislative powers. It would result in an absurd situation which cannot be countenanced, as pointed out in the judgment of the Federal Court (supra).

13. A statutory amendment may be brought into force either prospectively or retrospectively. A retrospective taxation, by its very nature, is intended to operate on conditions that were already existing. In ***Rai Ramkishna v. State of Bihar (1963) 50 ITR 171=AIR 1963 SC 1667***, a Constitution bench of the Supreme Court was dealing with the challenge to a retrospective amendment to a taxing statute by a validation enactment. **Gajendragadkar, J.**, as he then was, speaking for the Constitution Bench made the following comprehensive observations:-

> *"The other point on which there is no dispute before us is that the legislative power conferred on the appropriate*

legislatures to enact law in respect of topics covered by the several entries in the three Lists can be exercised both prospectively and retrospectively. Where the legislature can make a valid law, it may provide not only for the prospective operation of the material provisions of the said law, but it can also provide for the retrospective operation of the said provisions. Similarly, there is no doubt that the legislative power in question includes the subsidiary or the auxiliary power to validate laws which have been found to be invalid. If a law passed by a legislature is struck down by the Courts as being invalid for one infirmity or another, it would be competent to the appropriate legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed. This position is treated as firmly established since the decision of the Federal Court in the case of The United Provinces v. Mst. Atiqa Begum (1940) F.C.R. 110.

12. It is also true that though the Legislature can pass a law and make its provisions retrospective, it would be relevant to consider the effect of the said retrospective operation of the law both in respect of the legislative competence of the legislature and the reasonableness of the restrictions imposed by it. In other words, it may be open to a party affected by the provisions of the Act to contend that the retrospective operation of the Act so completely alters the character of the tax imposed by it as to take it outside the limits of the entry which gives the legislature competence to enact the law; or, it may be open to it to contend in the alternative that the restrictions imposed by the Act are so unreasonable that they should be struck down on the ground that they contravene his fundamental rights guaranteed under Art. 19(1)(f) & (g). This position cannot be, and has not been, disputed by Mr. Sastri who appears for the

respondent, vide The State of West Bengal v. Subodh Gopal Bose MANU/SC/0018/1953 : [1954]1SCR587 , and Express Newspapers (Private) Ltd. v. The Union of India (1954) 12 S.C.R. 139..

13. In view of the recent decisions of this Court Mr. Sastri also concedes that taxing statutes are not beyond the pale of the constitutional limitations prescribed by Articles 19 and 14, and he also concedes that the test of reasonableness prescribed by Art. 304(b) is justiciable. It is, of course, true that the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the legislature can be taxed by the legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Art. 19, courts would naturally be circumspect and cautious. Where for instance, it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purposes. This is illustrated by the decision of this Court in the case of

Kunnathet Thathunni Moopil Nair v. State of Kerala MANU/SC/0042/1960 : [1961]3SCR77 , where a taxing statute was struck down because it suffered from several fatal infirmities. On the other hand, we may refer to the case of Raja Jagannath Baksh Singh v. State of Uttar Pradesh MANU/SC/0184/1962 : [1962]46ITR169(SC) , where a challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed that unless the infirmities in the impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power; the Court would uphold a taxing statute."

14. These observations were followed and applied by the Supreme Court in ***M/s. Krishnamurthi & Co. v. State of Madras AIR 1972 SC 2455***. We will notice this judgment in some detail later.

15. Even otherwise, the argument of the petitioner that no justification has been shown for the retrospectivity is not correct. The sequence of events leading to the retrospective amendment cannot be ignored. There was no provision in Explanation 1 to section 115JB permitting an upward adjustment of the book profit by the amount debited to the provision for bad and doubtful debts. However, the revenue authorities had sought to include the said provision in the book profit. Their attempt failed right up to the Supreme Court which pointed out that a provision for bad and

doubtful debts is in fact a provision for diminution in the value of an asset which does not fall under clause (c) of Explanation 1. Having had the benefit of the view expressed by the highest court of the land and realising that the existing clause (c) in the Explanation was inadequate to cover a provision made for the diminution in the value of an asset, Parliament in its wisdom thought that its intention to impose a Minimum Alternate Tax (MAT) on companies which earned profits and declared dividends but did not pay any tax (after availing of all the allowances and reliefs permitted under the Income Tax Act) would be better effectuated by introducing a provision to the effect that even a provision made for diminution in the value of any asset would be added to the book profit. The statutory basis of the judgment of the Supreme Court in HCL Comnet (Supra) was changed; whereas the Supreme Court pointed out the inadequacy of the existing clause (c) to cover a provision for the diminution in the value of any asset, the legislature sought to plug the lacuna by inserting clause (i) which permitted an upward adjustment of the book profit by the provision made for diminution in the value of any asset, which obviously included a debt. It is not unusual for the legislature to make amendments with

retrospective effect to cure the lacuna pointed out by judicial decisions. In ***ITW Signode India Ltd.*** (*supra*) it was observed by the Supreme Court as follows:-

> *"A statute, it is trite, must be read as a whole. The plenary power of legislation of the Parliament or the State Legislature in relation to the legislative fields specified under Seventh Schedule of the Constitution of India is not disputed. A statutory act may be enacted prospectively or retrospectively. A retrospective effect indisputably can be given in case of curative and validating statute. In fact curative statutes by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing. However, the scope of the validating act may vary from case to case*."

16. In order to successfully challenge the retrospectivity of the amendment it is necessary for the petitioner to show that the retrospective operation so completely alters the character of the tax as to take it outside the limits of the entry which gives the legislature competence to enact the law. We do not think that the present amendment is open to such criticism. As already pointed out, all it does is to widen the base upon which the levy operates by adding one more category of a debit to the profit and loss account by which the book profit of the company can be

increased. The nature of the tax has not undergone any change and it still remains a tax on the book profit of the company. It is in our opinion perfectly open to the legislature to prescribe how the book profit of a company can be computed and this it has done by first enacting that the book profit should be the figure of the profit as per the profit and loss account prepared in accordance with parts II and III of the Companies Act and then by prescribing, in Explanation 1, the items by which the said book profit may either be increased or reduced. Section 4 of the Income Tax Act, 1961 lays the charge of tax on the total income of the previous year of every person. Section 2(45) defines "total income" as meaning "the total amount of income referred to in section 5, computed in the manner laid down in this Act". We have already seen that under sub-section (1) of section 115JB the book profit of a company shall be deemed to be its total income. Sub-section (1) is as follows:-

> *"(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on 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, 2012] is less than [eighteen 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 eighteen and one-half per cent."

17. Explanation 1 to the Section prescribes the manner in which the book profit of a company shall be computed and it is upon the book profit so computed, after giving effect to the said Explanation, that the tax is payable by the company. In other words it is the book profit adjusted in the manner prescribed by the Explanation 1 that is deemed to be the total income of the company. If this is the true position, it is difficult to accept the argument that the insertion of clause (i) with retrospective effect into Explanation 1 so completely alters the nature and character of the tax that it falls beyond the entry 82 in the Union List of the Constitution ("Taxes on income other than agricultural income") and consequently is beyond the competence of the legislature.

18. A case of some relevance to the present writ petition is that of the Constitution bench of the Supreme Court in ***Chhotabhai Jethabhai Patel v. Union of India, AIR 1962 Supreme Court 1006***. An amendment to the

excise law was the subject of challenge before the Supreme Court. Section 7(2) of the Finance Act, 1951 sought to impose an excise duty on tobacco retrospectively before the date of its enactment, i.e., 28.4.1951. One of the arguments in support of the challenge before the Supreme Court was that if the retrospective levy of the tax/ duty altered its essential nature and identity, then the power to legislate retrospectively would be open to Parliament only if the tax in the altered form was open to Parliament to impose. It was further contended that the duty of excise was an indirect tax and once imposed retrospectively, it deprived itself of all the essential characteristics of being an indirect tax and became a personal tax and had the effect of imposing a tax on a person merely because he happened to produce goods at an antecedent date. The Parliament, it was contended, did not have such a power. After examining in depth the nature of excise duty in other countries as well as in India, **N.Rajagopala Ayyangar, J**. speaking for the court held that in considering the validity of the retrospective levy of the tax, the court was not so much concerned as to whether the tax was a direct or indirect tax as upon the transaction or activity on which it was imposed. It was held that

the nature and character of the levy of tax/duty with retrospective effect was the same as the nature and levy of the duty with prospective effect and observed that "*it would seem to be rather a strange result to achieve, that the tax imposed satisfies every requirement of a duty of an excise in so far as the tax operates from and after April 28, 1951, but is not a duty of excise for the duration of two months before that date"*. The ratio of this judgment appears to us to apply to the case before us. The tax which was essentially a tax on the book profit and consequently a tax on the total income of the petitioner does not cease to be such a tax or become a new or different tax in nature and character merely because one more item of debit to the profit and loss account is prescribed to be added to the book profit shown in the profit and loss account from a retrospective date. The tax was always on the book profit and on the total income of the company; it continues to remain so even after the retrospective amendment, the change being not in the nature and character of the tax, but on the quantum of the book profit/total income of the company on which it is charged.

19. Three judgments were predominantly relied upon by the counsel for the petitioner in the course of his arguments. The first judgment is that of **A.N. Sen, J** in ***Lohia Machines Ltd. & Anr. vs. Union of India & Ors.,152 ITR 308***. It is in fact the judgment of the minority. However, on the point relied upon by the counsel for the petitioner, the judgment of A.N. Sen, J, cannot be considered as a dissenting or minority judgment because on this point, no opinion was expressed by the majority, which opinion was articulated by **Bhagwati, J**. In that case, two questions fell for determination. The first was the validity of Rule 19A of the Income Tax Rules, 1962, which according to the assessee in that case, went far beyond Section 80J by excluding borrowed capital from the capital employed in the industrial undertaking. The second question which fell for consideration was the validity of the retrospective amendment made to Section 80J by the Finance (No.2) Act, 1980, with effect from 1.4.1972. We are concerned only with the second point that fell for determination in that case and the observations of **A.N.Sen, J.** with regard to this point. After a very elaborate examination of the question of retrospectivity – if we may say so with respect – the learned Judge held that the

retrospectivity of the amendment was invalid. Holding that the principal question to be decided when considering the validity of the retrospectivity of an amendment was to inquire as to how the retrospective effect of the amendment operates, the learned Judge expressed the view that by enacting the retrospective amendment in question in that case, *"Parliament is seeking to validate not any provision of the statute declared invalid because of any flaw or defect, as there was none but is seeking to validate an invalid rule which had sought to deprive the assessee of the benefit which Parliament had clearly bestowed on the assessee by the Section"*. It was further observed that *"if any fiscal statute grants relief to any assessee and the assessee enjoys the benefit of that relief, as the assessee is legally entitled under the statute, the withdrawal of the relief validly and unequivocally granted and enjoyed by any assessee must necessarily in the absence of proper grounds be held to be unreasonable and arbitrary"*. These observations were strongly relied upon by the petitioner before us and in fact one more judgment of the Supreme Court has been cited in ground 'F' of the writ petition in support of the contention: ***Virender Singh Hooda vs. State of Haryana, (2004) 12***

***SCC 588*.** It must, however, be remembered that the above observations were made with reference to Section 80J, which had been enacted to grant relief for the purpose of promoting industrial growth of the country by affording incentives for the setting up of new undertakings. When Parliament enacted Section 80J, it was done in the larger public interest. It is, therefore, proper to consider the right granted by the Parliament to an assessee, who had set up a new industrial undertaking in the notified area, as a vested right, and it was so considered by the learned Judge. What Section 80J did, when it was amended by the Finance (No.2) Act, 1980, with retrospective effect from 1.4.1972, was to withdraw the benefit which had already accrued to the assessee as a vested statutory right and it was this kind of retrospective amendment which sought to defeat an accrued statutory right that was perceived to be "*likely to affect the sanctity of any statutory provision and may create a state of confusion*". It is also well to remember that in that case the legislature had earlier made an attempt to deny the relief granted by the Section, by enacting Rule 19A which was held to be invalid as being a case of excessive delegation. It was this rule that was sought to be validated by making a

retrospective amendment to the Section itself and the Section was so amended as to take away the benefit that had earlier accrued to the assessee, in precisely the same manner in which Rule 19A had done *albeit* invalidly. Several assessees had planned their affairs in such a manner as to obtain the benefit of Section 80J, more so when Rule 19A had been held to be invalid as being a case of excessive delegation. In the majority of the cases, the assessees had succeeded and were allowed the relief under Section 80J in respect of the capital employed which included the borrowed capital also, which Rule 19A had unsuccessfully sought to exclude. The inequitable and onerous nature of the retrospective amendment was brought out by the learned Judge in the following paragraph:-

> *"On the other hand, it is quite clear that if the relief granted is to be withdrawn with retrospective operation from 1972, the assessees who have enjoyed the relief for all those years will have to face a very grave situation. The effect of the withdrawal of the relief with retrospective operation will be to impose on the assessee a huge accumulated financial burden for no fault of the assessee and this is bound to create a serious financial problem for the assessee. Apart from the heavy financial burden which is likely to upset the economy of the undertaking, the assessee will have to face other serious problems. On the basis that the relief was*

legitimately and legally available to the assessee, the assessee had proceeded to act and to arrange its affairs. If the relief granted is now permitted to be with-drawn with retrospective operation, the assessee may be found guilty of violation of the provisions of other statutes and may be visited with penal consequences. This position cannot be and is not disputed by the learned Attorney-General who has, however, argued that taking into consideration the peculiar facts and circumstances, penal provisions may not be enforced. This argument does not impress me. The assessee has, in any event, to run the risk and for no fault on his part has to place itself at the mercy of the authorities for facing consequences of violation of the statutory provisions, which but for the introduction of retrospective amendment, would not have been violated by the assessee."

20. The further observations on this aspect are as under:-

"Before concluding I wish to emphasise that the withdrawal with retrospective effect by the amendment of any financial benefit or relief granted by a fiscal statute must ordinarily be held to be unreasonable and arbitrary. Such withdrawal makes a mockery of a beneficial statutory provision and leads to chaos and confusion. Such withdrawal in effect results in the imposition of a levy at a future date for past years for which there was no such levy in the relevant years. The imposition of any fresh tax with retrospective effect for years for which there was no such levy is bound to operate unduly harshly on every assessee who is entitled to arrange and normally arranges his financial affairs on the basis of the law as it exists. Such retrospective taxation imposes an unjust and unwarranted accumulated burden on the assessee for no fault on his part and the assessee has to face unnecessarily without any just reason very serious financial

and other problems. Imposition of any tax with retrospective effect for years which no such tax was there, cannot also be considered to be just and reasonable from the point of view of the Revenue. The years for which levy is sought to be imposed with retrospective effect had already passed and there cannot be any proper justification for imposition of any fresh tax for those years. Such retrospective taxation is likely to disturb and unsettle the settled position; and because of such imposition of retrospective levy for the years for which there was no such levy, assessments for those years which might already have been completed and concluded will get upset. If the State is in need of more funds, the State, instead of seeking to levy any tax with retrospective effect, can always take appropriate steps to collect any larger amount so required by the imposition of higher taxes or by other appropriate methods. I have already observed that Validating Acts which seek to validate the levy of any tax with retrospective effect do not in effect impose any fresh tax with retrospective effect and Validating Acts stand on an entirely different footing. I, therefore, hold that the impugned amendment in so far as it is sought to be made retrospective with effect from the 1st day of April, 1972, is invalid and unconstitutional, though the amendment in so far as it operates prospectively is valid."

21. We cannot possibly have a different opinion when the section of the statute concerned is a beneficial provision intended to give a fiscal incentive to the assessee. Section 115JB can hardly fit into this description. We have earlier referred to the *raison d'etre* of the introduction of Chapter XII B which is titled 'Special provision relating to

certain companies'. This Chapter was introduced into the Act by the Finance Act, 1987. As per the CBDT Circular No.495 dated 22.9.1987 explaining the provisions of the Finance Act, 1987, Chapter XII B which provided for a Minimum Alternate Tax (MAT) on certain companies was introduced with the following object:-

> "*New provisions to levy minimum tax on "book profit" of certain companies:*
>
> *36.1 It is an accepted canon of taxation to levy tax on the basis of ability to pay. However, as a result of various tax concessions and incentives certain companies making huge profits and also declaring substantial dividends, have been managing their affairs in such a way as to avoid payment of income-tax.*
>
> *36.2 Accordingly, as a measure of equity, section 115J has been introduced by the Finance Act. By virtue of the new provisions, in the case of a company whose total income as computed under the provisions of the Income-tax Act is less than 30 per cent of the book profit computed under the section, the total income chargeable to tax will be 30 per cent of the book profit as computed. For the purposes of section 115J, book profits will be the net profit as shown in the profit and loss account prepared in accordance with the provisions of Schedule VI to the Companies Act, 1956, after certain adjustments. The net profit as above will be increased by income-tax paid or payable or the provision thereof, amount carried to any reserve, provision made for liabilities other than ascertained liabilities, provision for losses of subsidiary companies, etc., if the amounts are*

debited to the profit and loss account. Liabilities relating to expenditure which has been incurred or which has accrued in respect of expenses which are otherwise deductible in computing income will not be added back. The amount so arrived at is to be reduced by –

(i) amounts withdrawn from reserves if any, such amount is credited to the profit and loss account;

(ii) the amount of income to which any of the provisions of Chapter III applies, if any such amount is credited to the profit and loss account; and

(iii) the amount of any brought forward losses or unabsorbed depreciation whichever is less as computed under the provisions of section 205(1)(b) of the Companies Act, 1956, for the purpose of declaration of dividends. Section 205 of the Companies Act requires every company desirous of declaring dividend to provide for depreciation for the relevant accounting year. Further, the company is required under section 205 to set off against the profit of the relevant accounting year, the depreciation debited to the profit and loss account of any earlier year(s) or loss whichever is less.

36.3 Section 115J, therefore, involves two processes. Firstly, an assessing authority has to determine the income of the company under the provisions of the Income-tax Act. Secondly, the book profit is to be worked out in accordance with the Explanation to section 115J(1) and it is to be seen whether the income determined under the first process is less than 30 per cent of the book profit. Section 115J would be invoked if the income determined under the first process is less than 30 per cent of the book profit. The Explanation to sub-section (1) of section 115J gives the definition of the "book profit" by incorporating the requirement of section 205 of the Companies Act in the computation of the book

profit. Brought forward losses or unabsorbed depreciation whichever is less would be reduced in arriving at the book profits. Sub-section (2), however, provides that the application of this provision would not affect the carry forward of unabsorbed depreciation, unabsorbed investment allowance, business of losses to the extent not set off, and deduction under section 80J, to the extent not set off as computed under the Income-tax Act."

22. Section 115JB was introduced by the Finance Act, 2000 w.e.f. 1.4.2001 and according to the CBDT Circular No.794 dated 9.8.2000, the following was the object for which it was introduced:-

"43. *Minimum Alternate Tax on companies*:

43.1 In recent years, as the number of zero tax companies and companies paying marginal tax had grown, minimum alternate tax was levied under section 115JA of the Income-tax Act from the assessment year 1997-98. The efficacy of the existing provision, however declined in view of the exclusions of various sectors from the operation of MAT and the credit system. The Act has, therefore, modified the scheme of MAT. The existing section 115JA has been made inoperative with effect from 1st April, 2001. In its place, the Act inserts a new provision, section 115JB of the Income-tax Act.

43.2 The new provisions provide that all companies having book profits under the Companies Act, prepared in accordance with Part II and Part III of Schedule VI to the Companies Act, shall be liable to pay a minimum alternate tax at a lower rate of 7.5 per cent as against the existing

effective rate of 10.5 per cent, of the book profits. These provisions will be applicable to all corporate entities without any exception.

43.3 The new provisions further provide that for purposes of MAT, the company shall follow same accounting policies and standards as are followed for preparing its statutory account.

43.4 The amended provision discontinues the system of allowing credit for MAT in future. However, the taxes paid under the existing provisions of section 115JA shall get the credit.

43.5 The export profits under sections 10A, 10B, 80HHC, 80HHE and 80HHF are kept out of the purview of this provision as these are being phased out. The new provisions also exempt companies registered under section 25 of the Companies Act.

43.6 Certificate from an auditor has also been prescribed with a view to ascertaining the extent of book profits.

43.7 These amendments will take effect from 1st April, 2001, and will, accordingly apply in relation to the assessment year 2001-2002 and subsequent years."

23. There is a marked difference in the nature and character of a Section such as Section 80J which was considered by **A.N. Sen, J** in ***Lohia Machines*** (*supra*) and those of Section 115J/115JB of the Act. Whereas Section 80J was a Section intended to give a fiscal incentive or relief for assessees who set up industrial undertakings in notified

backward areas, Section 115J/115JB targeted corporate entities for imposing a Minimum Alternate Tax on their book profit. It was noticed by the legislature that as a result of various tax concessions and incentives certain companies making huge profits and also declaring substantial dividends have been managing their affairs in such a way as to avoid payment of income tax. Recognizing that it was an accepted canon of taxation to levy tax on the basis of the ability to pay, Section 115J was enacted as a measure of equity to impose tax on profit-making, dividend-distributing companies. The object of Section 115J was thus quite different from the object for which Section 80J was enacted. Section 115JB was inserted having regard to the background that at the relevant time, the number of zero-tax companies and companies paying only marginal tax had grown and, therefore, the efficacy of the existing provision i.e. Section 115JA which had been introduced from 1.4.1997, had declined in view of the exclusion of various sectors from the operation of MAT. It was, therefore, thought by the Parliament that with effect from 1.4.2001, a new provision should take the place of Section 115JA. This Section was made applicable to all corporate entities without

any exception. The attempt was to widen the tax base in respect of these zero-tax companies as indicated by the discontinuance of the system of allowing MAT credit in the future and the phasing out of the deductions under Sections 10A, 10B, 80HHC, 80HHE and 80HHF from the purview of Section 115JB.

24. It would be incorrect to treat the provisions of Section 80J and the provisions of Section 115JB on par and require the same standards to be fulfilled to enact a valid legislative amendment with retrospective effect in both of them. It is apparent from Section 115JB that the object was to tax the so-called zero-tax companies who did not pay any income tax though they earned huge profits and even distributed dividends. By imposing such a tax on the book profit of such companies, Parliament was widening its revenue collection and it can hardly be suggested that it was granting any benefit to those companies. On the contrary, whatever benefits such companies were earlier enjoying were sought to be withdrawn or severely curtailed by the introduction of Chapter XII B and the Minimum Alternate Tax provisions. It would be erroneous and inaccurate to consider any deduction allowed while computing the book profit of the company as a

benefit or relief granted to it in the same manner in which Section 80J conferred a benefit upon an assessee who set up an industrial undertaking in a notified backward area. The scheme and purpose are so different that a comparison of both the provisions would be totally off the mark. Explanation 1 provided for computation of the book profit and initially there was admittedly no provision to add back the provision made in the profit and loss account for diminution in the value of an asset. It was wrongly assumed by the tax authorities that a provision for bad and doubtful debts was a provision for meeting an unascertained liability. The true position in law was pointed out by the Supreme Court in its judgment in ***HCL Comnet*** *(supra);* thereafter the legislature stepped in by introducing Clause (i). The reason was to take a lesson out of the judgment of the Supreme Court and to deny the deduction of a provision made not only for bad and doubtful debts but also for the diminution in the value of any asset. It must be recalled that the argument of the companies, accepted by the Supreme Court, was that a provision for doubtful debts is not a provision for meeting an unascertained liability but was a provision for diminution in the value of the debt due to non-

recovery or the debt becoming bad. It is of some significance that the retrospective amendment did not confine itself to adding back the provision for bad and doubtful debts; it authorized the Assessing Officer to add back the provisions made for the diminution in the value of 'any asset'. This reflects the anxiety of the legislature to curb the tendency of companies to make downward revisions in the value of their assets – both movable and immovable – so as to neutralise or reduce the book profit. The amendment is thus an attempt to prevent companies from making use of the absence of any provision in Section 115JB permitting the adding back of a provision made for diminution in the value of any asset in order to offset or reduce the book profit. The amendment must be visualized in the larger perspective i.e. that the legislature thought it inequitable that companies earning huge profits and even declaring dividends were not paying any income tax. The basis of computing the total income of such companies was changed. They were no longer entitled to compute their total income in accordance with the other provisions of the Income Tax Act, which are normally applicable. They were to pay tax on their book profit which was deemed to be the total income. If regard is had to the

broader canvass of Chapter XII B, as we must, it would be difficult to hold that the absence of any provision in Explanation 1 to add back the provision for doubtful debts (on the footing that it was a provision for meeting an ascertained liability) was not an incentive or relief consciously allowed to the zero-tax companies in the same manner in which the relief under Section 80J was allowed. The *sequitur* of this conclusion is that the very weighty observations of **A.N. Sen, J**, made in the context of Section 80J and the retrospective amendment made by the Finance (No.2) Act, 1980 with effect from 1.4.1972, would be out of place in the context of Chapter XII B of the Income Tax Act. If it is not a benefit, deduction or relief allowed by the legislature, there is no question of applying those observations by saying that the benefit etc. cannot be taken away retrospectively.

25. We will now turn to the second judgment strongly relied upon by the counsel for the petitioner. That is a decision of the Bombay High Court in ***CIT v. Hico Products (P.) Ltd., (1991) 187 ITR 517***. A Division Bench of the High Court conceded that a taxing statute which validates the imposition of a tax earlier held invalid by a court of law or an

amendment to remove the lacuna and clarify the legislative intent, even if it is enacted retrospectively can be considered as justified. It however, held that there should be compelling reasons for making a retrospective amendment in public interest and in the absence of reasons of public interest it runs the risk of being unreasonable or arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution. That was also a case of retrospective amendment made w.e.f. 1.04.1962 by an amending act passed in 1980, to amend Section 35 of the Income Tax Act. This judgment of the Bombay High Court was reversed in appeal by the Supreme Court in ***CIT Vs. Hico Products (P) Ltd., (2001) 247 ITR 797 (SC)***. The Supreme Court held that the retrospective amendment which provided that where a deduction for scientific expenditure had been allowed in respect of a capital asset to an assessee under Section 35, no depreciation shall be allowed on the said capital asset for the same or any other previous year, was merely clarificatory and valid. The Supreme Court placed reliance on its earlier judgment in the case of ***Escorts Ltd. Vs. Union of India, (1993) 199 ITR 43***. In the judgment of Escorts Ltd. (supra) it was held that even before the 1980 amendment the section did

not permit depreciation in respect of a capital asset acquired for the purpose of scientific research and which had been written off entirely. It was opined that the amendment did not effect any change. Even conceding that, having regard to the view expressed by the Supreme Court in ***Escorts Ltd.*** (*supra*), the Supreme Court had not occasion to examine the other part of the judgment of the Bombay High Court (supra) which invalidated the retrospective amendment (on the ground that the amendment brought about a change in the law by denying retrospectively the right of an assessee to claim depreciation for a long period of 18 years and that no public purpose was shown justifying the retrospective taking away of the benefit which was available to the assessees from 1946 and further that it would result in a heavy financial burden on the assessees as also unreasonably affect the right of the assessee to carry on business) the distinction pointed out earlier between a provision which confers a benefit or allowance to an assessee and a provision which essentially imposes a tax on a class of assessees who were considered by the legislature to be unjustly falling outside the ambit of the tax would hold good and would answer the views expressed by the Bombay High Court. It is emphasised

here that there is considerable difference between provisions conceived as incentive or relief provisions, (enacted with a view to foster industrial growth and scientific research activities in the country) and those which essentially seek to bring within the purview of the fiscal legislation companies which did not pay any tax, though earning substantial profits and also dividends. If this essential difference between the two types of provisions is kept in mind, it will be apparent that there can be no question of the retrospective amendment under challenge before us not serving the larger public interest. The provisions of Chapter XII B of the Income Tax Act seek to achieve a larger public interest by removing the inequalities in the tax regime by making companies with the ability to pay tax on account of earning substantial profits, to pay tax and thereby contribute to the fiscal health of the economy. If this is not in the larger public interest, we do not see what can be.

26. We may now turn to the third decision on which heavy reliance was placed on behalf of the petitioner. That is the judgment of the Gujarat High Court in ***Avani Exports and Ors. Vs. CIT & Ors., (2012) 348 ITR 391***. The amendment made to section 80HHC of the Income Tax Act by

the Taxation Laws (2nd Amendment) Act, 2005 was challenged to the extent of its retrospectivity. Several grounds were argued before the Gujarat High Court but so far as the present petition before us is concerned we need to refer only to the challenge to the retrospectivity of the amendment. The High Court upheld the prospective nature of the amendment but struck it down to the extent that it operated retrospectively. It observed that although in a taxing statute laxity is permissible and a benefit already given to the assessees can be taken away or curtailed, that can be done only with prospective effect and not retrospectively. The Court noticed that a citizen has a right to arrange his business in a manner which accorded with the law and claim a benefit accordingly; the benefit cannot be taken away by law with retrospective effect by imposing a new condition which the citizen at that stage is incapable of complying, whereas if such promise (by the legislature) was not there, the citizen could have arranged his affairs in a different way to get the same or at least some part of the benefit. In that case, the view taken by the assessees on the interpretation of the statutory provisions was upheld by the Income Tax Appellate Tribunal which interpreted those

provisions in a way beneficial to the assessees. According to the Finance Minister, it was never the intention of the legislature to give such a benefit to the assessees. Therefore, a retrospective amendment was made taking away the benefit if certain conditions are not fulfilled. In this factual background, the High Court held that it was open to the revenue to challenge the decision of the Tribunal before a higher forum but simply because there would be a delay in disposal of such an appeal and without actually filing an appeal to the High Court or the Supreme Court, the revenue cannot curtail the benefit by proposing an amendment incorporating new conditions from an earlier date. It was further noted that wrong orders passed by the Tribunal under the statutory provisions which were also enacted by the Parliament, should be challenged by the aggrieved party before the appropriate High Court and still if it is aggrieved, it should carry the matter to the Supreme Court. In effect what the High Court held was that an order of a judicial Tribunal such as the Income Tax Appellate Tribunal was not final on a matter of interpretation of the statutory provisions and that its orders could be challenged before the High Court and the Supreme Court, before proceeding to make a

retrospective amendment. This was actually articulated by the High Court by saying that *"…….. such curtailment with retrospective effect cannot be made for overcoming the effect of a judicial decision without taking recourse to the provision of appeal prescribed by law on the plea of delay"*.

27. We are not sure if this decision can avail of the petitioner before us. Again it needs to be pointed out that Section 80HHC is a Section which grants deduction in respect of profits earned from exports. A particular view canvassed by the assessees on the interpretation of the Section was upheld by the Tribunal. That view was sought to be nullified by an amendment with retrospective effect, on the ground that it was never the intention of the Parliament to allow such a benefit. Some further conditions which were not there at the earlier date were sought to be imposed by the retrospective amendment. The main objection of the High Court, with respect, appears to be that the order of the Tribunal could have been challenged by the revenue before the High Court and the Supreme Court before proceeding to change the law and to impose further conditions with retrospective effect. We do agree that the view expressed

by the Income Tax Appellate Tribunal on the interpretation of statutory provisions may not be final and may not enjoy the same authority as that of a High Court or Supreme Court, and this we say with due respect to the Tribunal, but we are not able to take the proposition forward by saying that the revenue is bound to wait till the last word is said by the High Court or Supreme Court before changing the law with retrospective effect. It need not be so uniformly in all cases. Section 80HHC was a very important relief provision and with booming exports the tax implications of the Section were very high. Parliament may have very well thought that considering the revenue implications the earlier the law is changed the better it would be for all, and for the sake of certainity and clarity it may be desirable that a retrospective amendment to the law is made as expeditiously as possible. If the suggestion is that the legislature has to necessarily wait till the Supreme Court pronounced its view and assuming the Supreme Court endorsed the view of the Tribunal, only then can the legislature make a retrospective amendment, then there would be a long lapse of time covering several years causing delay in the collection of tax and consequential burden of interest. There is nothing which prevents the

legislature from giving effect to its intention at the earliest point of time so that there is certainty and clarity in the law. The Court cannot impose its moral standards in such matters as there is no equity about a tax.

28. So far as the other aspects are concerned, we may examine them now.

29. We shall now consider the judgment of the Supreme Court in ***M/s. Krishnamurthi & Co. v. State of Madras*** (*supra*). Entry 47 of the First Schedule to the Madras General Sales Tax Act levied sales tax on all kinds of mineral oils, including non-lubricants, at the rate mentioned in that entry. The Madras High Court in a judgment reported in ***Burmah Shell Oil Storage and Distributing Company of India Ltd. v. State of Tamil Nadu, (1968) 21 STC 227*** held that this entry did not include furnace oil which was a non-lubricant mineral oil, since the language used in the entry was inappropriate for levying tax on sale of non-lubricant mineral oils. The First Schedule was, therefore, amended by an Amending Act of 1967 to rectify and remove the defect in the language therein as pointed out by the High Court and to validate the past levy and

collection of tax in respect of all kinds of non-lubricating mineral oils, including furnace oil at the appropriate rate with retrospective effect from 1.4.1964. Entry 47A was inserted in the Schedule to provide for the rate of sales tax in respect of all kinds of mineral oils (other than those falling under item 47 and not otherwise provide for in this Act) including furnace oil. The retrospective amendment was challenged unsuccessfully before the Madras High Court and on further appeal to the Supreme Court, one of the principal contentions advanced on behalf of the dealer was that the retrospective operation of entry 47A was violative of article 19(1)(g) of the Constitution as it imposed an unreasonable restriction on the right of the appellants to carry on their trade and business. Rejecting the contention, **H.R. Khanna, J**, speaking for the Bench of three judges noted that the amending act was intended to cure an infirmity as revealed by the judgment of the High Court and to validate the past levy and collection of tax in respect of certain kinds of non-lubricating mineral oils, including furnace oil. The legislature, it was noticed, for this purpose split the original entry 47 into two entries, i.e., 47 & 47A and made the position clear that furnace oil would also suffer the same rate of tax as

non-lubricating mineral oil. Rejecting the other argument that the tax levied by entry 47A was a fresh tax, it was held that since the object of the amending act was "*to remove and rectify the defect in phraseology or lacuna of other nature and also to validate the proceedings, including realization of tax, which have taken place in pursuance of the earlier enactment which has been found by the court to be vitiated by an infirmity*", it was a permissible mode of legislation. It was observed that such an amending and validating Act in the very nature of things has a retrospective operation. An earlier judgment of the Supreme Court in the case of **Union of India vs. Madan Gopal Kabra, *AIR 1954 SC 158*** was noticed, in which it was held by the Supreme Court that the power to impose taxes on income comprehended the power to impose income tax with retrospective operation even for a period prior to the Constitution.

30. The facts of the present case bear close resemblance to the facts in the case of ***M/s. Krishnamurthi & Co.*** (*supra*). Just as the Madras High Court in that case found that entry 47 in the First Schedule to the MGST Act was not wide enough to include furnace oil which necessitated a retrospective amendment by insertion of entry 47A to clearly provide for

sales tax at the same rate on all mineral oils including furnace oil, in the case under consideration too after the Supreme Court pointed out in ***HCL Comnet*** (*supra*) that clause (c) of Explanation 1 was inadequate to bring within its fold a provision for diminution in the value of any asset, the legislature stepped in to cure the lacuna by adding, with retrospective effect, clause (i) to the aforesaid Explanation to unambiguously provide for a provision for the diminution in the value of an asset to be added back to the book profit. On the question whether, in the absence of anything in the statement of objects and reasons to show the intention or to otherwise justify the amendment, it can be said that the legislature always intended to add-back any provision made for diminution in the value of any asset, we have already expressed our view.

31. In ***Government of AP vs. Hindustan Machine Tools Ltd., AIR 1975 SC 2037*** the question arose as to the validity of a retrospective amendment in the definition of the word "house" appearing in Section 2(15) of the Andhra Pradesh Gram Panchayat Act, 1964. The definition of the word "house" as it originally stood for the purpose of levy of house tax did not include certain buildings. An amendment was made in the

year 1974 to amend the definition so as to include buildings not originally included in the definition. A building which did not have a main entrance on the common way was included in the definition by the amendment. The amending Act was made retrospective to validate – notwithstanding any judgment, decree or order to the contrary – as if the definition as amended was always enforced. It was held that the amendment was not an encroachment on the judicial power by the legislature. The Supreme Court held that the amendment removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances. The present case is also not one of encroachment of the legislature upon the judicial power. Parliament did not attempt to validate the add-back of the provision for bad and doubtful debts by validating the action of the income tax authorities without changing the statutory basis. The provision for bad and doubtful debts, which was described by the Supreme Court in ***HCL Ltd.*** (*supra*) as one for diminution in the value of an asset, i.e., debt, was provided for as a separate item to be added to the book profit of the company by insertion of clause (i) with retrospective effect. If clause (i) had always been there

in Explanation 1, the Supreme Court would not have held that the provision for bad and doubtful debts cannot be added back. The amending Act cured the statutory provision of the vice from which it suffered and it was given retrospective effect which was quite within the competence of the legislature.

32. The judgment of the Supreme Court in ***National Agricultural Co-operative Marketing Federation of India Ltd. Vs. Union of India, (2003) 260 ITR 548*** was strongly relied upon by the Standing Counsel appearing for the revenue. He contended that this judgment covered almost all aspects of the matter. A careful perusal of the judgment confirms the claim of the learned Standing Counsel; in addition it was observed in this case that the test of the length of time covered by the retrospective operation cannot by itself necessarily be a decisive test. It was held that notice must be taken of the surrounding facts and circumstances relating to the taxation and the legislative background of the provision.

33. In view of the forgoing discussion, we hold that the amendment made to Explanation 1 to Section 115JB of the Income Tax Act, 1961 by

the Finance (No.2) Act, 2009 by insertion of clause (i) with retrospective effect from 1.4.2001 is not ultra vires or unconstitutional.

34. The only other contention which calls for our attention is the one based on different treatment given to different assessment years. It is pointed that the amended provision could not even be applied in the ordinary course in respect of the assessment years 2001-02 and 2002-03 for the reason that the time limit for reopening these assessments ended on 31.3.2008 and 31.3.2009 respectively. It is further pointed out that the amendment was introduced after these dates and only affects assessees in whose case some reassessment or appellate proceedings were pending at the time of introduction of the Bill. On this basis, it is argued that the sole reason for the amendment "*appears to arm some assessing officers with a tool to support a prima face erroneous action of adding the provision for bad and doubtful debts to the book profit without any statutory support for the same*". This aspect of the matter has been dealt with in the judgment of Supreme Court in ***National Agricultural Co-operative Marketing Federation of India Ltd.*** (*Supra*). The following passage from the judgment is relevant:-

"It is hardly likely on the given facts, that assessments had been concluded on the basis of the decision in Kerala Marketing case MANU/SC/2021/1998 : [1998]231ITR814(SC) and the period for reopening such assessments had become time barred. In any event the 1998 amendment cannot be construed as authorizing the revenue authorities to reopen assessments when the reopening is already barred by limitation. The amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of any such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provision authorises the Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred-S.S. Gadgil v. Lal & Co. MANU/SC/0122/1964 : [1964]53ITR231(SC) ; see also J.P. Jani, ITO v. Induprasad Devshanker Bhatt (supra); K. M. Sharma v. ITO MANU/SC/0312/2002 : [2002]254ITR772(SC). Different considerations would arise if, by the amendment even final assessments were unambiguously sought to be opened-Commercial Tax Officer v. Biswanath Jhunjhunwalla, MANU/SC/0097/1997 : AIR1997SC357 . That is not the case here."

These observations are a recognition of the consequence that is inevitable in the case of all retrospective amendments, which by their very nature, can be lawfully applied only to assessments that are open and pending

either before the Assessing Officer or in appeal proceedings. In the case of completed assessments the amendment can be invoked only if reopening of the assessments under Section 147 of the Act or modification of the assessments under any other provision of the Act is permissible. The provisions relating to limitation and finality of assessments cannot be disturbed, as they are also the result of legislation by Parliament as the Supreme Court itself has recognised. Different considerations would, therefore, arise if by the amendment even final assessments are sought to be reopened. The petitioner can have a grievance and it can be successfully ventilated, only if the revenue authorities seek to disturb the finality of a completed assessment, overlooking the provisions of the Act relating to reopening of assessments. We, therefore, do not think that there is any substance in the contention of the petitioner.

35. With regard to the claim of the petitioner for refund of the tax paid on the basis of the revised computation of the income, the contention is that this was neither advance tax nor self-assessment tax. It is further contended that the petitioner did not file any revised returns for any of the

three assessment years for which taxes were paid on 30.10.2009; for the assessment years 2002-03 and 2003-04 there is no provision in the Income Tax Act enabling the petitioner to *suo motu* file a return and pay the tax. It is therefore, contended that the amount deposited on 30.10.2009 cannot be appropriated as tax by the Government and the same ought to be refunded.

36. This contention is not sought to be linked to the challenge to the validity of the retrospective amendment because the claim for refund can be independently raised even if the amendment is held to be valid, on the ground that there is no provision in the Act for a voluntary payment of the tax without filing a return or a revised return or pursuant to an order of assessment of the income accompanied by a notice of demand. However, the prayer cannot be entertained in these proceedings since there is a separate remedy prescribed in Chapter XIX of the Act. Section 237 deals with refunds and states that if any person satisfies the assessing officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with

which he is properly chargeable under the Act for that year, he shall be entitled to a refund of the excess. Section 239 says that the claim for refund shall be made in the prescribed form, verified in the prescribed manner. Under clause (c) of sub-section (2), the claim has to be preferred within a period of one year from the last day of the assessment year. In the petitioner's case such periods have expired in respect of the three assessment years i.e. 2002-03, 2003-04 and 2009-10. The petitioner however, is not without remedy as Section 119(2)(b) empowers the CBDT, if it considers desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income tax authority (other than CIT(Appeals)) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law. It is open to the petitioner to avail of this remedy, if so advised. We refrain from making any observation touching upon the merits of the claim, if and when made. We may also add that we have no information as to any further proceedings relating to the three

assessment years.

37. For the above reasons the writ petition is dismissed but in the circumstances with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

February 28, 2013
vld/bisht/gm