

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**INCOME TAX REFERENCE No. 35 of 1998****For Approval and Signature:****HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MR.JUSTICE Z.K.SAIYED**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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AMICHAND INVESTMENT PVT. LTD. - Applicant(s)
Versus
DY. CIT (ASSTT.) S.R. - Respondent(s)

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Appearance :

MR MANISH J SHAH for Applicant(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA**and****HONOURABLE MR.JUSTICE Z.K.SAIYED****Date : 22/04/2008****ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)**

1. The Income Tax Appellate Tribunal, Ahmedabad Bench-C has referred the following question for the opinion of this Court under sec. 256(1) of the Income Tax Act, 1961 (the Act), at the instance of the assessee.

“Whether, on the facts and circumstances of the case, the Tribunal was right in law in holding that the book profit under sec. 115J is to be increased by the T.D.S. Of Rs. 5,73,451/- in spite of the fact that the same is not debited to Profit and Loss Account in accordance with the provisions of parts II and III of Schedule VI of the Companies Act?

2. The Assessment Year is 1988-89, the relevant account period being Financial Year ended on 31.3.1988. The assessee a limited company filed return of income on 6.2.1989 declaring taxable income of Rs. 2,35,379/- under sec.115J of the Act. The Assessing Officer did not accept the book profit worked out by the assessee under sec. 115J of the Act and added the sum of Rs. 5,73,451/- to the book profit declared by the assessee. According to the Assessing Officer, the tax deducted at source (T.D.S.) on dividend received from various companies had wrongly been excluded while showing the income

from dividend.

3. The assessee carried the matter in the appeal before the Commissioner (Appeals) who confirmed the action of the Assessing Officer vide order dated 9.7.1991. The assessee carried the matter in second appeal before the Tribunal who also confirmed the orders of Assessing Officer and Commissioner (Appeals) vide impugned order dated 17.9.1996. The assessee moved Miscellaneous Application before the Tribunal requesting the Tribunal to rectify the apparent error in the appellate order. Vide order dated 13.11.1997 the Tribunal rejected Miscellaneous Application holding that no apparent mistake existed in the order of the Tribunal so as to require modification.

4. The principal case of the assessee is based on paragraph No. 3 (xi) of Part-II of Schedule-VI to the Companies Act, 1956, whereunder, requirements as to profit and loss account under the said statute have been prescribed. It is the case of the assessee that the assessee is entitled to show income from dividend or interest at a net figure, that is, net of income tax deducted and only if the gross income is stated under sub-paragraphs (a) and (b) of paragraph No. 3 (xi) of part-II, the amount of income tax deducted has to be shown. The assessee having shown only the net amount was not obliged to show the amount of tax deducted at source.

5. The learned advocate for the assessee submitted that the provisions of section 115J of the Act, more particularly, the Explanation which defines "book profit" requires a company to adopt the figure of net profit as shown in the profit and loss account prepared in accordance with provisions of Parts-II and III of the Sixth Schedule to the Companies Act, 1956, and once the accounts are shown to have been prepared as prescribed under the Companies Act, any increase or reduction in the figure of net profit so arrived at is only permissible in accordance with what is laid down in the Explanation, and in no other eventuality. That the Tribunal had accepted, as a matter of fact, that the assessee had prepared its books of account and worked out book profit correctly as per the provisions of the Companies Act. Therefore, the Tribunal was in error in confirming the orders made by the Assessing Officer and Commissioner (Appeals) by adding the amount of tax deducted at source to the figure of book profit when such adding was not permissible in terms of the Explanation under sec. 115J of the Act. It was further submitted that Income Tax authorities were not empowered to tinker with the figure of net profit arrived at by computing book profit in terms of the provisions of the Companies Act and for this proposition reliance has been placed on the Apex Court's judgment in the case of **Apollo Tyres Ltd. vs. Commissioner of Income Tax, reported in (2002) 255**

ITR 273. Following decisions of various High courts were also cited in support of the submissions made:

1. (2003) 262 ITR 330 (Bombay)

(Kinetic Motor Co. Ltd. vs. Deputy Commissioner of Income Tax)

2. (2006) 281 ITR 177 (Raj)

(Raj. Spinning And Weaving Mills vs. Deputy Commissioner of Income-Tax)

3. (2007) 294 ITR 57 (Madras)

(Commissioner of Income-Tax vs. Koval Maruthi Paper And Board P. Ltd.)

4. (2007) 160 Taxman 22 (P & H)

Commissioner of Income-tax, Ludhiana vs. Sona Woollen Mills (P.) Ltd.

5. (2008) 296 ITR 727 (Gauhati)

(Amines And Plasticizers Ltd. vs. Deputy Commissioner of Income-Tax)

6. The judgment rendered by Supreme Court on 10.4.2008 in Civil Appeals Nos. 5420 to 5423 of 2002 in the case of Malayala Manorama Co. Ltd. vs. Commissioner of Income Tax, Trivandrum.

6. On behalf of the respondent – Revenue, learned Senior Standing Counsel Mr. M.R. Bhatt supported the order of the Tribunal by pointing out that dividend was income within the meaning of Sec. 2(24)(ii) of

the Act and the said amount has to be taken as the gross amount as provided under sec. 198 of the Act. He also referred to section 8 of the Act. That therefore, if the assessee had reduced the gross amount of dividend by the amount of T.D.S., such an exercise should not be permitted and the revenue was justified in adding the amount of tax deducted at source to the figure of net profit arrived at after computing Book Profit under the Companies Act. It was further submitted that under clause(a) of the Explanation to sec. 115J of the Act the figure of net profit was required to be increased by the amount of income tax paid or payable, and the provision therefor; that the assessee having failed to do so the department was justified in increasing the figure of net profit by adding the said sum of tax deducted at source. Referring to paragraph Nos. 2(a) & (b) of Part-II of Schedule – VI to the Companies Act, it was submitted that the profit and loss has to be so made out so as to clearly disclose the result of the working of the company during the accounting period and if the same was not so disclosed, the Assessing Officer was justified in making the addition. It was further contended that under paragraph No. 3(xi) (c) it was provided that amount of income tax deducted had to be shown and therefore also there was failure on the part of the assessee which permitted the authority to add the amount of such tax deducted at source. That if such an exercise was not permitted an amount which was otherwise liable to tax would escape assessment and therefore, the Tribunal was

justified in rejecting the contention of the assessee.

7. Furthermore, attention was invited to Accounting Standards, more particularly, ACCOUNTING FOR INVESTMENTS (AS-13) with special reference to paragraph NoS. 25 and 35 to point out that even as per Accounting Standard gross income was required to be stated and also the amount of income tax deducted at source being included under the Advance Taxes Paid. It was, therefore, submitted that in light of the accounting standard also the revenue was justified in adding the amount of tax deducted at source because the profit and loss account of the assessee could not be stated to be correctly cast in light of the accounting standard.

8. In the case of Apollo Tyres Ltd. (supra) provisions of sec. 115J of the Act as in force from 1.4.1989 came up for consideration. The Apex Court after referring to the budget speech of the then Finance Minister, has observed as under:

“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 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 115J was introduced in the Income-tax Act with a deeming provision which makes the company liable to pay tax on at least 30

percent of its book profits as shown in its own account. For the said purpose, section 115J makes the income reflected in the company's books of account 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 II 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 Income-tax 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 the 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 rescrutinise 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 115J of the Income-tax Act in support of the above contention is misplaced. Sub-section (1A) of section 115J 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 Income-tax 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, we do not think that the said sub-section empowers the authority under the Income-tax Act to probe into the accounts 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 115J 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 the 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 115J that "income of the company as accepted by the Assessing Officer". In the absence of the same and on the language of section 115J, it will have to held that view taken by the Tribunal is correct and the High court erred in reversing the said view of the Tribunal."

9. It has further been stated that the Assessing Officer while computing the income under sec. 115J of the Act, has only the power of examining whether the books of accounts are certified by the authority under the Companies Act as having been properly maintained in accordance with the Companies Act. In the present case, as already noted, the Tribunal has in no uncertain terms stated "Having regard to the provisions of part II & III of Schedule VI of the Companies Act, we are of the opinion that the assessee has prepared its book profit correctly as per the said provisions." The next stage thereafter would be to make increases or reductions as provided in the Explanation to sec. 115J of the Act. The Apex

Court has stated in the aforesaid judgment that the Assessing Officer has the limited power of making increases or reductions as provided for in the Explanation and does not have jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J of the Act.

10. Section 115J of the Act, more particularly, the Explanation permits increases of the amounts specified in clauses (a) to (f) provided any such amount is debited to the profit and loss account. Clause (a) which relates to the amount of income tax paid or payable, can be added to the net profit as shown in the profit and loss account provided such an amount of income tax paid or payable is debited to the profit and loss account. Admittedly, in the present case, there is no debit to the profit and loss account as found by the Tribunal and the debit is to the dividend account. Thus, on a plain reading of the language employed by the statute the exercise undertaken by revenue cannot be permitted. It is true, as contended by the learned counsel for the revenue, that such a situation operates inequitably in the facts of the present case. However, it is not open to the court to add words to the statute merely because in a given case the provision operates to the disadvantage of one side. The Court can only interpret the language of the statute without adding to or subtracting any words from the provision. The only exception to this rule of interpretation is

where the literal interpretation does not yield any result, or in other words, results in absurdity. That is not the position in the present case.

11. The Legislature has taken a conscious decision to bring to tax a notional income by deeming the same to be an income chargeable to tax at the prescribed rate under sec. 115J of the Act. The opening portion of sec. 115J (1) of the Act opens with a non-obstante clause which provides for a self contained code without having regard to anything contained in any other provisions of the Income Tax Act. Once this is the position, it is not possible to accept the stand of the revenue that a particular income or part thereof escapes assessment in the process. The object of incorporating section 115J of the Act in the statute was to ensure that companies, which otherwise do not pay any tax by availing of statutory deductions and reliefs under the Act, are now required to pay tax at the prescribed percentage on a deemed income. In these circumstances, revenue cannot be permitted, on one hand to invoke provisions of sec. 115J of the Act, and yet on the other hand resort to other provisions of the Act simultaneously.

12. The present fact situation has come about primarily because of the language employed in paragraph No.3 (xi) (c) of Part-II of Schedule-VI of the Companies Act, which permits crediting of net income to the profit and loss account without providing for corresponding debit in the profit and

loss account. It is for the Legislature to make appropriate amendment, either in the Companies Act or in the Income Tax Act in its wisdom, and the Court cannot take over role of the Legislature.

13. The reference to the Accounting Standards and other provisions of the Income Tax Act cannot carry the case of revenue any further. In so far as the Accounting Standards are concerned, paragraph No-36 of AS-13 itself states that the effective date for this Accounting Standard to come into effect is in relation to financial statements covering the period commencing on or after 1.4.1995. Therefore, the said Accounting Standard cannot have any role to play in interpreting the provisions of the Act as it stood for the accounting period under consideration, namely financial year ended on 31.3.1988. Similarly, reference to other provisions of the Act also cannot be of any assistance in light of non-obstante clause with which section-115J of the Act opens.

14. In the aforesaid fact situation, it is not possible to agree with the Tribunal that the book profit under sec. 115J of the Act is required to be increased by the tax deducted at source amounting to Rs. 5,73,451/- when admittedly the said amount is not debited to the profit and loss account in accordance with provisions of Parts-II and III of Schedule-VI to the Companies Act.

15. Accordingly, the question referred to this Court

is answered in the negative, that is in favour of the assessee and against the revenue. The Reference stands disposed of accordingly with no order as to costs.

(D.A. MEHTA, J.)

(Z.K. SAIYED, J.)

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