*Form No.(J2)*

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

**Present :**

THE HON'BLE JUSTICE T.S. SIVAGNANAM

A N D

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

**IA NO.GA/1/2021**
**ITAT 12/2021**

**THE PRINCIPAL COMMISSIONER OF INCOME TAX-I, KOLKATA**
**-Versus-**
**DAMODAR VALLEY CORPORATION**

**For the appellant** *:* ***Mr. Smarajit Roychowdhury, Adv.***
***Mr. Arunava Ganguly, Adv.***

**For the respondent** *:* ***Mr. Rahul Tangri, Adv.***
***Mr. Deepro Sen, Adv.***

Heard on : 03.12.2021

Judgment on :03.12.2021

***T. S. SIVAGANANAM, J. :*** The appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 20th December, 2017 passed by the Income Tax Appellate Tribunal (the 'Tribunal' in short) in ITA No.1292/Kol/2016 for the assessment year 2010-11.

The revenue has raised for the following substantial questions of law for consideration:

> *"(a) Whether in the facts and circumstances of the case, the learned Income Tax Appellate Tribunal has erred in law in directing the Assessing Officer not to apply the provisions of Section 115JB of the Income Tax Act, 1961?*
>
> *(b) Whether in the facts and circumstances of the case, the learned Income Tax Appellate Tribunal has correctly interpreted the Explanation-3 to the section 115JB of the Income Tax Act, 1961 as amended by Finance Act, 2012 w.e.f. 1st April, 2013?*
>
> *(c) Whether the amendment brought in Section 115JB of the Income Tax Act, 1961 read with Explanation-3 thereto by the Finance Act, 2012 is applicable in the case of the assessee with effect from the Assessment Year 2013-14 onwards or such provision covers the assessment in the case of the assessee for the Assessment Year 2010-11?*

We have heard Mr. Smarajit Roychowdhury, learned counsel for the appellant/revenue and Mr. Rahul Tangri, learned counsel for the respondent/assessee.

The assessee is engaged in the generation of power and has been established under the provisions of Damodar Valley Corporation Act, 1948. The assessee filed their return of income on 29th September, 2010 declaring total income as per the requirement of Part-B-TI of the return format; whereas the actual return was a loss and the assessee had claimed benefit of carry

forward of the same as business loss and refund. The return was processed under Section 143(1) of the Act. Subsequently, the return was selected for scrutiny and notice under Section 143(2) of the Act was issued and the assessee was served and documents were placed by the assessee before the assessing officer. During the course of hearing, the assessing officer pointed out with regard to the proposed addition to book profit under Section 115JB in respect of the excess provision for Income Tax written back for the assessment year 2007-08. The assessee had placed reliance on sub-Clause (i) to Explanation-I(i) to Section 115JB relating to the said issue. The assessee while raising several other factual and legal contention pointed out that provision of Section 115JB is not applicable to their case. The assessing officer did not agree with the stand taken by the assessee and completed the assessment by order dated 12th March, 2013 under Section 143(3) of the ACt. The assessee carried the matter on appeal before the Commissioner of Income Tax (Appeals)-15 (CIT(A)). The CIT(A) by order dated 17th March, 2016 allowed the assessee's appeal in so far as the issue on hand by following the decision of the assessee's own case for the assessment years 2008-09 and 2009-10. Aggrieved by the same, the revenue preferred appeal before the Tribunal. The Tribunal by impugned order dismissed the appeal following the decision rendered by the co-ordinate bench of the

Tribunal in the assessee's own case vide common order dated 13th January, 2016 in ITA No.1622/Kol/2011 and 451/Kol/2013. Aggrieved by the same the revenue is before us by way of this appeal.

Learned counsel appearing for the respondent/ assessee submitted that in so far as the assessment years which were the subject-matter of the order passed by the Tribunal dated 13th January, 2016 pursuant to the direction issued by the Government of India, the respondent/assessee had availed the benefit of *Vivad se Biswas* scheme. Though the revenue had filed appeals before this Court, those appeals were dismissed on the same ground. Therefore, we are required to design the legal issue raised in this appeal before us by the revenue. The undisputed facts are that the assessee is incorporated under the Act of Parliament known as Damodar Valley Corporation Act, 1948. In terms of Section 3(2) of the said Act, the respondent Corporation is a body corporate having perpetual existence and common seal. The revenue's case is that in terms of Section 43 of the Corporation Act, the tax liability of the assessee has been clearly stipulated and in terms of sub-Section (1) of Section 143 the respondent Corporation is liable to pay any tax on income levied by the Central Government in the same manner and in the same extent as a company. Therefore, the revenue is before us contending that the stand taken by the assessing officer has to be sustained and the

contention of the assessee that Section 115JB would not apply and has to be rejected. We need not elaborate much to decide the substantial question of law raised before us as identical issue has been considered by the High Court of Kerala in the case of *Kerala State Electricity Board vs. Deputy Commissioner of Income Tax* reported in 2010-TIOL-827-HC-Kerala-IT. The first of the two substantial questions of law framed in the said decision was whether Section 115JB is applicable to the appellant/assessee therein namely, Kerala State Electricity Board. To be noted that Kerala State Electricity Board is a statutory corporation constituted by the notification of the State of Kerala pursuant to the power vested in it by virtue of Section 5 of the Electricity Supply Act, 1948. In terms of Section 12 of the said Act, Kerala State Electricity Board was declared to be a body corporate having perpetual existence and common seal with power to acquire and hold property both movable and immovable. Section 80 of the said Act could be relevant which declares the Kerala State Electricity Board to be a company within the meaning of Income Tax Act, 1922 (old Act.) and further declares that the Board is liable to pay income tax and super-tax on its income, profits and gins. We note that Section 80 of the said Act is *pari materia* with Section 43 of the DVC Act, 1948. Therefore, we can safely proceed to hold that the decision of the Kerala High Court could be made applicable

with fully force to the facts of the case on hand. In the said decision, the Hon'ble Court has traced legislative history of Section 115JB and noted that Section 115JB was introduced for the first time in Chapter XII-B of the Income Tax Act and after tracing the legislative history, the Court proceeded to take note of Section 115JB which was inserted in the Income Tax Act, with effect from 1st April, 2001. Identical stand was taken by the revenue by contending that the assessee being a company, provisions of Section 115JB would stand attracted. While considering the said question, it was pointed that the appellant, though is by definition a company under the Income Tax Act and deemed to be a company for the purpose of income tax by virtue of the declaration of Section 80 of the Electricity Supply Act (therein) and Section 43 of the DVC Act, 1948 (herein), it is not a company for the purpose of Companies Act. The assessee is not obliged either to convene an annual general meeting or place its profit and loss account in such general meeting. Further, the Court pointed out that the legislature took note of the fact that a number of companies paying marginal tax and also "zero-tax" has grown and such companies earn substantial book profit and pays handsome dividend to the share-holders without paying any tax to the exchequer. Further, it was pointed out that CBDT understood that companies engaged in the business of generation and

distribution of electricity and enterprises engaged in developing, maintaining and operating infrastructure facilities, as a matter of policy, are not brought within the purview of the amendment (Section 115JA) for the reason that such a policy would promote the Infrastructural development of the country. The Court noted the circular issued by the CBDT and observed that the same is binding on the department. Thus, the Court concluded that the provisions namely, sub-Section(2) of Section 115JB would not stand attracted and consequently, the charging provision, namely, sub-Section (1) of Section 115JB would not stand attracted. To support such finding, reliance is placed on the decision of the Hon'ble Supreme Court in *CIT vs. B. C. Srinivasa Setty* reported in [1981] 128 ITR 294(SC) and *CIT vs. Eli Lilly and Co.(India) P. Ltd.* reported in [2009] 312 ITR 225(SC). Thus, in conclusion the court held that all taxation is meant for the welfare of the people in a constitutional republic and, therefore, the enquiry as to the mischief sought to be remedied by the amendment becomes irrelevant and, therefore, the Court held that the fiction fixed under Section 115JB cannot be pressed into service against the appellant therein while making the assessment of the tax payable under the Income Tax Act. On this issue, it would be beneficial to refer to the decision of the Hon'ble High Court of Karnataka in CIT vs. ING Vysya Bank Ltd. reported in [2020]-TIOL-1313-HC-KAR-

IT. In the said decision it was held that provision of Section 115JB cannot be made applicable to insurance companies, banking companies or companies engaged in generation or supply of electricity. The operative portion of the decision is as follows:

> *"8. From close scrutiny of Section 115JB(2) of the Act, it is axiomatic that every assessee being a company for the purposes of said Section prepares its profit and loss account for relevant previous year in accordance with provisions of Part II and Part III of Schedule VI of the Companies Act, 1956. The Assessee being a banking company is not required to prepare its account in accordance with provisions of Part II and Part III of Schedule VI of the Companies Act, 1956. The assessee being a banking company, its accounts are prepared as per the Banking Regulation Act, 1949 and it is not obliged either to convene an annual general meeting or place its profit and loss account in such general meeting. A General meeting contemplated under Section 166 of the Companies Act, 1956 is not possible in the case of the assessee as there are no shareholders of the assessee. It is also worth mentioning that under Section 166 of the Companies Act, 1956 every company is required to hold a general meeting in each year and Section 201 mandates that every year the Board Of Directors of the company in general meeting shall lay before the company a Balance sheet as at the end of the relevant period and also profit and loss account for the period. Part II and Part III of Schedule VI to the Companies Act specify the method and manner of maintaining profit and loss account. It is also pertinent to note that*

*the assessee under Section 210 of the Companies Act, 1956 is also required to lay its account before the annual general meeting. However such accounts have to be prepared in accordance with the Banking Regulation Act, 1949 which is not possible for the reasons assigned supra.*

9. *The submission that proviso to Sub section (2) of Section 115JB creates a legal fiction cannot be accepted as under the aforesaid proviso, the company has to prepare the profit and loss account and to place it before the annual general meeting in accordance with provisions with Section 210 of the Companies Act, 1956. A banking company under Section 115JB(2) of the Act can prepare additional accounts as per Part II and Part III of Schedule VI of the Companies Act or fulfill the requirements of the proviso of sub-Section(2) but it cannot fulfill both the conditions.*

*10. From perusal of general arrangement of provisions of the Income Tax Act, 1961 where under each head of income, the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and computation provisions together constitute an integrated code. When there is a case to which computation provision cannot apply at all, it is evident that such a case was not intended to fall within charging section. [SEE: 'COMMISSIONER OF INCOME TAX,BANGALORE VS. B.C.SHRINIVASA SETTY', 1981 VOL 128 ITR 294] = **2002-TIOL-587-SC-IT-LB**. Themachinery provisions provided in Sub- Section (2) of Section 115JB of the Act would be rendered wholly unworkable in case of a Banking*

*company. It is also pertinent to mention here that the Companies Act, 1956 has excluded insurance, banking companies or the companies engaged in the generation or supply of electricity from the purview of Section 211(1) of the Companies Act, 1956 and resultantly from the purview of Section 115JB of the Act.*

*11. Admittedly, the provisions of Section 115JB of the Act have been amended with effect from 01.04.2013, the memorandum explaining the provisions of Finance Bill, 2012 while explaining the amendments to Section 115JB of the Act, notes that in cases of certain companies such as insurance, banking and electricity companies, they are allowed to prepare the profit and loss account in accordance with the Sections specified in their Regulatory Acts. Thus, to align the provisions of the Income Tax Act, 1961 with the Companies Act, 1956, it was decided to amend Section 115JB of the Act to provide that companies which are not required under Section 211 of the Companies Act, 1956 to prepare profit and loss account in accordance with Schedule VI of the Companies Act, 1956. Profit and loss account prepared in accordance with the provisions of their Regulatory Act shall be taken as basis for computing book profit under Section 115JB of the Act. We agree with the view taken by Bombay High Court in THE COMMISSIONER OF INCOME TAX-LTU referred to supra on the common substantial question of law involved in these appeals. For the foregoing reasons, it is held that the provisions of Section 115JB(2) of the Act do not apply to the Banking companies."*

The decision in ING Vysya Bank Ltd. (supra) was followed by the High Court of Karnataka in Principal Commissioner of Income Tax & Ors. vs. Karnataka Power Corporation Limited reported in 2020(5) TMI 645 (Karnataka) and the appeal filed by the revenue was dismissed. The revenue had raised before us the effect of the amendment brought about to Section 115JB by Finance Act, 2012 with effect from 1st April, 2013 and sought to impress upon us the effect of such amendment to sustain their contention. This very issue was considered by the High Court of Bombay in the case of CIT, LTU vs. Union Bank of India reported in 2019(5)TMI 355 (Bombay). The Court held that the amendments to Section 115JB are neither declaratory nor classificatory but are substantive and significant legislative changes and can be applied only prospectively. The operative portion of the decision is as follows:

> *17. This proviso thus refers any insurance or banking companies or companies engaged in the generation or supply of electricity or to any other class of company in which form of financial statement has been specified in or under the Act governing such class of company. Combined reading of this proviso to sub-section (1) of Section 129 of the Act, 2013 and clause (b) of Sub-section (2) of Section 115JB of the Act would show that incase of insurance or banking companies or companies engaged in generation or supply of electricity or class of companies for whom financial statement has been*

*specified under the Act governing such company, the requirement of preparing the statement of accounts in terms of provisions of the Companies Act, is not made. Clause (b) of sub-section (2) provides that in case of such companies for the purpose of Section 115JB the preparation of statement of profit and loss account would be in accordance with the provisions of the Act governing such companies. This legislative change thus aliens class of companies who under the governing Acts were required to prepare profit and loss accounts not in accordance with the Companies Act, but in accordance with the provisions contained in such governing Act. The earlier dichotomy of such companies also, if we accept the revenue's contention, having the obligation of preparing accounts as per the provisions of the Companies Act has been removed.*

*18. These amendments in section 115JB are neither declaratory nor classificatory but make substantive and significant legislative changes which are admittedly applied prospectively. The memorandum explaining the provision of the Finance Bill, 2012 while explaining the amendments under Section 115JB of the Act notes that in case of certain companies such as insurance, banking and electricity companies, they are allowed to prepare the profit and loss account in accordance with the sections specified in their regulatory Acts. To align the Income Tax Act with the Companies Act, 1956 it was decided to amend Section 115JB to provide that the companies which are not required under Section 211 of the Companies Act, to prepare profit and loss account in accordance with Schedule VI of the Companies Act, profit and loss*

*account prepared in accordance with the provisions of their regulatory Act shall be taken as basis for computing book profit under Section 115 JB of the Act."*

Further, the High Court of Kerala in Principal Commissioner of Income Tax vs. State Bank of India reported in 2019-TIOL-2558-HC-Kerala-IT had considered the identical issue in respect of a banking company and following the decision in the Kerala State Housing Board and Union Bank of India had dismissed the appeal filed by the revenue.

In the light of the above legal position, we are of the clear view that the grounds canvassed by the revenue before us and the substantial questions of law raised by them have to be necessarily answered against the revenue.

In the result, the appeal (ITAT/12/2021) stands dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (GA/2/2021) is also dismissed.

(**T.S. SIVAGNANAM, J.**)

I agree.

**(HIRANMAY BHATTACHARYYA, J.)**

A/s./S.Das