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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.09.2022

PRONOUNCED ON : 30.11.2022

CORAM:

THE HON'BLE MR. JUSTICE S.VAIDYANATHAN
and
THE HON'BLE MR. JUSTICE C.SARAVANAN

T.C.(A).No1316 OF 2009

The Commissioner of Income Tax,
Chennai .. Appellant

vs

M/s.Ashok Leyland Limited,
19, Rajaji Salai,
Chennai 600 001. ... Respondent

**Prayer** : Tax Case (Appeal) filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 08.05.2009 passed in ITA No.2144/Mds/2008.

For Appellant : Mrs.R.Hemalatha
Junior Standing Counsel
for M/s.T.Ravi Kumar

For Respondent : Mr.R.Vijayaraghavan
for M/s.Subbararaya Aiyar Padmanabhan

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**JUDGMENT**

**VAIDYANATHAN,J**
**AND**
**C.SARAVANAN,J**

This Tax Appeal has been filed by the Revenue against the order dated 08.05.2009 of the Income Tax Appellate Tribunal in ITA.No.2144/Mds/2008.

2. At the time of admission, the present appeal was admitted with the following substantial questions of law:-

> Whether on the facts and in the circumstances of the case, the Tribunal was right is holding that the provisions of bad and doubtful debt cannot be added by the Assessing Officer vehicle computing book profit under Section 115 JA of the Income Tax Act, 1961, especially in view of the retrospective amendment to the explanation to Section 115 JA of the Act, with effect from 01.04.1998 substituted by Finance Act, No.2, 2009.

3. An operative portion of the impugned order of the Tribunal dated

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08.05.2009 in I.T.A.No.2144/Mds/2008, reads as under:-

> After hearing both parties we find that the assessment order was passed in pursuance to the revisionary order passed under Section 263 wherein the Assessing Officer was directed to add provision for doubtful advance to the book profits. The learned Commissioner (A) confirmed the addition on the basis of decision of Hon'ble Madras High Court in the case of **DCIT vs. Beardsell Ltd** (254 ITR 256).
>
> "3. We have carefully considered the rival submissions. We find that now the issue has been decided by the Hon'ble Supreme Court in the case of CIT vs. HCL **Comnet systems and Services Ltd.** (305 ITR 409). The Hon'ble Apex Court has held as under:-
>
> > " Item (c) of the Explanation to Section 115JA is not attracted to the provision for bad and doubtful debts. The provision for bad and doubtful debts is made to cover up probable diminution in the value of the assets, i.e. a debt which is an amount receivable by the assessee. Such a provision cannot be said to be a provision for a liability, because even if the debt is not recoverable no liability can be fastened on the assessee. Any provision made towards irrecoverability o a debt cannot be said to be a provision for liability
>
> Now therefore the issue stands covered in favour of the assessee. Respectfully following this decision, we decide the issue in favour of the assessee.
>
> In the result, the appeal is allowed."

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4. The dispute in the present appeal pertain to the assessment year 1998-99. An Assessment under Section 143(3) r/w Section 147 of the Income Tax Act, 1961 (hereinafter referred to as Act") was passed by the Assessing Officer on 08.03.2005.

5. On perusal of the records, the Commissioner of Income Tax , Chennai opined vide order dated 29.03.2007 under Section 263 of the Income Tax Act that while computing the book profits under Section 115JA, amount towards provision for doubtful advance to an extent of Rs.5,64,13,050/- was not added back to the book profit, while completing the assessment under Section 143(3) r/w 147 on 08.03.2005 by the Assessing Officer. The Commissioner of Income Tax, therefore passed the aforesaid order dated 29.03.2007 by directing the Assessing Officer to add back the provision for doubtful advance to the book profits of the appellant under Section 115 JA .

6. The aforesaid order dated 29.03.2007 of the Commissioner of Income Tax passed under Section 263 of the Income Tax Act was given effect by the Assessing Officer vide order dated 30.07.2007.

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7. Aggrieved by the aforesaid order dated 30.07.2007 of the Assessing Officer the respondent assessee preferred an appeal in ITA.No.32/2007 dated 19.06.2008 before the Commissioner of Income Tax(Appeals) The said appeal was dismissed by the Commissioner of Income Tax (Appeals) vide order dated 19.06.2008 with the following observation:-

> "5. I have carefully considered the submissions made by the appellant and I am unable to accept the contentions of the appellant that provision made for doubtful advances does not fall within the purview of a liability. Once the provision for doubtful advances is debited to the profit and loss account, it partakes the character of an expense and therefore a liability, a charge against the profits. If the same had been written of f in the books without being debited to the profit and loss account i.e. set off against revenue it may perhaps be not classified as a liability. Further this issue is covered by the madras High Court's decision in the case of DCIV vs. Beardsell Lt., report and in 244 ITR 256 wherein the High Court has held that provision made for doubtful debts is an ascertained liability in terms of Section 115JA and therefore has to be added back to the book profits. Respectfully, following this decision, I uphold the action of the Assessing Officer in implementing the directions of Commissioner of Income Tax .
> After consideration of all the submissions on all the grounds the appeal is dismissed".

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8. Aggrieved by the same, the respondent filed

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I.T.A.No.2144/Mds/2008 before the Income tax Appellate Tribunal which has culminated in the impugned order dated 08.05.2009 for the Assessment year 1998-99 which has been extracted above.

9. The Revenue is aggrieved by the impugned order dated 08.05.2009 allowing I.T.A.No.2144/Mds/2008 filed by the respondent before the Income Tax Appellate Tribunal.

10. In support of the present appeal, the learned counsel for the appellant submits that the issue is no longer res-integra and is covered by the decision of this Court and that of the Delhi High Court in the following three cases:-

> i) **Commissioner of Income Tax vs. Ilpea Paramount** (P) Ltd., (2011) 336 ITR 0054(Del)
> ii) **Commissioner of Income Tax vs. Tamil Nadu Small Industries Development Corporation Ltd.,** (2015) 57 Taxmann.com 417 (Madras)
> iii) **Eid Parry (India) Limited vs. Assistant Commissioner of Income Tax**, (2020) 425 ITR 0508(Mad)

11. It is further submitted that explanation to Section 115 JA (ii) has

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been amended vide finance (2) Act, 2009 with retrospective effect from 01.04.1998 and therefore on this count alone the impugned order of the Appellate Tribunal is not sustainable.

12. Per contra, the learned counsel for the respondent Assessee submits that in the schedule to the balance sheet following entries were made :-

| ***Sundry Debtors*** | | |
|---|---|---|
| Trade | ***8,764.27/-*** | 10,419,08/- |
| Others (including Export Incentives) | 263.68/- | 114.68/- |
| Less Provision | 9,027.95<br>15.96<br>-------------<br>9,011.99<br>------------- | 10,533.76<br>20.73<br>-------------<br>10,513.03<br>-------------- |

13. It is submitted that though amendment to Explanation to Section 115J substituting clause (g) retrospective with effect from 01.04.1998, was made it was neither there when Original Assessment Order dated 8.3.2005 was passed nor when the Commissioner of Income Tax passed order dated 27.03.2007 under Section 263 of the Income Tax Act, 1961 as or when the

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Assistant Commissioner of Income Tax passed order dated 30.07.2007 giving effect to the aforesaid order dated 27.03.2007 on 30.07.2007 or when the Appellate Commissioner passed order dated 19.06.2008 in ITA.No.32/2007 /2008/LTU nor when the Tribunal passed the impugned order dated 08/04.2009 in ITA.No.2144/Mads/08.

14. It is submitted that during the material period, the issue stood covered by the decision of the Hon'ble Supreme Court in **Commissioner of Income Tax vs. HCL Comnet Systems and Services Ltd,** (2008) 305 ITR 0409. That apart, it is submitted that when two views are possible and ITO has taken one view with which CIT does not agree, it would be treated as a erroneous order prejudicial to the interest of Revenue unless the view taken by the ITO is unsustainable in law. In this connection, a reference was made to the **Commissioner of Income Tax vs. Makes India limited** ITA 2007 295 ITR 282

15. The learned counsel for the respondent has placed reliance on the following decisions of various High Court:-

i) **Commissioner of Income Tax vs. Vodafone Essar Gujarat Ltd.,** 397 ITR 0055

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ii) **Commissioner of Income Tax vs. Yokogawa**

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**India Ltd.,** (2012) 204 Taxman 0305
iii) **Commissioner of Income Tax vs. Kirloskar Systems Ltd.,** (2014) 220 Taxman 0001

16. We have given a careful consideration to the facts and circumstances of the case. The dispute in the present case pertains to the Assessment Year 1998-1999. Section 115JA of the Income Tax Act, 1961 deals with deemed income relating to certain companies.

17. As per the aforesaid provision where in the case of an assessee, being a company, the total income , as computed under the Act in respect of the previous year relevant to the Assessment Year commencing on or after 1$^{st}$ day of April 1997, but before the 1$^{st}$ day of April 2001 is less than 30% of its profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to 30% of such profit.

18. After explanation to after sub-section (2) to Section 115JA of the Act the expression " book profit" is defined as it stood prior to 1.4.1998. As per the aforesaid Explanation, the expression " book profit"means the net profit as shown in the profit and loss account for the

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relevant previous year prepared under Section (2) as increased by-

a) the amount of income-tax paid or payable, and the provision there for:

(b) the amounts carried to any reserves 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;

if any amount referred to in the above clauses(a) to (f) is debited to the Profit and Loss Account and is reduced by,-

i. the amount withdrawn 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, 1997 but ending before the 1st day of April, 2001 shall not be reduced from the book profit unless the book

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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 amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation. For the purposes of this clause,-

a) the loss shall not include depreciation;

b) the provisions of this clause shall not apply if the amount of loss forward or unabsorbed depreciation is nil; or

iv. the amount of profits derived by an industrial undertaking from the business of generation or generation and distribution of power; or

v) the amount of profits derived by an industrial undertaking located in an industrially backward State or district as referred to in sub- section (4) and sub-section (5) of section 80-IB, for the assessment years such industrial undertaking is eligible to claim a deduction of hundred per cent of the profits and gains under sub-section (4) or sub- section (5) of section 80-IB; or

vi. the amount of profits derived by an industrial undertaking from the business of developing, maintaining and operating any infrastructure facility as defined in the Explanation to sub-section (4) of section 80- IA and subject to fulfilling the conditions laid down in that sub-section; or

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vii. the amount of profits of sick industrial company for the assessment year commencing from the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation. For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986); or

viii. the amount of profits eligible for deduction under section 80HHC, computed under clause (a), (b) or (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in sub-sections (4) and (4A) of that section:

ix. the amount of profits eligible for deduction under section 80HHE, computed under sub-section (3) of that section.

19. Clause(g) was inserted by Finance (No.2) Act, 2009, with effect from 01.04.1998. Similarly, the phrase beginning with "***if any amount referred to clauses (a) to (f) is debited to the profit and loss account and as reduced by***"**,** was substituted with the phrase ***if any amount referred to clauses (a) to (g) is debited to the profit and loss account and as***

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reduced by".

20. The above amendment was not considered by the Hon'ble Supreme Court when it gave its verdict in **Commissioner of Income Tax vs. HCL Comnet Systems & Services Ltd.,** (2008) 305 ITR 0409 for the Assessment Year 1997-98. The above amendment vide Finance (No.2) Act, 2009 was not relevant for the Assessment year 1997-1998 which fell for consideration. The above decision is therefore not relevant. The Tribunal therefore ought to have examined the issue in the light of the inserted Clause (g) to Explanation Sub-Section 2 to Section 115JA of the Act with effect from 1.4.1998 vide Finance (No.2) Act, 2009 which was relevant for the present case.

21. Therefore, we are of the view that the impugned order deserves to be set aside and the case should be remitted back to the Tribunal to re-examine the issue fresh in the light of the above amendment brought to the definition of" Book Profit" by Finance (No.2) Act, 2009 with effect from 01.04.1998. Otherwise, the above amendment would be rendered otiose. Therefore, we remit the case back to the Tribunal without answering to the substantial questions of law raised to re-examine the issue afresh in the

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light of the above observation, leaving all issues open to be canvassed by both the appellant and the respondent.

22. Considering the fact that the impugned order pertains to the Assessment Year 1998-99, the Tribunal may endeavour to pass a final order in the *denovo* proceeding within a period of six months from the date of receipt of a copy of this order.

23. This Tax Case Appeal stands disposed with the above observation by way of remand to the Tribunal. No costs.

(S.V.N.,J.)

(C.S.N.,J.)

30.11.2022

Index : Yes/No
Internet: Yes/No
Speaking : Non-Speaking order
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**S.VAIDYANATHAN,J**
**AND**
**C.SARAVANAN,J.**

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To
The Income Tax Appellate Tribunal,
Chennai 'B' Bench.

Pre-delivery Order in
T.C.(A).No1316 OF 2009

30.11.2022