IN THE HIGH COURT OF CALCUTTA

ITA No.353 of 2004

M/s PEICO ELECTRONICS & ELECTRICALS LTD
(NOW KNOWN AS PHILIPS INDIA LTD)

Vs

COMMISSIONER OF INCOME-TAX, WEST BENGAL-IV & ANR

Bhaskar Bhattacharya and Sambuddha Chakrabarti, JJ

Dated: August 12, 2011

Appellant Rep by: Dr. D Pal, Mr. Abhratosh Majumdar, Mr. Ananda Sen, Mr. Somak Basu
Respondent Rep by: Mr. R N Bandopadhyay, Mrs. Smita Das Dey

JUDGEMENT

Per: Bhaskar Bhattacharya:

This appeal under Section 260A of the Income-tax Act, 1961 is at the instance of an assessee and is directed against order dated 30 th January, 2004, passed by the Income-tax Appellate Tribunal, "D" Bench, Kolkata, in ITA No.1629/Kol/2001 relating to the Assessment Year 1990-91 allowing the appeal filed by the Revenue.

Being dissatisfied, the assessee has come up with the present appeal.

The facts giving rise to filing of this appeal may be summed up thus:

a) With the return of income filed by the appellant, a computation under Section 115J of the Act was furnished wherein an adjustment as contemplated in Item No. (iv) of Explanation to Section 115J(1A) was claimed by the assessee to the extent of an amount of Rs.13,85,66,479/- to reduce the adjusted book profit shown at Rs.4,57,78,389/- and in this way, the assessee had arrived at the book profit to nil.

b) According to the assessee, there was no tax liability under Section 115J of the Act. However, the claim of adjustment under Clause (iv) of the Explanation to Section 115J (1A) was not accepted by the Assessing Officer, inasmuch as, in his opinion, an adjustment of Rs.2,61,04,656/- was only to be made under Clause (iv) of Explanation to Section 115J(1A) being the loss brought forward from the earlier year, i.e. the year ended on 31 st March, 1989.

c) In other words, according to the Assessing Officer, the loss of Rs.2,61,04,656/-, as appearing in the statutory profit and loss account prepared in accordance with Part-II and Part-III of Schedule VI of the Companies Act by the assessee, is only to be reduced from the net profit being lower than the unabsorbed depreciation of Rs.13,85,66,479/- as claimed in the profit and loss account for the year ending on

31 st March, 1989 in accordance with Clause (iv) of Explanation to Section 115J(1A) of the Act.

d) Being aggrieved, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals), who accepted the contention of the appellant that for the purpose of Clause (iv) of Explanation to Section 115J(1A) of the Act, the amount of depreciation claimed at Rs.13,85,66,479/- is to be set off against the profit of the year ended on 31 st March, 1990, i.e. the year under consideration, inasmuch as, the same is lower than the loss of Rs.16,48,74,073/- shown before the adjustment or transfer from reserve account and consequently, directed the Assessing Officer to exclude the amount of Rs.13,85,66,473/- being the depreciation and being the lower of the amount of loss or the depreciation from the profits of the year under consideration for the purpose of computation of book profit under Section 115J of the Act.

e) Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and by the order impugned herein, the said Tribunal has set aside the order passed by the Commissioner of Income-tax (Appeals) and has restored the order of the Assessing Officer.

f) According to the Tribunal below, the assessee had adjusted an amount of Rs.2,61,04,656/- in the profit and loss account prepared in accordance with Part-II and Part-III of Schedule VI of the Companies Act and the contention that the assessee disclosed a loss of Rs.16,48,74,073/- after charging depreciation of Rs.13,85,66,479/- for the year ending on 31 st March, 1989 was of no assistance to the assessee inasmuch as an amount of Rs.16,48,74,073/- had been disclosed by the assessee before making any adjustment of the amount transferred from the reserve. The Tribunal held that the amount of loss shown by the assessee after adjustment of the amount transferred from reserve is of Rs.2,61,04,656/- which was claimed to be carried forward to the subsequent year and the net result ultimately determined by the assessee at Rs.2,61,04,656/- being the loss after adjusting the amount transferred from reserve being lower than the amount of depreciation charged to the profit and loss account as per Clause (iv) of the Explanation to Section 115J(1A), the assessee is only entitled to reduce the net profit shown in the profit and loss account of the current year.

g) Being dissatisfied, the assessee has come up with the present appeal.

A Division Bench of this Court at the time of admission of the appeal formulated the following substantial questions of law:

"(i) Whether on a true and proper interpretation of Section 115J(1A) and Clause (iv) of Explanation to Section 115J in determining the amount of loss or the depreciation what is required to be set off against the profit for the relevant previous year is the amount which according to the provisions of Clause (b) of the first proviso to Sub-section (1) of Section 205 of the Companies Act is applicable in accordance with the alternative modes for such determination provided under the Companies Act.

"(ii) Whether in view of the admitted position that for the previous year of the 15 months period ending 31.3.89 the loss of the appellant is Rs.16,48,74,073/- and for the same period the depreciation is Rs.13,85,66,473/-, the amount of depreciation

therefore being less than the quantum of loss should be required to be set off in view of clause (iv) of the Explanation to Section 115J of the Act."

In order to appreciate the points involved in this appeal, it will be appropriate to refer to the provisions contained in Section 115J of the Act as well as Section 205 of the Companies Act which are quoted below:

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

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

Explanation. - For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (1-A), as increased by -

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

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

(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

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

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

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

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

(h) the amount credited to the reserve account under Section 80-HHD, to the extend that amount has not been utilised within the period specified in sub-section (4) of that section;

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

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

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

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

(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; or

(iii) the amounts [as arrived at after increasing the net profit by the amounts referred to in clauses (a) to (f) and reducing the net profit by the amounts referred to in clauses (i) and (ii)] attributable to the business, the profits from which are eligible for deduction under Section 80-HHC or Section 80-HHD; so, however, that such amounts are computed in the manner specified in sub-section (3) or sub-section (3-A) of Section 80-HHC or sub-section (3) of Section 80-HHD, as the case may be; or

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

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

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

Provided that:

(a) If the company has not provided for depreciation for any previous financial year or years which falls or fall after the commencement of the Companies (Amendment) Act, 1960, it shall, before declaring or paying dividend for any financial year provide

for such depreciation out of the profits of that financial year or out of the profits of any other previous financial year or years;

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

(c) the Central Government may, if it thinks necessary so to do in the public interest, allow any company to declare or pay dividend for any financial year out of the profits of the company for that year or any previous financial year or years without providing for depreciation:

Provided further that it shall not be necessary for a company to provide for depreciation as aforesaid where dividend for any financial year is declared or paid out of the profits of any previous financial year or years which falls or fall before the commencement of the Companies (Amendment) Act, 1960.

(1-A) The Board of Directors may declare interim dividend and the amount of dividend including interim dividend shall be deposited in a separate bank account within five days from the date of declaration of such dividend.

(1-B) The amount of dividend including interm dividend so deposited under sub-section (1-A) shall be used for payment of interim dividend.

(1-C) The provisions contained in Sections 205, 205-A, 205-C, 206, 206-A and 207 shall, as far as may be, also apply to any interim dividend.]

(2) For the purpose of sub-section (1), depreciation shall be provided either -

(a) to the extent specified in Section 350; or

(b) in respect of each items of depreciable asset, for such an amount as is arrived at by dividing ninety-five per cent of the original cost thereof to the company by the specified period in respect of such asset; or

(c) on any other basis approved by the Central Government which has the effect of writing off by way of depreciation ninety-five per cent of the original cost to the company of each such depreciable asset on the expiry of the specified period; or

(d) as regards any other depreciable asset for which no rate of depreciation has been laid down by3 [this Act or any rules made thereunder] on such basis as may be approved by the Central Government by any general order published in the Official Gazette or by any special order in any particular case:

Provided that where depreciation is provided for in the manner laid down in clause (b) or clause (c), then, in the event of the depreciable asset being sold, discarded,

demolished or destroyed the written down value thereof at the end of the financial year in which the asset is sold, discarded, demolished or destroyed, shall be written off in accordance with the proviso to Section 350.

(2-A) Notwithstanding anything contained in sub-section (1), on commencement of the Companies (Amendment) Act, 1974, no dividend shall be declared or paid by a company for any financial year out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), except after the transfer to the reserves of the company of such percentage of its profits for that year, not exceeding ten per cent., as may be prescribed:

Provided that nothing in this sub-section shall be deemed to prohibit the voluntary transfer by a company of a higher percentage of its profits to the reserves in accordance with such rules as may be made by the Central Government in this behalf.

(Emphasis supplied by us).

The Supreme Court in the case of *Apollo Tyres Ltd. vs. CIT, reported in AIR 2002 SC 2131* had the occasion to consider the question whether an Assessing Officer while assessing a company for income tax under Section 115-J of the Income Tax Act can question the correctness of the profit and loss account prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the Companies Act. In that context, the Apex Court made the following observations:

“6. For deciding this issue, it is necessary for us to examine the object of introducing Section 115-J in the IT Act which can be easily deduced from the Budget Speech of the then Hon. Finance Minister of India made in the Parliament while introducing the said Section which is as follows:

"It is only fair and proper that the prosperous should pay at least some tax? The phenomenon of so-called "zero-tax" highly profitable companies deserves attention. In 1983, a new section 80VVA was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby every company will to have to pay a "minimum corporate tax" on the profits declared by it in its own accounts. Under this new provision, a company will pay tax on at least 30% of its book profit. In other words, a domestic widely held company will pay tax of at least 15% of its book profit. This measure will yield a revenue gain of approximately Rs. 75 crores."

7. The above Speech shows that the income tax authorities were unable to bring certain companies within the net of income-tax because these companies were adjusting their accounts in such a manner as to attract no tax or very little tax. It is with a view to bring such of these companies within the tax net that Section 115-J was introduced in the IT Act with a deeming provision which makes the company liable to pay tax on at least 30% of its book profits as shown in its own account. For the said purpose, Section 115-J makes the income reflected in the companies books of accounts as the deemed income for the purpose of assessing the tax. If we examine the said provision in the above background, we notice that the use of the words "in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act" was made for the limited purpose of empowering the assessing

authority to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, an assessing officer under the IT Act has to accept the authenticity of the accounts with reference to the provisions of the Companies Act which obligates the company to maintain its account in a manner provided by the Companies Act and the same to be scrutinised and certified by statutory auditors and will have to be approved by the company in its General Meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the Companies Act. In spite of all these procedures contemplated under the provisions of the Companies Act, we find it difficult to accept the argument of the Revenue that it is still open to the assessing officer to re-scrutinise this account and satisfy himself that these accounts have been maintained in accordance with the provisions of the Companies Act. In our opinion, reliance placed by the Revenue on sub-section (1A) of Section 115-J of the IT Act in support of the above contention is misplaced. Sub-section (1A) of Section 115-J does not empower the assessing officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the Companies Act which mandate, according to us, is bodily lifted from the Companies Act into the IT Act for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income-tax. Beyond that, we do not think that the said sub-section empowers the authority under the Income-tax Act to probe into the account accepted by the authorities under the Companies Act. If the statute mandates that income prepared in accordance with the Companies Act shall be deemed income for the purpose of Section 115-J of the Act, then it should be that income which is acceptable to the authorities under the Companies Act. There cannot be two incomes one for the purpose of Companies Act and another for the purpose of income tax both maintained under the same Act. If the legislature intended the assessing officer to reassess the company's income, then it would have stated in Section 115-J that "income of the company as accepted by the assessing officer". In the absence of the same and on the language of Section 115-J, it will have to held that view taken by the tribunal is correct and the High Court has erred in reversing the said view of the tribunal.

8. Therefore, we are of the opinion, the assessing officer while computing the income under Section 115-J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The assessing officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the assessing officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115-J."

(Emphasis and underline supplied by us).

A Three-Judge-Bench of the Supreme Court in the case of *Surana Steels Pvt. Ltd vs. Deputy Commissioner of Income-tax and others, reported in AIR 1999 SC 1455* has in this connection laid down the meaning of the word "loss" as used in the provisions of the Companies Act and has held that "loss" includes depreciation. The following observations of the Court in the said case are relevant and quoted below:

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

(Emphasis supplied by us).

In the case before us, the admitted position is that for the previous year ending on March 31, 1989, the loss of the appellant was shown as Rs.16,48,74,073/-. For the selfsame period, the amount of depreciation claimed was Rs.13,85,66,473/-. The question before us is whether the amount of depreciation being less than the amount of loss, should be required to be set off, in terms of Clause (iv) of the Explanation to Section 115J of the Act.

The answer to the aforesaid question has been clearly given by the aforesaid two decisions of the Supreme Court quoted above. Once loss is held to be arrived at after taking into account depreciation, there is no scope of disputing the contention of Dr. Pal, the learned senior counsel appearing for the appellant that the amount of depreciation of Rs. 13,85,66,473/- is to be set off in terms of clause (iv) of the Explanation to Section 115 J of the Act. Thus, it was the duty of the Assessing Officer to set off the said amount as the said duty falls within the purview of *the limited power of making increases and reductions as provided for in the Explanation to the said section.*

We, therefore, find that the Tribunal below erred in law by not appreciating the aforesaid provisions of law and illegally set aside the order of the CIT (Appeals).

We, consequently, set aside the order of the Tribunal below and restore the one passed by the CIT (Appeals) on the above question. The appeal is allowed by answering both the questions in the affirmative and against the Revenue.

In the facts and circumstances, there will be, however, no order as to costs.