

**IN THE HIGH COURT OF GUJARAT AT
AHMEDABAD**

**TAX APPEAL No. 37 of 2017
With
TAX APPEAL No. 118 of 2017**

FOR APPROVAL AND SIGNATURE:
HONOURABLE Mr. JUSTICE M.R. SHAH
and
HONOURABLE Mr. JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

PR. COMMISSIONER OF INCOME-TAX-2....Appellant(s)
Versus
SURAT TEXTILE MILLS LTD.....Opponent(s)

Appearance :

Mr SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1
Mr JP SHAH, Sr Advocate with Mr MANISH J SHAH, CAVEATOR for the Opponent(s) No. 1

CORAM: HONOURABLE Mr. JUSTICE M.R. SHAH
and
HONOURABLE Mr. JUSTICE B.N. KARIA

17th February 2017

COMMON JUDGMENT (PER : HONOURABLE Mr. JUSTICE M.R. SHAH)

As a common question of law and facts arise in both these Tax Appeals with respect to the same assessee, but with respect to different assessment years, both these Appeals are heard together and disposed of by this common judgment and order.

2. Feeling aggrieved and dissatisfied with the *impugned* judgment and order dated 23rd May 2016 passed by the learned Income Tax Appellate Tribunal, Ahmedabad [**“Tribunal”** for short] passed in ITA No. 3215/AHD/2015 for Assessment Year 2012-2013, by which the learned Tribunal has allowed the said Appeal preferred by the assessee and set-aside the action of Assessing Officer, confirmed by the learned CIT [A], in disallowing the deduction of alleged accumulated unabsorbed depreciation of earlier years amounting Rs. 27,36,90,817/= while computing the book profit of Rs. 27,51,00,602/= for the purpose of Section 115JB of the Income-tax Act, 1961 [hereinafter referred to as, **“the**

Act”], the Revenue has preferred Tax Appeal No. 37 of 2017 with the following proposed question of laws :

[A] “Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that credit amounts lying in funds of capital nature, including Reserve & Surplus, against which the debit balance of profit and loss account were liquidated as per the sanctioned rehabilitation scheme under the Sick Industrial Companies [Special Provisions] Act, 1985, would make no difference and loss brought forward or unabsorbed depreciation, as standing before rehabilitation plan, shall be reduced from book profited u/s. 115JB of the I.T Act particularly in view of the facts that loss brought forward stood set off from these funds including reserve and surplus ?”

[B] “Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that restructuring credits brought by the

assessee to the profit and loss account against accumulated profit and loss/debit balance, while giving effect to the scheme sanctioned by the BIFR would not extinguish alleged loss and the depreciation from the accounts of the assessee in actual terms ?”

2.1 Now so far as Tax Appeal No. 118 of 2017 preferred by the Revenue is concerned, it is arising out of the judgment and order dated 29th February 2016 passed by the learned Tribunal in ITA No. 1469/Ahd/2015 for A.Y 2010-2011 by which, the learned Tribunal has allowed the said Appeal preferred by the assessee by *quashing* and setting aside the order passed under Section 143 (3) read with Section 263 of the Act by which, the Assessing Officer disallowed a similar deduction claimed under Section 115JB of the Act for A.Y 2010-2011.

3. For the sake of convenience, the facts emerging in Tax Appeal No. 37 of 2017 for A.Y 2012-2013 are narrated hereunder :

3.1 That the assessee company is engaged in the business of manufacturing of Polyester chips and Polyester Yarn and property development. The assessee filed its return of income for Assessment Year 2012-2013. That, the assessee claimed deduction of alleged accumulated unabsorbed depreciation of earlier years amounting to Rs. 27,36,90,817/= while computing the book profit of Rs. 27,51,00,602/= for the purpose of Section 115JB of the Act. The case of the assessee was selected for scrutiny assessment. A notice under Section 143 (2) of the Act was issued on 8th August 2013, which was served upon the assessee. According to the Assessing Officer, the assessee had not calculated book-profit correctly, and therefore, the Assessing Officer issued a show cause notice on 20th March 2015 and directed the assessee to explain why book profit should not be calculated at Rs. 21,51,00,602/= instead of “nil” book profit shown by the assessee. The said show cause notice was replied by the assessee. The stand of the assessee before the

Assessing Officer was that the assessee-company was carrying on the business of polyester chips and polyester yarn at its plant at Jolwa, Surat. That, because of unavoidable business conditions, the company during the Financial Year 1997-98 made huge losses. The net worth of the company got wiped out and therefore, the case of the assessee was referred to the Board for Industrial & Financial Reconstruction under the Sick Industrial Companies [Special Provisions] Act, 1985. The assessee company was declared as "Sick" industrial unit in terms of Section 3 [1](o) of the SICA. The Industrial Development Bank of India was appointed as operating agency under Section 17 (3) of the SICA to examine its viability and formulate the rehabilitation scheme of the assessee company. Vide its order dated 22nd February 2008, the Board has sanctioned the rehabilitation scheme and appointed IDBI as monitoring agency on behalf of the Board to oversee the implementation of the scheme. In the F.Y 2007-08, relevant to the Assessment Year 2008-2009, a

rehabilitation account was opened to give effect to the order of the BIFR. In rehabilitation scheme account, all credit amounts lying in various accounts, such as equity share capital account, share premium account and surplus and secured loan accounts, which were of capital nature were transferred to credit of rehabilitation account, and ultimately, the credit balance in that account was used to liquidate the debit balance of profit and loss account by way of transfer of debit balance of P&L account to the rehabilitation scheme account to the extent of credit balance available therein. The assessee also contended that right from Assessment Year 2008-2009, it has been reducing the brought-forward loss/unabsorbed depreciation; whichever is lower, from the book profit, as per clause (iii) and (vii) of *Explanation* to Section 115JB(2) of the Act and the Assessing Officer has allowed such claim of the assessee in the past. However, the Assessing Officer did not accept the case on behalf of the assessee and disallowed deduction of

alleged accumulated unabsorbed depreciation of earlier years amounting Rs. 27,36,90,817/=, while computing the book profit for the purpose of Section 115JB of the Act.

4. Feeling aggrieved and dissatisfied with the action of the Assessing Officer, the assessee preferred appeal before the learned CIT [A]. The learned CIT [A] dismissed the appeal, confirming the action of the Assessing Officer by further observing that the principle of *res judicata* is not applicable in Income-tax proceedings, if the Assessing Officer is able to point out specific circumstances which can demonstrate that in the earlier years it was contrary to the law, he was justified to take a different view in the subsequent year. On merits also, the learned CIT [A] observed that once unabsorbed depreciation/loss were forming part of the profit & loss account, such debit balance or loss of credit balance was available in rehabilitation account, then nothing remains with the assessee in the books of account which can be claimed as reduction, while

computing the book profit for the purpose of Section 115JB of the I.T Act.

5. Feeling aggrieved and dissatisfied with the order passed by the learned CIT [A] confirming the action of Assessing Officer, the assessee preferred appeal before the learned Tribunal, being ITA No. 3215/Ahd/2015. By the *impugned* judgment and order, the learned Tribunal allowed the said Appeal preferred by the assessee and set-aside the action of the Assessing Officer by specifically observing that from the A.Y 2009-2010 onwards, the assessee has reduced its book profit by making adjustments under Section 115JB of the Act and similar adjustments have been accepted by the Assessing Officer in the assessment orders passed under Section 143 (3) of the Act [for Assessment Year 2009-2010], the learned Tribunal has allowed the said Appeal preferred by the assessee and set-aside the action of Assessing Officer, which has given rise to the present Appeal with the aforesaid proposed questions of law.

6. Shri Sudhir Mehta, learned counsel appearing on behalf of the Revenue has vehemently submitted that the learned Tribunal has materially erred in not appreciating the fact that in the taxation matters, each assessment year is a separate and distinct year and principle of *res judicata* will not be applicable in the taxation statute. It is submitted that therefore merely because in the earlier years, claim of the assessee was accepted by the Assessing Officer, if subsequently, it has been found by the Assessing Officer that such a view was not correct and legal, in the subsequent year, the Assessing Officer can take a different view. It is submitted that therefore for the Assessment Year 2012-2013 and also for Assessment Year 2010-2011, the Assessing Officer/Revisional authority; as the case may be, were justified in taking a different view.

6.1 Making the above submissions, it is requested to admit/allow the present Tax Appeals.

7. On the other hand, Shri J.P Shah, learned senior advocate appearing on behalf of the assessee has

heavily relied upon a recent decision of the *Hon'ble* Supreme Court in the case of **Commissioner of Income-tax, Delhi-IV vs. M/s. Dalmia Promoters & Devels (P) Limited** [Civil Appeal No. 74 of 2007]. Relying upon the said decision, it is submitted that when in the earlier assessment years *ie.*, Assessment Years 2009-2010 and 2011-2012, when the Assessing Officer had allowed such depreciation claimed by the assessee under Section 115JB of the Act and the same has attained finality, therefore, it will not be open for the subsequent Assessing Officer to take a contrary view. It is submitted that therefore, as observed by the *Hon'ble* Supreme Court, in light of the aforesaid judgment, the appeal preferred by the assessee can be disposed of on the ground of consistency; more particularly when there are chain of circumstances *viz.*, Assessment Years 2009-2010 and 2011-2012.

7.1 Making above submission, it is requested by learned counsel appearing on behalf of the assessee to dismiss the present Tax Appeals.

8. We have heard learned advocates appearing for the respective parties at length. At the outset, it is required to be noted that in A.Y 2012-2013, the Assessing Officer disallowed deduction of alleged accumulated unabsorbed depreciation of earlier years of Rs. 27,36,90,817/= while computing the book profit of Rs. 27,51,00,602/= for the purpose of Section 115JB of the I.T Act. The same came to be confirmed by the learned CIT [A], which has been set-aside by the learned Tribunal on the ground that in the earlier years *ie.*, Assessment Years 2009-2010 and 2011-2012, similar deduction was allowed and the book profit was accordingly computed for the purpose of Section 115JB of the Act. From the material on record, it appears that for A.Y 2009-2010, the Assessing Officer allowed deduction of alleged accumulated unabsorbed depreciation of earlier years and computed the book profit for the purpose of Section 115JB of the Act accordingly. It is required to be noted that assessment for A.Y 2009-2010 was a scrutiny assessment under

Section 143 (3) of the Act. A similar treatment was given by the Assessing Officer for Assessment Year 2011-2012. It is not in dispute that the aforesaid assessments for Assessment Years 2009-2010 and 2011-2012 have attained finality. Despite the above, in the subsequent Assessment Year 2012-2013, the Assessing Officer has taken a contrary view which has been confirmed by the learned CIT [A] by observing that each assessment year is a distinct year and therefore, the principle of *res judicata* shall not be applicable. However, it is required to be noted that the question in the earlier years was also with respect to the similar/same deduction of alleged accumulated unabsorbed depreciation of earlier years, which came to be allowed by the Assessing Officer while computing the book profit for the purpose of Section 115JB of the I.T Act. It was not the case on behalf of the Assessing Officer and even before this Court, it is not the case of the Revenue, that there are change in circumstances with respect to the year under consideration and with

respect to A.Y 2009-2010 and/or A.Y 2011-2012. Under the circumstances, in absence of any change in the circumstances, it was not open for the Assessing Officer to take a different view in the subsequent assessment years. In the similar set of circumstances, the *Hon'ble* Supreme Court in the case of *M/s. Dalmia* [Supra] has dismissed/disposed of the appeal preferred by the Revenue on the ground that consistency does demand that there being no change in the circumstances, the income for the year under consideration will have to be treated business income, as per the previous years.

9. In view of the above set of facts and circumstances, it cannot be said that the learned Tribunal has committed any error in *quashing* and setting aside the action of Assessing Officer in disallowing the deduction of alleged accumulated unabsorbed depreciation of earlier years amounting Rs. 27,36,90,817/=, while computing the book profit of Rs. 27,51,00,602/= for the purpose of Section 115JB of the Act on the ground that in the earlier years *ie.*, AY 2009-

2010 in the scrutiny assessment under Section 143 [3] and A.Y 2011-2012 [u/s. 143 (1) assessment], such deduction was allowed for the purpose of computing the book profit under Section 115JB of the Act. We see no reason to interfere with the *impugned* judgment and order passed by the learned Tribunal.

10. Similarly, the learned Tribunal has rightly set-aside the order passed by the revisional authority under Section 263 of the Act by which the revisional authority for A.Y 2010-2011 took a similar view, which has been set-aside by the learned Tribunal on the ground of consistency and granted similar benefit in the earlier years.

11. In view of the above and for the reasons stated above, both these Tax Appeals fail and the same deserve to be dismissed and are accordingly dismissed, as no substantial question of law arises; as proposed.

Sd/= {M.R Shah, J.}

Sd/=

{B.N Karia, J.}

Prakash

